

PANORAMA OF BRAZILIAN LAW

*"A step towards realizing a long standing dream:
to provide the world a window to Brazilian law"*

ARTICLES SECTION

THE BRAZILIAN JUDICIARY AS AN ORGAN OF POLITICAL CONTROL

Ada Pellegrini Grinover - Grasielly de Oliveira Spínola

RECOGNITION OF FOREIGN JUDGMENTS IN BRAZIL: NOTES ON BRAZILIAN SUBSTANTIVE AND PROCEDURAL PUBLIC POLICY

Carmen Tiburcio - Luis Roberto Barroso

BRIEF ANALYSIS OF COMPETITION DEFENSE IN BRAZIL

Augusto Jaeger Junior - Daniela Copetti Cravo

JUDICIARY REFORM IN BRAZIL AND THE NATIONAL COUNCIL OF JUSTICE: IMPROVING COMMUNITY INVOLVEMENT IN OFFENDER TREATMENT

Márcio Schiefler Fontes

SOME THOUGHTS ON PRISON CONDITIONS, HUMAN DIGNITY AND URBAN VIOLENCE UNDER BRAZILIAN LAW

Ana Paula Barcellos

THE LEGAL FRAMEWORK OF MEDIATION IN BRAZILIAN LAW

Humberto Dalla Bernardina de Pinho

AN ATTEMPT FOR THE PROTECTION OF SEXUAL DIVERSITY IN BRAZILIAN LAW

Marcos Vinicius Torres Pereira

PARENTAL ALIENATION WITHIN THE CONTEXT OF THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: THE BRAZILIAN PERSPECTIVE

Bruno Rodrigues de Almeida - Gisela Vieira Dalfeor Vidal

GUN JUMPING IN BRAZILIAN ANTITRUST LAW: A CASE STUDY IN THE OIL INDUSTRY

Clarissa Brandão - Aline Teodoro de Moura

INTERNATIONAL REACH OF SECURITIES REGULATION: A COMPARATIVE VIEW ON BRAZILIAN AND U.S. LAW

Gabriel Valente dos Reis

CAMPAIGN FINANCE IN COMPARATIVE PERSPECTIVE: A NESTED ANALYSIS APPROACH

Ranulfo Paranhos - Dalsen Filho - Enivaldo Rocha - José Alexandre Júnior

THE ENVIRONMENTAL ISSUE IN BRAZIL: A MATTER OF PRINCIPLES

Marco Aurelio Peri Guedes

FORCED TAX COLLECTION PROCEEDINGS IN BRAZIL: AN OVERVIEW OF FEDERAL LAW NO. 6,830

Bruno Fernandes Dias

MORAL, POLITICS AND METHOD: THE INFLUENCE OF RONALD DWORKIN'S PHILOSOPHY ON THE BRAZILIAN SUPREME COURT

Luciano Del Monaco - Nuria López

PENSION DEFICIT IN BRAZILIAN SOCIAL SECURITY SYSTEM: LEGAL REMARKS AND STRATEGIES TOWARDS FINANCIAL SUSTAINABILITY

Cristiane Miziara Mussi - Marcos Roberto Pinto

LE RÔLE DU BRÉSIL DANS LA FORMATION ET L'INSTITUTION DU MARCHÉ COMMUN DU SUD – MERCOSUR

Fernanda Marcos Kallas

EL ESTABLECIMIENTO VIRTUAL Y SU CONDICIÓN DE ESTABLECIMIENTO EMPRESARIAL SECUNDARIO (FILIAL)

Rubia Carneiro Neves - Ana Caroline Faria Guimarães

LECTURES AND CONFERENCES

VÖLKERRECHT AUS BRASILIANISCHER SICHT (ODER MIT BRASILIANISCHEM AKZENT) – ZWISCHEN UNIVERSALISMUS UND REGIONALISMUS

Paulo Borba Casella

Panorama of Brazilian Law

Year 2, No 2, 2014

Rua Pasteur, 181/102 - Santa Helena
36015-420
Juiz de Fora - MG
Brazil

www.panoramaofbrazilianlaw.com

HONORARY EDITORS

Prof. Jacob Dolinger, Universidade do Estado do Rio de Janeiro, Brazil
Prof. Carmen Tiburcio, Universidade do Estado do Rio de Janeiro, Brazil

EDITORS-IN-CHIEF

Prof. Raphael Carvalho de Vasconcelos, Universidade Federal Rural do Rio de Janeiro / Tribunal Permanente de Revisão - MERCOSUL, Brazil
Prof. Bruno Rodrigues de Almeida, Universidade Federal Rural do Rio de Janeiro, Brazil

DEVELOPMENT EDITORS

Ruth Navarro, Tribunal Permanente de Revisión - MERCOSUR, Paraguay
Prof. Raphael Carvalho de Vasconcelos, Universidade Federal Rural do Rio de Janeiro / Tribunal Permanente de Revisão - MERCOSUL, Brazil

ONLINE SUPPORT

Manuel Fernández, Tribunal Permanente de Revisión - MERCOSUR, Paraguay

ISSN 1075-1343 (print)
ISSN 2318-1516 (online)

Year 2, No 2, 2014

Copyright in the collection of articles comprising the Panorama of Brazilian Law is held by the editors of Panorama of Brazilian Law. Isolated material on these pages is copyright Panorama of Brazilian Law or reproduced with permission from other copyright owners. It may be downloaded and printed for personal reference, but not otherwise copied, altered in any way or transmitted to others (unless explicitly stated otherwise) without the written permission of the editors of Panorama of Brazilian Law. With respect to the online issue, hypertext links to other Web locations are for the convenience of users and do not constitute any endorsement or authorization by Panorama of Brazilian Law. For further information please contact raphaelvasconcelos@panoramaofbrazilianlaw.com. The opinions expressed in this publication are those of the authors and do not necessarily reflect the views of the editors.

EDITORIAL BOARD

- Prof. Augusto Jaeger Junior, Universidade Federal do Rio Grande do Sul, Brazil
Prof. Cláudia Lima Marques, Universidade Federal do Rio Grande do Sul, Brazil
Prof. Cláudio Michelin, University of Edinburgh, United Kingdom
Prof. Colin Crawford, Tulane University, United States
Prof. Conrado Hubner Mendes, Universidade de São Paulo, Brazil
Prof. Deo Campos Dutra, Pontifícia Universidade Católica do Rio de Janeiro, Brazil
Prof. Diego P. Fernández Arroyo, Institut d'Études Politiques de Paris - Sciences Po, France
Prof. Fabrício Bertini Pasquot Polido, Universidade Federal de Minas Gerais, Brazil
Prof. Gabriel Valente dos Reis, Universidad de São Paulo, Brazil
Prof. Gustavo Vieira da Costa Cerqueira, Université de Strasbourg, France
Prof. Iacyr de Aguiar Vieira, Universidade Federal de Viçosa, Brazil
Prof. Jamile Bergamaschine Mata Diz, Universidade Federal de Minas Gerais, Brazil
Prof. João Maurício Adeodato, Universidade Federal de Pernambuco, Brazil
Prof. John H. Rooney, University of Miami, United States
Prof. Luiz Edson Fachin, Universidade Federal do Paraná, Brazil
Prof. Luís Roberto Barroso, Universidade do Estado do Rio de Janeiro / Supremo Tribunal Federal, Brazil
Prof. Marcelo da Costa Pinto Neves, Universidade Nacional de Brasília, Brazil
Prof. Marcos Vinício Chein Feres, Universidade Federal de Juiz de Fora, Brazil, Brazil
Prof. Marilda Rosado, Universidade do Estado do Rio de Janeiro, Brazil
Prof. Nadia de Araujo, Pontifícia Universidade Católica do Rio de Janeiro, Brazil
Prof. Paulo Borba Casella, Universidade de São Paulo, Brazil
Prof. Rachel Sztajn, Universidade de São Paulo, Brazil
Prof. Véronique Champeil-Desplats, Université de Paris Ouest - Nanterre La Défense, France
Prof. Vicente Marotta Rangel, Universidade de São Paulo, Brazil
Prof. Wagner Menezes, Universidade de São Paulo, Brazil
Prof. Will Kymlicka, Queen's University, Canada
Prof. Zeno Veloso, Universidade Federal do Pará, Brazil

AD HOC CONSULTANTS AND PEER REVIEW BOARD

The following legal scholars are members of the board of ad hoc consultants of the Panorama of Brazilian Law. They have been selected among the 87 reviewers currently enrolled in the site of the electronic magazine.

Prof. Ana Carolina Marossi Batista, Universidade de São Paulo, Brazil
Prof. Carolina Araújo de Azevedo, University of Oklahoma, United States
Prof. Daniel Giotti de Paula, INTEJUR, Brazil
Prof. Danielle Campos, Ludwig-Maximilians-Universität München, Germany
Prof. Ely Caetano Xavier Junior, Universidade do Estado do Rio de Janeiro, Brazil
Prof. Emília Lana de Freitas Castro, Universität Hamburg, Germany
Prof. Flavia Machado Cruz, Universidade Federal Rural do Rio de Janeiro, Brazil
Prof. Henrique Sartori de Almeida Prado, Universidade Federal da Grande Dourados, Brazil
Prof. Henrique Weil Afonso, Pontifícia Universidade Católica de Minas Gerais, Brazil
Prof. Joseli Fiorin Fiorin Gomes, UniRitter, Brazil
Prof. Leonardo Ostwald Vilardi, Pontifícia Universidade Católica do Rio de Janeiro, Brazil
Prof. Maira Fajardo Linhares Pereira, Universidade Federal de Juiz de Fora, Brazil
Prof. Orlando José Guterres Costa Jr, Universidade do Estado do Rio de Janeiro, Brazil
Prof. Pedro Baumgratz Paula, Universidade de São Paulo, Brazil
Prof. Ricardo Campos, Goethe Universität Frankfurt am Main, Germany
Prof. Sergio Maia Tavares, Universidade Federal Fluminense, Brazil
Prof. Tulio Louchard Picinini Teixeira, UNIFEMM, Brazil

A FINAL FOREWORD

“A Panorama of Brazilian Law’ is a step towards realizing a long standing dream: To provide the world with a window to Brazilian law”.

These were the concluding words of the Foreword I wrote for the collection of essays on various fields of Brazilian law, as co-editor of the “Panorama of Brazilian Law”, together with Professor Keith S. Rosenn of the University of Miami, which was published in 1992.

21 years have passed and now a group of the next generation of Brazilian law scholars has undertaken to resuscitate and keep alive the idea of the Panorama by means of a permanent electronic journal.

Professor Carmen Tiburcio, who contributed to the original Panorama and later substituted me as head of the Private International Law Department of the Rio de Janeiro State University, together with Raphael Carvalho de Vasconcelos and Bruno Rodrigues de Almeida, both professors of international law at the UFRJ are leading this important initiative.

Today, much more than two decades ago - Brazil, one of the BRIC countries - has become an important player in the international economy and its legal system an important factor in the proper development of international commercial relations.

May this effort prosper for years and generations to come.

Jacob Dolinger, 2013

EDITORIAL NOTE

In 1992, a group of prominent Brazilian scholars led by Professors Jacob Dolinger (Universidade do Estado do Rio de Janeiro) and Keith Rosenn (University of Miami) created the journal Panorama of Brazilian Law as an attempt to provide reliable legal information on Brazilian Law for non-Portuguese speakers. Originally planned as a Yearbook, the ancient PBL presented papers related to several branches of Brazilian law written by respected authors. Due to several reasons, this groundbreaking project did not go ahead and the inaugural issue was the only one released.

In order to rescue the goals and ideas of the original project, the first number of the new Panorama of Brazilian Law was issued in 2013 with sixteen articles in three different languages – English, French and German - covering several brands of Brazilian law. Besides its print version, the yearbook is also available in the electronic magazine format (www.panoramaofbrazilianlaw.com) which allows a broader perspective for the broadcasting of articles reaching a greater number of potential researchers.

For this second edition, papers written in English, French, German, Italian, Spanish and Swedish were able to submission. Papers in English, French, German and Spanish were selected and are original and unpublished. Versions of papers originally released in Portuguese or published in the context of academic conferences were also accepted.

The Scientific Council is responsible for the Editorial Line of the magazine, whose goals are to spread information about Brazil's legal order and juridical environment among non-Portuguese speakers.

Formal aspects and criteria for publication are found at the www.panoramaofbrazilianlaw.com website under “about” > “submissions” > “author guidelines”. The call for papers for its forthcoming volume 3 is already available.

The tolerant and plural perspective of the project, which is opened to all branches of Brazilian law, was determinant for choosing not to establish a hermetic format concerning the logical organization of the articles – neither with respect to its distribution along the yearbook nor in the organization adopted by authors in its papers.

The access to the online magazine is completely free of costs or registration.

The editors of Panorama of Brazilian Law are very happy with the present success and positive repercussions of the project and hope to provide foreign researchers an ultimate way to access Brazilian law.

Brazil, September 2014.

Raphael Carvalho de Vasconcelos
Bruno Rodrigues de Almeida

EDITORIAL POLICY

AND

SUBMISSION GUIDELINES

REASONS

One should not deny that there are studies on Brazilian law already available in foreign languages. Such efforts are, however, mainly isolated initiatives. Law sectors with traditional external interest, such as business law and investment's regulation, naturally receive attention of foreign researchers and concentrate the most publications about Brazilian law in other languages.

Portuguese constitutes also a natural barrier to put forward Brazilian law abroad. A legal journal entirely released in foreign languages is intended to contribute to break this barrier stimulating academic research focused on international researchers and scholars.

It has been noted that the lack of updated material on Brazilian legislation in idioms other than Portuguese constitutes an obstacle for interested scholars or potential investors.

At the same time, it is always desirable to increase the integration of Brazilian Law Academy in the international scenario, thus facilitating the access of foreigners to take knowledge and participate in the discussions in Brazilian legal arena.

GENERAL NOTES

Panorama of Brazilian Law is a journal that publishes articles, book reviews and essays substantially related to Brazilian Law. Within such context, research works and papers focused on Theory of Law, Sociology of Law, Philosophy of Law and History of Law are also acceptable.

This journal is opened to different theoretical and methodological approaches, including interdisciplinary papers and articles that fall into Law & Society, and Law & Economics research Fields.

PUBLICATION FREQUENCY

PBL is an annual journal and is released every second semester.

DOUBLE BLIND PEER REVIEW

Prior to publication, Editors will analyze submissions to assess

whether or not it fits the PBL's Editorial Policy. The submission is then sent to two anonymous reviewers who evaluate qualitatively its content and style in accordance with blind peer review principles. Reviewers take 45 to 120 days to provide their comments, which will be forwarded to the author(s) for acknowledgment or revision proceedings. In this latter case, authors can send the reviewed version back to PBL for re-evaluation.

Authors will be notified about the status of evaluation process, being able to access reviewer's comments on their articles. Exceptionally, Panorama of Brazilian Law's Editorial Board can also directly invite authors to publish articles.

SUBMISSIONS GUIDELINES

Panorama of Brazilian Law (PBL) currently publishes articles and papers written in English, French, German, Italian, Spanish or Swedish not previously published elsewhere. For such matter, PBL will also accept English, French, German, Italian, Spanish or Swedish versions of works originally published in Portuguese.

Papers written in other languages are subject to specific call for papers previously released.

TECHNICAL DETAILS

Submissions must have a minimum of 15 pages and a maximum of 30 pages of 2100 characters. They must also meet ABNT's standards (Brazilian Technical Norms Association). Under special circumstances, submissions exceeding the maximum limit might be published depending of Editors' discretionary decision.

Paper Size: Letter (8,5 x 11 in) text editor: Word for Windows 6.0 or higher. Margins (Left and top, 3 cm – right and bottom, 2 cm); Font: Times New Roman, Size 12 paragraph: left aligned; Space before text: 0; Space after text: 12 points; line Spacing: 1,5 spacing. Text highlights made in italic (rather than underlined).

Title with a maximum of 8 words, uppercase, bold, written English, and translation to English for those submissions written in French, German, Italian, Spanish or Swedish.

Summary, written in English with version in English for submissions written in French, German, Italian, Spanish or Swedish, with about 150 words, Left aligned, containing study Field, objectives, applied methodology (encouraged, but not mandatory), results and conclusions.

Minimum of three and maximum of five keywords in English with translation to English if Submission is written in French, German,

Italian, Spanish or Swedish.

References can be cited whether in footnotes (according to Annex I of NBR 6023/2002) or using the Author-Date style in the body of text (including author's Last name, year and page of the publication). In all cases, complete bibliographical references are mandatory in alphabetical order at the end of the submission, under NBR-6023's rules.

Diagrams, Graphics and tables must have title and indicate source, should be placed within the body of text, properly titled and referenced and should avoid duplicity.

Prior to submission, authors must make sure that full name of each author, institutional affiliation and personal academic information, E-mail accounts, social network contacts and/or phone number are informed **ONLY** in SUBMISSION FORM (step 3 of the submission proceedings).

IMPORTANT if any of the above mentioned data (full name of each author, institutional affiliation and personal academic information, E-mail accounts, social network contacts and/or phone number) figures on submission file, it will be immediately rejected for hindering blind peer review.

COPYRIGHTS

Panorama of Brazilian Law employs Open Journal Access policies.

Authors are fully and exclusively responsible for their submissions.

Upon submitting a paper to Panorama of Brazilian Law, authors fully agree with cession of copyrights to Panorama of Brazilian Law (PBL), and expressly allow either publishing it in electronic media or printed versions for research purposes. Full reproduction of articles is prohibited. Citation of parts of text without previous solicitation is allowed provided that the source is properly identified.

TABLE OF CONTENTS

ARTICLES SECTION

THE BRAZILIAN JUDICIARY AS AN ORGAN OF POLITICAL CONTROL 15

Ada Pellegrini Grinover - Grasielly de Oliveira Spínola

RECOGNITION OF FOREIGN JUDGMENTS IN BRAZIL: NOTES ON BRAZILIAN SUBSTANTIVE AND PROCEDURAL PUBLIC POLICY 33

Carmen Tiburcio - Luís Roberto Barroso

BRIEF ANALYSIS OF COMPETITION DEFENSE IN BRAZIL 59

Augusto Jaeger Junior - Daniela Copetti Cravo

JUDICIARY REFORM IN BRAZIL AND THE NATIONAL COUNCIL OF JUSTICE: IMPROVING COMMUNITY INVOLVEMENT IN OFFENDER TREATMENT 69

Márcio Schiefler Fontes

SOME THOUGHTS ON PRISON CONDITIONS, HUMAN DIGNITY AND URBAN VIOLENCE UNDER BRAZILIAN LAW 91

Ana Paula Barcellos

THE LEGAL FRAMEWORK OF MEDIATION IN BRAZILIAN LAW 113

Humberto Dalla Bernardina de Pinho

AN ATTEMPT FOR THE PROTECTION OF SEXUAL DIVERSITY IN BRAZILIAN LAW 143

Marcos Vinicius Torres Pereira

PARENTAL ALIENATION WITHIN THE CONTEXT OF THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: THE BRAZILIAN PERSPECTIVE 167

Bruno Rodrigues de Almeida - Gisela Vieira Dalfeor Vidal

GUN JUMPING IN BRAZILIAN ANTITRUST LAW: A CASE STUDY IN THE OIL INDUSTRY 193

Clarissa Brandão - Aline Teodoro de Moura

INTERNATIONAL REACH OF SECURITIES REGULATION: A COMPARATIVE VIEW ON BRAZILIAN AND U.S. LAW 213

Gabriel Valente dos Reis

CAMPAIGN FINANCE IN COMPARATIVE PERSPECTIVE: A NESTED ANALYSIS APPROACH 225

Ranulfo Paranhos - Dalson Filho - Enivaldo Rocha - José Alexandre Júnior

THE ENVIRONMENTAL ISSUE IN BRAZIL: A MATTER OF PRINCIPLES 251

Marco Aurelio Peri Guedes

FORCED TAX COLLECTION PROCEEDINGS IN BRAZIL: AN OVERVIEW OF FEDERAL LAW NO. 6,830 267

Bruno Fernandes Dias

MORAL, POLITICS AND METHOD: THE INFLUENCE OF RONALD DWORKIN'S PHILOSOPHY ON THE BRAZILIAN SUPREME COURT 287

Luciano Del Monaco - Nuria López

PENSION DEFICIT IN BRAZILIAN SOCIAL SECURITY SYSTEM: LEGAL REMARKS AND STRATEGIES TOWARDS FINANCIAL SUSTAINABILITY 309

Cristiane Miziara Mussi - Marcos Roberto Pinto

LE RÔLE DU BRÉSIL DANS LA FORMATION ET L'INSTITUTION DU MARCHÉ COMMUN DU SUD – MERCOSUR 331

Fernanda Marcos Kallas

EL ESTABLECIMIENTO VIRTUAL Y SU CONDICIÓN DE ESTABLECIMIENTO EMPRESARIAL SECUNDARIO (FILIAL) 357

Rubia Carneiro Neves - Ana Caroline Faria Guimarães

LECTURES AND CONFERENCES

VÖLKERRECHT AUS BRASILIANISCHER SICHT (ODER MIT BRASILIANISCHEM AKZENT) – ZWISCHEN UNIVERSALISMUS UND REGIONALISMUS 397

Paulo Borba Casella

ARTICLES SECTION

THE BRAZILIAN JUDICIARY AS AN ORGAN OF POLITICAL CONTROL

Ada Pellegrini Grinover

Full Professor at the Law College at University of São Paulo.

Grasielly de Oliveira Spínola

Universidade de Itaúna, Brazil.

Abstract: The fruition of fundamental rights like healthcare, education, worthy housing and work is directly related to the creation and implantation of universal and egalitarian public policies by the Congress and the Public Administration. In the cases where the existing public policies are shown to be insufficient, inadequate or do not achieve the fundamental goals of the Federative Republic of Brazil, it arises the need of the action of the jurisdictional function to control the constitutionality over these public policies. In Brazil, this control is made both by direct way, by means of its own constitutional actions, and by diffuse way, by means of collective actions interposed in first instances courts. In this context, the enforcement of the liberal theories like Montesquieu's *Separation of Powers and the Intangibility of the Discretionary Activities* reveal themselves incoherent with the Democratic Rule-of-the-Law State. In another way, the jurisdictional action is limited by the *Reasonableness*, by the *Possible Reserve* and by the *Existential Minimum*, and can also find some obstacles in the individual actions that end up influencing the public policies. Therefore, there is a great effort to collectivizing individual actions by Brazilian scholars. Another problem is the difficulty of Judicial Power in using the adequate procedural class action. It will be analyzed one specific decisions made by the Court of Justice of the State of São Paulo about the jurisdictional control of public policies related to the autistic people, with a goal to point out a direction to the improvement of the jurisdictional tutelage in terms of effectiveness and adequacy.

Keywords: Public Policies – Jurisdictional control – effectiveness and adequacy.

I - INTRODUCTION

1 Fundamental social rights, public policies and jurisdictional control

The Brazilian Constitution, as well as the corresponding obligation of the government to provide the citizens with services that they are entitled to – which, in accordance with the same Constitution, are to be immediately effective – involve the necessity of positive benefits to be given by the government, and, hence, are called fundamental rights of having services provided. The fruition of rights, such as health, education, housing, work, a clean environment will, then, depend on the governmental organization that shall rule and implement the public policies (of an equalitarian and universal nature) through both the function of the legislative branch (lawmaking), and the administrative function (steps for implementation). However, the political powers (and mainly the Administration) often stand by. They lay inert or evolve inadequate public policies that do not meet the constitutional provisions (article 6 of the Brazilian Constitution) nor the fundamental goals of the Federative Republic of Brazil (article 3 of the Brazilian Constitution). At this moment, always *a posteriori*, the jurisdictional function may be brought into action, as long as it is invoked, and carry out the constitutionality control over the public policy, even taking actions to implement or correct it.

For this purpose, the Brazilian legal system establishes specific constitutional procedural instruments, such as the direct action of unconstitutionality, declaratory action of unconstitutionality by omission, action of obedience to the fundamental precept and the mandatory injunction. However, as it happens in Brazil, the constitutionality control is not carried out in a direct way only, but also in a diffuse way¹ So, the first instance courts of law are responsible for carrying out the constitutionality control over the public policies, implementing or correcting them, making use of collective actions, which are of an equalitarian and universal nature, just like the public policies, leading to the *res judicata erga omnes*.

That point of view was rejected at first, but now it is totally accepted by the jurisprudence and by most of the Brazilian scholars. There were two opposing theories: *the theory of separation of powers* and *the principle of intangibility of the discretionary activities of the Administration*.

But the strict application of the *theory of separation of powers*,

¹ It is worth having in mind that in Brazil the contentious administrative proceedings do not exist, and it is up to the judiciary branch to acknowledge and judge all the disputes even if the state is one of the parties.

created by Montesquieu, modeled by the principles of the liberal state, and according to which the judge's role was only to be the mouth of the law, cannot be accepted by the social state any longer, and much less by the democratic rule-of-the-law state, to which the state is one single unit, and so is its sovereignty. The so-called powers of government just represent the state functions, whose exercise is originally awarded by the Constitution, but whose performance may be submitted to the control of the judiciary branch, the last guardian of the Constitution ²

The *principle of intangibility of the discretionary activities of the Administration*, according to which the judiciary branch could only review the legality of the administrative act, but not its grounds (that is, its opportunity or convenience), has also been worn away along the time due to the broadening of the legality concept towards the administrative activity. It ended up embracing not only the legal formal written texts, but also matters regarding the finality, the cause and the reasoning of the administrative act, as well as its real aim. Consequently, the concept of power misuse has arisen and allowed the intervention of the judiciary branch. In Brazil, the last attempt, which definitely put an end to the idea of intangibility of the discretionary act, was set forth by the 1988 Constitution, since it allows a constitutional popular action to be filed against an administrative act that may be, in some way, harmful to the administrative morality. *Morality* shall not be mixed up with legality: the act may be both legal and immoral.

Following the same principles, the possibility of jurisdictional control of the public policies has been adopted by several countries. India, South Africa, Argentina and Colombia, among others, have many lawsuits to submit the public policies to the jurisdictional control (in the courts of law, although more often in the Supreme or Constitutional Courts). It is not a coincidence that the necessity of control is more urgent in emerging countries, where the legislative and the executive branches often lay idle and the fundamental social rights are less respected.

2 Limits to the jurisdictional performance over the control of public policies

Although the jurisdictional control of the public policies has received the approval of the jurisprudence as well as of most of the Brazilian scholars, the Brazilian Supreme Federal Court wanted to

² Since the middle of the 19th. century, Justice Marshall, in the famous case Marbury vs. Madison, Justice Marshall established in the United States the principle that awards the constitutionality control to the judiciary branch, and may even undermine the law that offends the Constitution. And the Brazilian republican Constitution has adopted that principle, which is in force until today.//

make clear that the control has to be seen as being exceptional and exist within certain limits ³

The first limit is the *reasonableness* of the intention to implement or to change some specific public policy and the *unreasonable idleness* or *choice* of the administration. ⁴. Just in this case the judiciary branch is allowed to interfere, substituting its choice by the one of the administrator.

The second limit is the *contingency reserve fund* (*reserva do possível*), a concept originated from the German constitutional jurisprudence: if a public policy is to be implemented or even modified, it must have enough funds in the state's budget. ⁵

Finally, the last limit, also originated from the German constitutional jurisprudence, is the *existential minimum*, which corresponds to the hard core of the fundamental rights, and without them the human being lacks dignity ⁶.

The *existential minimum* is also considered a *limit to the limits*, as its existence dismisses the obligation of the *contingency reserve fund*, according to another decision by the Brazilian Supreme Federal Court.

3 The public policies and the individual actions

It has already been said that the collective actions are the proper procedural way to the jurisdictional control of the public policies. Due to their necessary equalitarian and universal nature, they are the only ones that may give an equalitarian and universal jurisdictional answer. However, the access to justice, guaranteed in the article 5, item XXXV of the Constitution, rules not only the collective protection, but also the individual protection of the subjective rights.

It is inevitable, therefore, that together with the collective actions, whose specific aim is to implement or correct public policies, several individual suits proliferate. They intend to seek after compensation for

3 The leading vote of the Supreme Court in this issue was from Justice Celso de Mello, in the ADPF, number 54 of 2012.

4 It is worth noticing that according to the terminology of the Brazilian Supreme Federal Court, the principle of *reasonableness* mixes up with the principle of *proportionality*. Although the doctrine points out some differences between the two principles, it is possible to ascertain that the *reasonableness* is the subjective sub-criteria of the *proportionality*, and, in a concrete situation, the judge is in charge of choosing the value that seems to be worthwhile protecting, according to the criteria that sensibly show the common sense.

5 However, it is necessary more than the allegation of inexistence of funds. It has to be proved. The impossibility to reallocate the budget has to be proved, too. And the judge may sentence the executive and the legislative branches to make a specific budget forecast for the following year./

6 It has been argued the nature of the *existential minimum* by the scholars: absolute or relative, static or dynamic, external or internal. For us, each fundamental right has its hard core, to be checked in the concrete situation, according to the circumstances.

personal subjective rights, and, indirectly, end up influencing the public policies.

The influence of the individual actions over the public policies is most of the times negative, as the judge's order to grant the individual claims falls over the amount of money to be shared among all, and, hence, it becomes significantly reduced, as already shown by the statistics. Sometimes, however, the repetition of individual actions with the same object may induce the administration to change the public policies, as it has already happened with the cocktail anti-aids and, more recently, with a more modern, effective, with few side effects medicine against diabetes, which was not in the list of medications of the Unique Health Care System (Sistema Único de Saúde).

4 The critics of the judicial activism and the judge's co-participation in the political arena

The judge's co-participation in the political arena, with the possibility of intervention in the legislative and administrative activities, mainly towards the public policies, is not exempt from critics directed to the so-called *judicial activism*.

The most important critics refer both to the lack of the judge's democratic legitimacy, as he is not elected, as well as to the lack of the judge's qualification, as he would not be as prepared as the administrator to make political choices.

It is exactly the fact that the judge is not elected that makes him much more immune against the political pressure that is exercised over the majority powers, and end up influencing his choices. In a majority system, like ours, the minorities' voice is suffocated and can only be heard through the judiciary branch. It is clear that the judge is obliged to hear complaints and direct them using a dialectic process, and to assume personal responsibilities because of his decisions, as well as to justify them based on reasons that are socially acceptable. The content of the jurisdictional function is essentially public, and, besides solving disputes, gives meaning and concrete expression to the public values that define a society and give it identity and coherence. On the other hand, the democratic legitimacy of the judiciary branch comes either from the polls or, more exactly, from the principles and guarantees that rule the exercise of the jurisdictional function: the impartiality, the adversarial system, the ample defense, the reasoning for the decisions, the publicity, the internal control and the political control.

Concerning the alleged judge's lack of qualification because he is not acquainted with technical matters, such as the budget or the administration plan regarding the public policies of a specific area and its progressive implementation, whose aim is to have coherent, balanced,

fair and achievable decisions, we shall recognize that nowadays, mainly in Brazil, the judge is not duly informed, is isolated, does not have specialized assistance, is far from the administration or even from other judges or appellate courts that face similar matters.

That is the reason why the next item will approach the institutionalization of a new action, more adequate to solve the so-called conflicts of public interest, as being a suitable technique to overcome the above mentioned problems.

5 The conflicts of public interest and its adequate jurisdictional protection. Characteristics of a new action

The conflicts of public interest or strategic are the ones designed to implement the fundamental collective rights, which means, to discuss the performance of important institutions or public services, such as the school systems, the prison systems, institutions or organizations that are responsible for protecting the public health, access to transportation, housing, sewage treatment, and urban mobility. That was the origin of the disputes of public interest that have happened since the decade of the '50s, in the last century, in the North-American legal system ⁷.

This way, the recognition of the existence of an important category of public right disputes has been asserting itself, and should be differenced from both the procedural protection aimed at solving private disputes, as well as from most of the collective protection, because at this moment the dialogue that prevails in the action has an institutional nature, involving other state "powers". The decision is not about past events anymore on which the law should be applied, but it will be reflected in the future in a prospective dimension. The judge's order must not say "pay" or "do" anymore, but it has to be a mere indication of the steps to be taken in order to obtain the result intended by the decision.

And that decision must be a result of the dialogue between the parties and mainly among the powers of the government, opening the adversarial system also by having public hearings and the intervention of third parties like the *amicus curiae*. The judge's knowledge must be widened with the help of specialized assistance and with the information provided by the administration itself, so that if there is not any settlement, the judge can be informed about the effects of his decision, which has to be fair, balanced and enforceable. The enforcement of the decision, in turn, must be made flexible, with the participation of the administration, by having plans approved by the judge, who must follow up its

⁷ Widely known is the landmark judgment "Brown vs. Board Education of Topeka", which was judged by the Warren Court together with other precedents that permitted the development of the doctrine. Mauro Cappelletti was the great propagator of those ideas among us in 1976.//

enforcement, with the help of an independent third party from public or private organs, who will be responsible for its enforcement, always in close communication with the judge and on his command.

This new action, which requires great judicial activism, the widening of the judge's powers, as well as the dialogue method, including the dialogue among the powers of the government, greater publicity, participation and transfer, does not exist yet. However, the jurisprudence of several countries has been able to create it, modifying the classic procedural methods.

A landmark judgment and an interesting example to be followed is the case of Beatriz Mendoza, which was filed before the Supreme Court of Argentina, and whose plaintiffs were some groups of individuals who suffered damages, several environmental associations and the People's Defender. The defendants were the national government, the Buenos Aires Province and the autonomous city of Buenos Aires, as well as a group of 44 companies that supposedly poured polluting chemicals into the river basin. The court freely exercised its order power, used the principle of preclusion flexibly, and required the states the peremptory presentation of an integrated and complete plan based on the principle of progressivism, so that objectives could be gradually obtained, and according to a chronogram. In July of 2008 the final decision definitely put an end to the matter, pointing out that the effects of the decision will have reflections in the future. It also determined general criteria to the decision enforcement, however respecting the limits of the discretionary powers of the administration. Concerning its enforcement, the decision set forth the citizen participation to monitor the accomplishment of both the sanitation plan, as well of the action plan that was established. The People's Defender was required to monitor compliance with the judgment, by forming a collegiate body comprised by non-governmental organizations involved in the litigation. The enforcement of the decision is still in progress, in a gradual way, and following the chronogram.

In Brazil, the appellate courts have not been so careful, and after the judgment, which is stiff and fixed, there has been some difficulty to enforce the decision. The dialogue with the administration has turned out to be essential. More recently, in a collective action filed by the Prosecution, whose aim was to request the necessary availability of thousands of places in day-care centers, there were at least public hearings and the enforcement was based on the Plan of Goals, which is progressive, and was presented by the mayor of São Paulo when he was a candidate.

However, the best solution would be to rule, through the legislative activity, a new action to discipline the jurisdictional control of public policies, with the above mentioned characteristics, which would balance the three powers of the government, and the commitment

to seek consensual solutions, and even to make the judge more secure to issue decisions and solve litigations not based on the past anymore, but looking at the future ⁸

II - AN EMBLEMATIC CASE OF FAILURE IN THE INADEQUACY OF DECISION ON PUBLIC POLICY

1 About Autism: Diagnosis, Symptoms and Treatments

This is a global dysfunction of development that typically appears during the first three years of life and affects the ability of an individual's communication, socialization (building relationships) and behavior (responding appropriately to the environment). This disease affects about 20 out of every 10,000 births and it is four times more common in males than in females.

Some autistic children may exhibit intelligence and clear speech, others, however, have serious limitations in language development, interaction, and may appear distant or introspective and locked in rigid and limited patterns of behavior.

One of the most common myths about autism is that autistic people live in their own world, only interacting with the environment they have created, but this is a fallacy. If, for example, an autistic child is alone watching other children playing, it is not due to the fact that the child is necessarily uninterested in these games or because they live in their own world. Most often this occurs because this child presents real difficulty initiating, maintaining and properly ending a conversation or joke, which is actually regarded as difficulty in interaction.⁹

Autistic spectrum is another term denominated to the various forms of manifestation of autism, which indicates a range of possible symptom. According to clinical analysis, it can be split into 3 groups:

1) complete absence of any interpersonal contact, inability to learn how to speak, incidence of stereotyped and repetitive movements, mental retardation;

2) the carrier is self-focused, does not establish eye

⁸ A Bill on this matter has been prepared by *Cebepej - Centro Brasileiro de Pesquisas e Estudos Judiciais* (Brazilian Center for Researches and Judicial Studies), founded by Kazuo Watanabe and currently presided by Ada Pellegrini Grinover. It was submitted to debates and will soon be presented to the National Congress

⁹ GAUDERER, E. Christian. *Autismo e outros atrasos do desenvolvimento: guia prático para pais e profissionais*. Rio de Janeiro: Revinter; 1997. p 3.

contact neither with people nor the environment; can speak, but does not use speech as a communication tool (is able to repeat complete sentences but out of context) and has impaired understanding;

3) mastery of language, normal intelligence or even above average, less difficulty with social interaction that allows the carriers to live an almost normal life.

In adolescence and adulthood, the manifestation of autistic symptoms depends on how people were able to learn the rules of social behavior and develop that behavior which favors adaptation and self-sufficiency in childhood.

Each autistic child should then be diagnosed and begin treatment as soon as possible, and this treatment should be directed to the needs of each individual, according to the *autistic spectrum*, both in health institutions, as well as the school environment attended by the child.

It is important to emphasize that therapy requires a multi and interdisciplinary team composed of medical care of pediatricians and psychiatrists and non-medical treatments, with psychologists, speech therapists, pedagogues, occupational therapists, and educators prepared to deal with special needs. All these procedures are able to provide a progressive evolution of the prognosis and social inclusion of the autistic child.

2 The Jurisdictional Control of Public Policy Related to Autism in São Paulo

In 2000, triggered by a complaint made by the father of an autistic child, the Public Ministry of the State of São Paulo initiated a Civil Inquiry to verify whether the State provided specific treatment and education to attend the needs of people with autism.

Following an authorized investigation, it was confirmed that the State only made a common psychiatric treatment for autistic patients available and not a specialized treatment to meet the specific needs.

The State Prosecution Department tried to sign an agreement with the Government, but the State of São Paulo showed no interest in including specialized treatment as part of the Unified Health System, nor provide institutions specialized in the education and training of people affected by this disease.

Thus, the Public Prosecution Department filed a Class Action (called in Brazil Public Civil Action)¹⁰ with a request for preliminary injunction against the Government of the State of São Paulo, requesting full compensation from the defendant for the treatment, care and

education of autistic patients in specialized treatment institutions.

This class action was heard in the court of first instance to order the Government of São Paulo, to bear the full value of the treatment, care and education of autistic patients in specialized private institutions for all residents in the state, as long as it has no free specialized treatment units for autistic patients, as specified in the passage of the operative part of the law suit below:

I JUDGE FOUNDED the Civil Action brought by the Public Prosecutor of São Paulo against the Government of the State of São Paulo, based on article 269, paragraph I, of the Code of Civil Procedure, to order it, so that if the want, own and provide free specialized units, never existing for the treatment of “common” mental patients, for health care, education and healthcare to autistics, specializing in full or part-time for all residents of the State of São Paulo:

I - Coping with the full costs of treatment (specialized hospitalization or full-time regime or not), counseling, education and health specific, fund specialized treatment for non-state entity suitable for the care and assistance to residents in autistic State of Sao Paulo;

II - By application of the legal representatives or guardians, accompanied by a medical certificate attesting to the situation of autistic addressed to the Hon. Secretary of Health and filed with the office of the Secretary of State for Health or sent by letter with acknowledgment of receipt, the State will have a period of thirty (30) days from the date of filing or the receipt of the registered letter, as the case, to provide, at its expense, appropriate institution for the treatment of autistic applicant;

III - The institution nominated for the autistic requester by the State should be as close as possible to their home and their families, with, however, the body of the application may include the institution of preference or responsible representatives of the autistic, while the State support infeasibility of the statement, if applicable, and elect another

appropriate entity;

IV - The system of treatment and care in full-time or part-time period, always specialized, should be specified in the medic prescription certificate itself, and the State shall provide entities with such characteristics;

V - After the state to provide the indication of the institution, the State shall notify the person responsible for the autistic providing the necessary data for the start the treatment. For cases of noncompliance with obligations to make the items I to V, fixed daily fine of \$ 50,000.00 (fifty thousand reais), for the State Fund Interests metaindividual injured (Article 13 of Federal Law No. 7347/85), and the reverse maximum period of 30 (thirty) days from the date of intimation of this decision to provide, permanently, such care to autistic children.

The Government of the State of São Paulo appealed against that decision, alleging interference by the judiciary in the executive branch, which was dismissed by the Third Public Law Chamber of the Court of Justice of São Paulo:

PUBLIC CIVIL ACTION - Providing specialized treatment for autistic - Alleged lack of interest and procedural illegitimacy of prosecutors – not recognized - Article 5 CF - Norma constitutional for protection on public health - Alleged interference by the judiciary in the executive branch – not recognized. ex - Judicial Control on discretionary activity- Guarantee of the right to public health - Implementation of a daily fine for noncompliance - Aim to compel the administrator to implement public policies - Resources not provided.¹⁰

The Court of São Paulo upheld the decision at first instance, considering that the State Government can not state administrative discretion to maintain legal budget forecast (Theory of Possible Reserve). If this were the case, the exercise of collective, diffuse, individual rights or public interest would always be subjected to administrative discretion

¹⁰ TJ/SP Apelação Cível nº 278.801.5/8-00

and the willingness of the administrator to insert the necessary funds in the budget.

When analyzing the provisions of the sentence that was issued on December 28, 2001, it is acknowledged that judicial control of public policy related to autism was conducted in order to ensure compliance with the decision because the magistrate not only focused on the state to supply treatment, but one that is appropriate and in specialized institution close to the patient's home in order to facilitate their access.

Nevertheless, while displaying many specific and too detailed commands, it ended up complicating and hindering their compliance.

The first difficulty is related to the type of compliance to be made, which can only be individual. This means that every time an autistic person has to seek rights guaranteed in the sentence, they should seek the health department, perform certain procedures, indicate the institution of their choice and wait for thirty days to have the management response with the location and start date for the treatment.

If the Health Department remains inert or partially fails to comply with an order of the sentence, the representative of the autistic patient should initiate a Single Sentence Execution, with reasons which substantiates their claims.

Taking into account the number of inhabitants of the state of São Paulo – location of the decision in question - and the number of autism diagnosis, it is hard to measure the infeasibility of the judiciary to appreciate, each case and therefore the delay in compliance with court order.

As soon as the decision became final, the individual executions were initiated by autistic individuals, through their legal representatives, and after action together with the secretary of health and education, the judge ordered the refund of amounts paid to private institutions by the defendant through the legal deposit system.

However, eight years after the order of the judge and when thousands of acknowledged individual executions had piled up under one jurisdiction, the Assistant Judge, who had just taken over the 6th Court of Exchequer Capital, saw fit to abolish individual executions based on art. 462 of CPC (supervening grace in of actions taken in the main proceedings) while at the same time, ordered the State to take steps to register and provide appropriate treatment in autistic patients in administrative form.

Moreover, the judge decided that new acknowledgements could not be prosecuted because the defendants should endeavor directly before the State Department of Health - in negative adjudication. Further determined that the Public Prosecutor of São Paulo, after gathering the responsible representatives of the autistic patients through the press and television, propose a unique and ultimate execution of sentence.

This decision brought real procedural turmoil, having even caused suspicion against the judge for “lack of sensitivity to the autism cause” and although the charges were dismissed as unfounded, the judge was removed from office.

This act of judgment in practice annulled the effects of the earlier decision given in the process of knowledge (decision was confirmed by TJSP and non-appealable), a clear affront to the Due Process and Material *res judicata*. Furthermore this act left the autistic people of São Paulo in the same helpless condition they were before the filing of the Civil Action in 2000.

The São Paulo Public Prosecution filed a bill against the decision with a request for a suspension effect, claiming offense to art. 125 and 471 of the Procedural Civil Code, Consumer’s Defence Code 81, 16 Public Civil Action Law and art.5, XXXV of the Constitution.

The Court of São Paulo demonstrating consistency with previous decision granted the injunction to suspend the effectiveness of any act aggravated and determined the following judgment statement:

*COLLECTIVE ENFORCEMENT
IMPLEMENTATION.PRINCIPLE DEVICE.
ASSIGNMENTS OF JUDGMENT. 1. Judicial
executive title contains provision of a collective
nature, being unfeasible of satisfaction, allows
the filing of executions individuais2. The purpose
of the civil action, the court consolidated the
command enforceable prevent it is to be autistic
taste of fruitless discussion with the Secretary of
State as to the technical capacity of the institution
elected to provide medical services when the state
does not provide the effective means for providing
a clear demonstration affront to the dignity of the
human person and Justice. 3. Aggravated the act
nullifies the judgment of this Court and do things
return to preceding the filing of the civil action state.
grievance provided¹¹*

As expected, aware of the constitutional and procedural effect, the TJSP annulled the effects of interlocutory decision rendered by the judge of the 6th Court of Exchequer of São Paulo upholding the interlocutory appeal brought up by the São Paulo Public Prosecutor in 09 April 2006, guaranteeing the rights of the autistic patients to receive proper and free treatment provided by the state and also emphasized the

11 Agravo de Instrumento 767.934-5/4-00

unfeasibility of leaving them at the mercy of the State Secretariat for the faithful compliance of the judgment ruling.

2.1 The inefficiencies of the judicial decision due to the implementation based on the wrong class action

Despite the Justice Court of São Paulo having acted correctly when revoking the effects of the decision, which was clearly contrary to many legal and constitutional provisions, the agreement did not solve the problem of trial inefficiency. The individual compliances continued to overcrowd the courts and the jurisdictional still had to wait a long time to receive judicial protection and receive the reimbursement to which they were entitled.

Accordingly, this whole problem could be solved if the Public Prosecution had sought the tutelage of Collective Rights instead of the Homogeneous Individual Rights, as can be seen in the following.

2.2 Diffused , Collective and Homogeneous Individual Rights

Article 81, unique paragraph, clause I of the Code of Consumer Protection - which applies by express legal provision protection of collective rights of any kind - states that diffuse interests or rights are *“trans-individual, indivisible by nature, and held indeterminate people who are linked by factual circumstances.”*

Now the collective rights set forth below, in section II of the same statute, are *“indivisible by nature of trans-individual that holds group, category or class of persons connected with each other or with the other party by a legally based relationship.”*

Gregório Assagra de Almeida direct us on the differences between the two¹²:

In the rights or diffuse interests there is no legal basis prior relationship, because people are connected by mere factual circumstances, whereas the collective in the strict sense it is important to have legal basis prior relationship between the members of the category, class or group people or between such persons and the other party.

The individual homogeneous rights or interests are, by legal definition of art. 81, sole paragraph III, of the CDC, due to the common

12 ALMEIDA, Gregório Assagra. *Direito Material Coletivo: Superação da Summa Divisio* Direito Público e Direito Privado por uma nova *Summa Divisio* Constitucionalizada. Del Rey: Belo Horizonte, 2008.

origin. They have to hold perfectly individualized persons, who may even be indeterminate, but are amenable to determination.

At first, it might be thought that the fact that all stakeholders are autistic, it would consequently provide a guardianship of homogeneous individual interests, but the law is clearly diffuse, as extracted from Kazuo Watanabe lessons, which differentiates the institutes.

The interests or 'diffuse' rights, its indivisible nature and the non-existent base of the legal obligation do not possibility, as already seen, the determination of holders. Of course, a more general level of legal phenomenon under analysis, it is always possible to find a bond that unites people, such as nationality. But the legal basis relationship that interests us, the setting of the concepts under study, is that which is derived from the interest tutoring, so that keeps most immediate interest and close relationship with the injury or threat of injury. ¹³(highlight)

It seems, therefore, that the common origin of all carriers of autism is not the existence of a legal base relationship, but a "de facto" relationship, which is, being carriers of the same disease. As we have seen, the holders of diffuse rights are indeterminate and indeterminable, united only by a circumstance of fact, for example, live in the same region, consume the same products and so on.

Therefore, in this case the relationship that binds all holders of the diffuse law is the fact that they are carriers of the same disease.

Yet the fact of being indeterminate subjects of diffuse rights, so are those with autism, because being a carrier of the disorder is not necessarily being diagnosed with the disease, especially in a state like Sao Paulo where many people live below the poverty line and have less access to health. Furthermore, as Kazuo Watanabe transcribed above, it might not be possible to define the subject of a diffuse law, to a lesser or greater degree in legal terms there will always be a bond between the holders, in this case, the disease.

2.3 Importance of recognizing the rights and common interests in the case of autism, for efficiency judged

As we have seen, the rights related to autism are clearly diffuse and so they should have been conceived and analyzed by the Public Prosecutor, when the proposal of the São Paulo Civil Action was put forward, in order to reach the desired effectiveness.

When the action tutoring homogeneous individual rights was mistakenly proposed by the parquet, it caused the fragmentation of interest and consequently forced their holders to individually pursue their compensation benefit, in which they should assemble extremely complicated proof of their specific conditions.

Moreover, the judiciary was overloaded with thousands of

individual judicial executions and failed to ensure widespread access and treatment for all autistic children, since a large part of the population especially the poorest, was unaware of the lawsuit that guaranteed them the right to treatment.

On the other hand, if the Public Prosecution had filed a Civilian Public Action for protection of diffuse rights, requiring the condemnation of the State of São Paulo in its first compulsory duty, to first and foremost present a plan, which is gradual and progressive, capable of delivering appropriate educational and medical treatment to autistic patients in a multidisciplinary approach, stipulating terms and fines for noncompliance, certainly there would be a greater chance of effectiveness of the jurisdictional provision.

III - CONCLUSIONS

In Brazil, the judicial control of public policies is admitted, but is hasn't been applied appropriately and effectively.

The decisions of the State of São Paulo, related to autistic people showed genuine interest in the welfare of this group of people and outline guidelines for compliance.

The role of the Public Prosecutor of São Paulo was important to progress in protecting the rights of people with autism in that state, because he used the appropriate investigative procedures, produced evidence to support its claim, and he implemented the public policy in a proper way, which is the collective way, and incisively acted to put an end to the abuses of judgment execution.

However, the court decision meant to implement public policy has not achieved the desired effectiveness, since the interest has been conceived as a homogeneous individual, when in fact, it was diffuse interest. This misconception of the Public Prosecutor to judge the Civil Action São Paulo, which was not remedied by the decision of first instance or by Justice Court of São Paulo resulted in veritable landslide of individual executions, requiring complicated evidence which took a long time to be verified. The result was the ineffectiveness of trial.

If the rights of the autistic people had been treated as diffuse, and the sentence which implemented the public policy had widely condemned the state to a first compulsory obligation, ordering the State to submit a feasible project for gradual implementation service to meet the diverse needs of people with autism to be negotiated with the Public Prosecution and approved by the judge - who should also monitor compliance with the judgment, by persons or institutions interested in the judicial guidance - the decision would have full effect, benefitting all people with autism in the state, including the underprivileged people who are not aware of the judiciary decision.

IV - BIBLIOGRAPHY

- ALMEIDA, Gregório Assagra. *Direito Material Coletivo: Superação da Summa Divisio* Direito Público e Direito Privado por uma nova *Summa Divisio* Constitucionalizada. Del Rey: Belo Horizonte, 2008.
- APPIO, Eduardo. *Controle judicial das políticas públicas no Brasil*. Curitiba: Juruá, 2008.
- ARANTES, Rogério Bastos. *Judiciário e Política no Brasil*. São Paulo: Sumaré, 1997.
- ARAUJO, Ana Luiza Gomes de. *Controle Jurisdicional de Políticas Públicas*. UFMG: Belo Horizonte, 2006.
- BARROSO, Luiz Roberto. *O direto constitucional e a efetivação de suas normas: limites e possibilidades na constituição brasileira*. 5 ed. Rio de Janeiro: Renovar, 2001.
- BERIZONCE, Roberto, *Los conflictos de interes público*, pp 3/32, disponível em www.direitoprocessual.org.br
- CAPPELLETTI, Mauro, *Vindicating the Public Interest through the Courts: A Comparativist's Contribution*, 25 Buffalo L. Rev., 643, 1976.
- CHAYES, A., *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev, 1281, 1976.
- COMPARATO, Fábio Konder. *O Ministério Público na Defesa dos Direitos Econômicos, sociais e Culturais*. In: GRAU, Eros Roberto et al (Coord.). *Estudos de Direito Constitucional em homenagem a José Afonso da Silva*. São Paulo: Malheiros, 2003.
- FISS, O. *The forms of Justice*, 93 Harv. L. Rev. I, 1979.
- GAUDERER, E. Christian. *Autismo e outros atrasos do desenvolvimento: guia prático para pais e profissionais*. Rio de Janeiro: Revinter; 1997.
- GRINOVER. Ada Pellegrini. WATANABE Kazuo. (Coordenadores) *O controle Jurisdicional de Políticas Públicas*, Rio de Janeiro: Forense, 2ª Ed. 2011.
- _____. *O Controle Jurisdicional de Políticas Públicas*, in *O Controle Jurisdicional de Políticas Públicas*, coord. Ada Pellegrini Grinover e Kazuo Watanabe, Gen-Forense, 2ª Ed, 2011.
- _____. *Processo coletivo*, in *Teoria Geral do Processo*, collaboration of CINTRA ANTONIO CARLOS ARAUJO and CÂNDIDO DINAMARCO, 30ª edição, São Paulo, Malheiros Editores, 2014.
- GRINOVER, Ada Pellegrini. WATANABE. Kazuo. NERY JÚNIOR. Nelson. *Código de Defesa do Consumidor comentado pelos autores do anteprojeto*. 10ª edição. Rio de Janeiro: Forense, 2011.
- SARLET, Ingo Wolfgang; TIMM, Luciano Benetti (Org.). *Direitos fundamentais, orçamento e reserva do possível*. 2. ed. Porto Alegre: Livraria do Advogado, 2010.
- SCHWARTZMAN, José Salomão. *Autismo e outros transtornos do espectro autista*. Revista Autismo, 2010.

Motivation of the Project of Bill on Judicial Control of Public Policies.
in *O controle Jurisdicional de Políticas Públicas*, coord. Ada Pellegrini
Grinover e Kazuo Watanabe, Gen-Forense, 2^a ed, 2013, Apêndice.

RECOGNITION OF FOREIGN JUDGMENTS IN BRAZIL: *NOTES ON BRAZILIAN SUBSTANTIVE AND PROCEDURAL PUBLIC POLICY*¹

Carmen Tiburcio

Professor of Private International Law and International Litigation at the State University of Rio de Janeiro. LLM and SJD University of Virginia School of Law, USA. Consultant in Brazil at Barroso Fontelles, Barcellos, Mendonça & Associados

Luís Roberto Barroso

Professor of Constitutional Law at the State University of Rio de Janeiro. LLM from Yale Law School and SJD from the State University of Rio de Janeiro. Justice of the Brazilian Federal Supreme Court

Abstract: After presenting a brief overview on the Brazilian legal system, the paper deals with the recognition of foreign decisions in Brazil, focusing on the requirement of public policy, both in the substantive and procedural aspects.

Keywords: Foreign judgments - Exequatur - Public policy.

I. INTRODUCTION

The purpose of this paper is to analyze the system adopted by Brazilian Law for certain issues involving recognition of foreign judicial decisions, specifically concerning substantive and procedural public policy. The issues raised involve an integrated examination of various areas of Brazilian Law.

II. A PRELIMINARY NOTE REGARDING THE BRAZILIAN LEGAL SYSTEM

A preliminary note about the Brazilian Legal System seems indispensable for an understanding of the issues the subject raises. For

¹ The authors wish to acknowledge the assistance of Luíza Azambuja and Luisa Viana in the preparation of this article.

classification purposes, Brazilian Law is considered part of a branch of the so-called Roman-Germanic system, in which written legislation is the main source of Law. In recent decades, however, case law has assumed a central role in the Brazilian legal system, not only due to the common use in Brazilian legislative text of relatively vague or general terms – therefore, making the Courts responsible, in the final analysis, for defining the precise meaning of the wording in each case – but also because of the special importance the legislator himself has attributed to case law².

It so happens that in Brazil the decisions of higher courts do not automatically have a binding effect in relation to lower courts. There are mechanisms by which the Federal Supreme Court (STF), for example, can produce this kind of binding effect³, but if these mechanisms are not applied in a specific manner, each judge or Court will – strictly speaking – be free to decide, in the manner he/it deems fit, taking into account the existing body of law as a whole, with the Constitution at the top. This means that the judges and the Courts can decide differently and it is not always possible to identify which case law applies to a given subject, but merely which understandings are adopted more frequently in the Courts in relation thereto.

The preceding point is important because the subject analyzed in this study is inserted in a more general debate involving the contents of the concept of public policy. Today, the interpretation and application of fundamental rights have resulted in a series of disputes, due to the need to co-exist with other fundamental rights and with the attainment of public goals. For this very reason, even though there are constitutional and legal norms in the Brazilian legal system from which one can logically extract – directly or indirectly – some of the contents of Brazilian public policy, we must also examine, in addition to these

2 Among some of the examples of the current importance of precedents in Brazilian Law, one can cite art. 285-A of the Code of Civil Procedure (CPC), included by Law no. 11.277/2006, which authorizes the judge to issue a ruling even before the defendant has been served with process, when the issue of dispute is solely one of law and he/she has already issued rulings totally rejecting arguments in identical cases. Another example is art. 518, § 1 of the CPC, by which the judge can refuse to receive an appeal when he/she feels that the appeal violates a *súmula* (brief summaries of its case law) of the Superior Court of Justice or the Federal Supreme Court. Finally, but also without running out of examples, it should be noted that appeals in general can be granted or rejected in the preliminary phase by the reporting judge as a function of their conformity or non-conformity with dominant case law, especially case law of the Higher Courts. See CPC [Code of Civil Procedure], art. 557, *caput* and § 1-A.

3 The Federal Supreme Court can issue “*súmulas*” (brief summaries of its case law) that, upon being published in the official press, will have a binding effect on the other bodies of the Judicial Branch and the direct and indirect public administration in the federal, state and municipal spheres. These are the so-called binding *súmulas*, expressly established in the Federal Constitution (art. 103-A).

laws, the tendencies of case law, which is not always consistent with what these laws seem to indicate.

III. BRAZILIAN LEGISLATION AND THE RULES APPLICABLE TO RECOGNITION OF FOREIGN JUDGMENTS

The recognition and execution of foreign judgments in Brazil is basically regulated by the Introductory Law to the Brazilian Civil Code (LICC – Decree-Law No. 4.657/42, now LINDB- Introductory Law to the Brazilian Legal System) and, at the moment, by the Superior Tribunal of Justice (STJ) Resolution No. 09 dated May 04, 2005, which governs the procedure for recognition of foreign judgments (formerly under the competence of the Federal Supreme Court and currently under the competence of the STJ by means of Constitutional Amendment (EC) No. 45/2004).

Article 15 of the Introductory Law to the Brazilian Legal System lists the requirements for the foreign decision to be recognized in Brazil:

“Article 15. A sentence rendered abroad shall be executed in Brazil provided it has the following requisites: a) having been rendered by a competent court; b) the parties having been cited and having taken part in the action or having allowed judgment to go by default; c) being a final decision and having fulfilled the necessary formalities for execution in the place where it was rendered; d) having been translated by an authorized interpreter; e) having been homologated by the Federal Supreme Court.”⁴

In addition to the formal requirements quoted above, it is essential that the foreign decision does not violate national sovereignty, good morals and public policy. This is set forth in Article 17 of the LINDB as follows:

“Article 17. Laws, acts, and judgments of other countries, as well as any declarations of volition, shall not be enforceable in Brazil when they offend national sovereignty, public order and good morals.”

⁴ Constitutional Amendment No. 45/2004 transferred from the STF to the STJ the competence to recognize foreign decisions.

Along the same lines, Article 6 of Resolution No. 09/2005 of the STJ determines: “*neither a foreign judgment nor a rogatory letter will receive exequatur if sovereignty or public policy is violated*”.

IV. SOME NOTES ON THE CONCEPT OF PUBLIC POLICY

The term *public policy* consists of an open concept, not defined in any legal provision⁵. Notwithstanding, it is possible to identify it as being the set of values and fundamental political choices prevalent in a particular society at a particular time in history, as a rule, specified in the Constitution and legislation in force, especially in countries belonging to the civil law system, as Brazil.

Within the concept of public policy, legal commentators point to the existence of a number of levels, such as first, second and third grade of public policy⁶. Put simply, **first grade** public policy consists of public policy within the domestic arena, that is, the rules and principles of the Brazilian legal system deemed mandatory and that cannot be derogated as a result of the will of the parties. It should be said that, in the national sphere, public policy coincides with the concept of mandatory rules. The **second grade** of public policy, within the private international law arena, is the one that prevents the application of foreign laws, acts and decisions that are contrary to the public policy of the forum. **Third degree** public policy consists of a set of principles applicable primarily to international relations, comprising the interests of the world community as a whole and are placed above the national legal systems.

As it is quite obvious, the sphere of recognition of foreign decisions deals primarily with second grade public policy, which

5 See DOLINGER, Jacob, *Ordem pública mundial; ordem pública verdadeiramente internacional no direito internacional privado*, *Revista de Informação Legislativa do Senado Federal* v, 90, 1986, p. 211. See, also, on the principle of public policy in private international law, DOLINGER, Jacob. *Direito internacional privado – Parte geral*. Rio de Janeiro: Renovar, 2008, p. 3.

6 Check the concepts in DOLINGER, Jacob, *Ordem pública mundial; ordem pública verdadeiramente internacional no direito internacional privado*, *Revista de Informação Legislativa do Senado Federal*, v. 90, 1986, p. 211: “Thus, identified as first grade public policy, is the one in the domestic sphere that sets forth, for instance, the invalidity of contractual clauses that hurt basic principles of the legal system; the second grade would be the one preventing the applicability of foreign laws, acts and decisions contrary to domestic public policy and that, consequently, produce effects in the international sphere. Third degree public policy is the one that establishes the universal principles, in the various international law fields, as well as in international relations, serving the highest interests of the world community, the common hopes of mankind. It is related to a set of values placed above the national legal systems that, eventually, can even be in collision with the circumstantial interests of the States individually considered.”

involves the possibility of preventing the application of a foreign law, act or decision in the domestic arena. There are four relevant notes that should be made on this topic.

Private international law, in accordance with local connecting rules, admits the application of foreign laws that are different to those of the forum. Due to international comity, to the respect between countries and to the tolerance towards what is different – essential in this field of law – it is admissible to apply foreign laws that are contrary to mandatory local rules.

Hence, and that is the *first important observation* to be made, not all mandatory rules (first grade public policy) are deemed to integrate the “second grade public policy”, able to obstruct the applicability of the competent foreign law⁷. In truth, second grade public policy corresponds to a selection of the most relevant elements of the first grade public policy, as will be discussed further on.

Secondly, it is important to point out that second grade public policy will be employed in two different contexts, although closely related: in the case of direct applicability of the foreign law or in the case of the indirect application of the foreign legislation, such as is the case of recognition of foreign judgments. The distinction is relevant, as the contents of public policy will be more restricted in the second case.

That is to say that whenever the local judge has to take foreign legislation into account to regulate the situation under analysis, this will be a case of direct applicability. Indeed, in the event of relationships with overseas ramifications, the applicable law is determined in accordance with the so-called *connecting rules* - an instrument of private international law to determine the applicable legislation in each case – which may consider the foreign legislation to be applicable. In this context, second grade public policy works as a protection device to prevent the application of foreign legislation contrary to the legal system of the forum. Thus, in the event the connecting rules determine the applicability of the foreign law, the judge must analyze, on a case-by-case basis, the content of the foreign legislation in order to verify whether there is any aspect contrary to Brazilian public policy, national sovereignty or good morals. In the event he or she concludes that there

⁷ This is the lesson that can be extracted from the decision of the STF in a case involving the adoption of a Brazilian by an alien and in which the alien, of German nationality, was only 12 years older than the adoptee, which violated Article 369 of the 1916 Civil Code, according to which the minimum age difference should be 16 years. STF, DJU 7 Mar 1986, SE 3638/ Alemanha, Rel. Min. Carlos Madeira: “The ruling of Article 369 of the Brazilian Civil Code is not of Public Policy, but of public interest, thus the *lex fori* is not effective in a case of an adoption regulated by a foreign law [German law, in this case]”. And later on: “Certainly, in our country, the provision of Article 369 of the Civil Code is of public interest, which is not enough to consider it a provision of public policy”.

is such a violation, the foreign legislation is put aside and the forum law is applied (*lex fori*).

In the sphere of indirect applicability of foreign law – being that the case of the recognition of foreign judgments – public policy normally prevents recognition of foreign judgments contrary to national fundamental principles, as per Article 17 of LINDB. Nevertheless, this protection device will have a more restricted scope in this case, due to a fundamental principle of private international law, according to which vested rights validly acquired abroad should be respected as a rule.

That is: public policy has a decreasing scope of application: broader in the domestic arena, and more restricted in the applicability of foreign legislation; in the case of recognition of foreign judgments, that is indirect applicability of foreign law, there is an even greater restriction. In this last hypothesis, the prevailing rule is to respect the situations validly constituted abroad. Public policy will impose the non-recognition of the foreign decision only under extreme circumstances, when fundamental principles of the forum where the decision will be executed are seriously disrespected.

The *third observation* to be made regarding second grade public policy, especially the one able to prevent recognition of foreign decisions, involves the content of this concept. As already mentioned, it is not sufficient that the foreign law be different from the local rules, as this is the core of private international law: allow for the applicability of the foreign law to which the juridical relationship is more closely connected in comparison to that of the forum. On the other hand, it is not possible to recognize each and every foreign decision solely based on the argument that situations validly constituted abroad should be respected. It is fundamental to set forth a minimum set of guarantees of the domestic legal system that under no circumstances may be violated.

Traditionally, the role of defining this set of guarantees has always been granted to private international law commentators, and in particular to the decisions rendered by the STF, which over the years has denied recognition to several foreign decisions grounded on this argument⁸. Although there is no final list of the elements of the public

⁸ See, only as examples, some of the elements already considered by the STF as violating public policy and which led to the non-recognition of the foreign decision: (i) lack of motivation of the foreign decision (RTJ 95:34, SE 2521/Japan, Rel. Min. Antonio Neder; and DJU 24 Oct 1986, SE 3262/USA, Rel. Min. Djaci Falcão; DJU 16 Aug 2010, SEC 684/US, Rel. Min. Castro Meira); (ii) decisions of divorce between aliens and Brazilians, before divorce was admitted in Brazil (DJU 27 July 1950, SE 1188, Rel. Min. Ribeiro da Costa; DJU 12 April 1952, SE 1285, Rel. Min. Edgard Costa; and DJU 27 Nov 1958, SE 1630, Rel. Min. Barros Barreto); and (iii) decisions rendered in face of defendants domiciled in Brazil and served through other means than by rogatory letter (DJU 12 Nov 2004, SE 7696/HL, Rel. Min. Marco Aurélio; DJU 13 Dec 1996, SE 4605 AgR/EU, Rel. Min. Carlos Velloso; DJU 21 Mar 1986, SE 3534, Rel. Min.

policy concept able to prevent recognition of foreign judgments, there is a certain consensus that such concept consists of fundamental legal, economic, moral and social principles of the forum where the decision will be executed⁹.

From a juridical viewpoint, this understanding was corroborated by Brazilian law, when the 1988 Constitution adopted the category “fundamental principles” which allow for the filing of the action called *Arguição de Descumprimento de Preceito Fundamental* (ADPF) – Argument of Non-compliance with a Fundamental Principle¹⁰. Indeed, the constitutional legislator has recognized that among all the constitutional provisions, there is a specific group of rights deemed of fundamental importance to the legal system as a whole and that, if violated, should give rise to a specific remedy.

In spite of the fluidity typical of the indeterminate concepts, there is a set of rules that undeniably should be comprised within the scope of these fundamental principles. In this category are the foundations and objectives of the Republic, as well as the structural political decisions, all comprised within the general concept of *fundamental principles*, object of Title I of the Constitution (Articles 1 to 4). Along the same lines, there is a consensus that this concept also comprises fundamental rights, namely the individual, collective, political and social rights. Moreover, one should also add to the minimum content of these fundamental principles the rules comprised in the concept of the constitutional provisions that are not subject to restrictive amendments (*cláusulas pétreas*) (Article 60, § 4) or deriving directly from them and, lastly, the constitutional principles called *sensitive* principles (Article 34, VII), which are those which, given their importance, may give rise to federal intervention¹¹.

The fourth and last note to be made on the subject involves

Sydney Sanches: ; DJU 15 Mar 2013, SEC 5543/EX, Rel. Min. Ari Pargendler; DJU 19 SEP 2012, SEC 1970/EX, Min. Rel. Humberto Martins);(iv) cumulation of monetary restatement and of exchange rates. (DJU 02 Feb 2014 , SEC 2410/EX, Rel. Min. Napoleão Nunes Maia Filho); (v) matter already decided by the Brazilian courts (DJU 12 Jun 2011, SEC 1271/EX, Rel. Min. Castro Meira; DJU 07 Jun 2011, SEC 5302/EX, Rel. Min. Nancy Andrighi); (vi) bankruptcy(DJU 15 SEP 2010, SEC 1734/PT, Rel. Min. Felix Fischer).

9 DOLINGER, Jacob. *Direito internacional privado* – Parte geral. Rio de Janeiro: Renovar, 2008, p. 394.

10 The ADPF was regulated in the original text of the Constitution – sole paragraph of Article 102, after converted into § 1 by Constitutional Amendment No. 3, of 13.03.93 –, with the following text: “The allegation of disrespect a fundamental principle deriving from this Constitution will be examined by the STF, in accordance with the law”. The ADPF was only regulated eleven years afterwards, with the enactment of Law No. 9.882, of December 3, 1999, which sets forth about the proceedings and judgment.

11 BARROSO, Luís Roberto. *O controle de constitucionalidade no direito brasileiro: exposição sistemática da doutrina e análise crítica da jurisprudência*. São Paulo: Saraiva, 2012, p. 279.

an almost intuitive classification regarding the content of the norms within the concept of public policy. In addition to the classification according to its grade, public policy can also be divided into matters of (i) substantive law and (ii) procedural law, when they are deemed of fundamental importance in the forum of execution of the decision.

The analysis of substantive public policy in the requests for recognition of foreign judgments is a tradition in Brazilian law. There are several decisions which have been denied *exequatur* because it would lead to a situation deemed contrary to the fundamental principles of the country. Examples of these are the foreign decisions of divorce before 1977, which were denied *exequatur* because their merits (divorce) would violate Brazilian public policy¹², and foreign decisions of divorce in which the husband repudiates the wife¹³. In the case of a foreign decision of annulment of a marriage, the STF has expressly resorted to the public policy device to prevent recognition. In the case, the spouses had obtained the annulment of the marriage abroad based on the incompetence of the civil registrar officer who celebrated the marriage, and the STF has concluded that Brazilian public policy would be violated if such fragile grounds were admitted to annul the marriage, as Brazilian law seldom allows for the annulment of marriages even those based on far more serious grounds¹⁴.

Procedural public policy, in its turn, comprises a set of guarantees of a procedural nature, inherent to the due process of law, deemed fundamental principles as per the 1988 Constitution. It should be pointed out that some objective elements of the due process of law clause – such as the competence of the judge who renders the decision and the need for the defendants to be properly served – are formal requirements deemed essential for the *exequatur*, as per Article 15 of LINDB, above. Nevertheless, such elements are not enough to determine whether there has been a minimum compliance to the

12 STF, DJU 27 Jul 1950, SE 1188, Rel. Min. Ribeiro da Costa; STF, DJU 12 Apr 1952, SE 1285, Rel. Min. Edgard Costa; STF, DJU 27 Nov 1958, SE 1630, Rel. Min. Barros Barreto. Along the same lines, it is important to mention a Dutch divorce decision which was not recognized because it was rendered based on adultery committed when the couple was already separated in Brazil – and, consequently, the obligation of faithfulness had already ceased. (STF, DJU 6 Aug 1976, SE 2174/The Netherlands, Rel. Min. Djaci Falcão).

13 STF, DJU 26 May 1977, SE 2.373, Rel. Min. Thompson Flores.

14 STF, DJU 2 May 1997, SE 4297/Chile, Rel. Min. Carlos Velloso: “Well, if the Brazilian public policy does not allow a marriage to be annulled because of incompetence of the officer of the Civil Registry who celebrated the marriage, but on the contrary allows the matrimony to be celebrated in front of any officer of the Civil Registry, private international law in Brazil cannot admit such a fragile ground for the annulment of marriages”. Justice Carlos Velloso quoted two other precedents of a similar nature, namely: STF, DJU 27 Oct 1989, SE 3886/Chile, Rel. Min. Francisco Rezek; and STF, DJU 18 Mar 1991, SE 4312/Chile, Rel. Min. Néri da Silveira.

guarantee of due process of law. Even when the judge is competent and the defendant was regularly served, if the parties are not guaranteed the right of defense or, for example, are subjected to endless appeals which only one party is entitled to file, clearly the due process of law clause has been disrespected in even its most basic level.

Taking into account only the foregoing, it is already possible to affirm that the following are fundamental principles for the Brazilian legal system, and as such are comprised within the concept of public policy able to prevent recognition of foreign decisions: (i) the preservation of legal certainty and as its corollary, the protection of the perfect juridical act; (ii) the obligation that the public administration, in a State based on the law, acts with a minimum good faith and morality towards the individuals; (iii) the protection of the right to property, preventing expropriation without indemnification; and (iv) the guarantee that everyone is assured essential elements of due process, such as equality among the parties, including the opportunity to be heard and to present one's claims and defenses.

As a consequence, a foreign decision which violates a perfect juridical act, consecrates uncertainty and legal insecurity, corroborates openly-disloyal conduct of the public administration towards private individuals, disrespects, without any payment of compensation, the right to property, and/or ignores basic guarantees of the procedural due process, cannot receive recognition of the Superior Tribunal of Justice. Such a decision cannot be effective in Brazil, as its content would clearly violate Brazilian public policy. The issue will be discussed further on the next topics.

V. SUBSTANTIVE PUBLIC POLICY

V.1. Legal certainty and protection of perfect juridical acts

Common knowledge, over a long period of time, consecrates security – and within this concept, *legal certainty* – as one of the foundations of the State and of the law, side-by-side with justice (fairness) and, more recently, with social well-being¹⁵. Democratic theories about the origins and justification of the State, of a contractual nature, are based on a commutative contract: one receives in security

15 ÁVILA, Humberto, *Sistema constitucional tributário*. São Paulo: Saraiva, 2006, p. 303 emphasizes that the principle of legal certainty, besides deriving directly from the State based on the law, also originates from other more specific constitutional rules, such as the protection to vested rights, to perfect juridical act and *res judicata*, as well as the rules of legality, non-retroactivity and anteriority.

that which is granted in freedom. Security, consecrated in Article 2 of the Declaration of the Rights of the Man and Citizen, of 1789, as a *natural and inalienable* right, is also comprised in the 1988 Brazilian Constitution, side-by-side with other rights, such as the right to life, freedom, equality before the law, and property, in the express terms of the heading of Article 5.

The duty of the State to assure predictability and stability of juridical relationships is comprehended within the right to legal certainty. Several rules existent in the Brazilian legal system are related to this goal, such as the ones dealing with the statute of limitations, non-retroactivity of laws and of the latest interpretation of legislation already in force, etc.

As a direct corollary of the right to legal certainty, the Brazilian Constitution protects the perfect juridical act, *res judicata* and vested rights against the incidence of new laws, as per the express terms of Article 5, XXXVI. Furthermore, as a result of Article 60, § 4, even constitutional amendments may not disrespect the perfect judicial act. Along the same lines, and for even more reason, as they are all subject to the law, the Executive and the Judiciary may not disregard the perfect juridical act. These constitutional provisions are largely observed by court decisions, and the STF has already decided on several occasions that the protection of a perfect juridical act cannot be put aside either by the so-called “public policy laws” or by “reasons of State”. The decisions quoted below reveal the importance of this guarantee to the Brazilian legal system:

“Article 5, XXXVI, of the Federal Constitution applies to each and every infra-constitutional legislation, no distinction being made whether it be a public or a private law or if it be a mandatory or facultative provision. Indeed, as in Brazil, the principle of respect to vested rights, perfect juridical acts and res judicata is of a constitutional nature, no exception being made to any type of ordinary legislation, the argument presented by many – influenced by the law of the countries in which the provision is set forth in the ordinary legislation -makes no sense that public policy legislation is immediately applied, affecting the future effects of the perfect juridical act or of the res judicata, and that is why, if the effects are altered, it is obvious that changes in the case are being introduced, which is prohibited by

the Constitution.”¹⁶

*“PUBLIC POLICY LAWS - REASONS OF STATE - GROUNDS WHICH DO NOT JUSTIFY DISRESPECT BY THE STATE OF THE CONSTITUTION - PREVALENCE OF THE PROVISION SET FORTH IN ARTICLE 5, XXXVI, OF THE CONSTITUTION. – The possibility of state intervention in the economic sphere does not release the public administration of the duty to respect the rules that derive from the Brazilian constitutional system. Reasons of State – grounds which often consist of political grounds aimed to justify, in practice, ex parte principis, the unacceptable adoption of measures of a normative character – cannot be invoked to enable disrespect of the Constitution itself. Public policy provisions – which are also subject to the rule of Article 5, XXXVI, of the Political Charter (RTJ 143/724) – cannot obstruct the full effect of the constitutional order, hindering its integrity and disrespecting its authority.”*¹⁷

Still in this context, and in addition to the specific rules that protect the perfect juridical act, both the Federal Supreme Court and the Superior Tribunal of Justice argue that the possibility of unlimited revision of the juridical acts, even if there is not a specific statute of limitations, is incompatible with the constitutional principle of legal certainty. This is even more true when the validity of the act has not been questioned for a long period of time and factual situations have already been consolidated taking into account the juridical act in question. It is worth quoting the following decisions in this respect:

“Writ of mandamus. 2. Decisions of the Federal Accounts Tribunal (TCU). Presentation of accounts of the Empresa Brasileira de Infraestrutura

16 STF, RTJ 143:724 et seqq, ADIn 493/DF, Rel. Min. Moreira Alves. Along the same lines, among others: STF, DJU 6 Dec 2002, RE 263161/BA, Rel. Min. Ellen Gracie; STF, DJU 13 Sept 2002, RE 248694/SP, Rel. Min. Moreira Alves; STF, DJU 6 Jun 1997, RE 205193/RS, Rel. Min. Celso de Mello; STF, RTJ 89:634, RE 88790/RS, Rel. Min. Moreira Alves; STF, RTJ 90:296, RE 89430/BA, Rel. Min. Rodrigues Alckmin; STF, RTJ 107:394, RE 99601/SP, Rel. Min. Rafael Mayer; STF, RTJ 112:759, AI 99655-AgR/SP, Rel. Min. Moreira Alves; and STF, RTJ 164:1144, RE 205622/RS, Rel. Min. Ilmar Galvão.

17 STF, DJU 6 Jun 1997, RE 205193/RS, Rel. Min. Celso de Mello.

Aeroporto – INFRAERO. Public service. Regularization of admissions. 3. Hirings carried out in accordance with a selection process without a public contest, validated by an administrative proceeding and by a previous decision of the TCU. 4. More than ten years have passed since the provisional measure in the writ of mandamus. 5. Obligation of compliance with the principle of legal certainty as a sub-principle of the State based on the law. Need for stability of the situations created administratively. (...) 8. Circumstances that, in addition to the long period of time passed, put aside the alleged nullity of the contracts of the plaintiffs. 9. Writ of Mandamus granted.”¹⁸

“Writ of Mandamus. 2. Revoking of a special pension by the Federal Accounts Tribunal. (...) Pension granted twenty years ago. (...) 7. Applicability of the principle of legal certainty, as a sub-principle of the State based on the law. The possibility of revocation of administrative acts cannot last forever. Power to annul, subject to a reasonable time. Need for stability of the situations created administratively. (...) 9. Principle of trust as an element of legal certainty.”¹⁹

“In evaluating the validity of administrative acts, it is essential to balance the rigidity of the principle of legality, for it to be placed in harmony with the principles of stability in the juridical relations, of good faith and other values essential to the perpetuation of the concept of the State based on the law”²⁰.

“This Court has adopted the understanding that in

18 STF, DJU 5 Nov 2004, MS 22357/DF, Rel. Min. Gilmar Mendes.

19 STF, DJU 17 Sept 2004, MS 24268/MG, Rel. Min. Ellen Gracie. Similarly, see also STF, DJU 1st Aug 2003, QO in Pet. 2900/RS, Rel. Min. Gilmar Mendes; STJ, DJU 21 Aug 2012, Ag no Resp 1205434/RS, Rel. Min. Napoleão Nunes Maia Filho; STJ, DJU, 1st Dec 2009, RMS 20572/DF, Rel. Min. Laurita Vaz and STJ, DJU 16 Jun 2009, Resp 1047524/SC, Rel. Min. Jorge Mussi

20 STJ, DJU 16 Sept 1991, REsp 6518/RJ, Rel. Min. Gomes de Barros; STJ, DJU 11st Dec 2013, MS 18554/DF, Rel. Min. Napoleão Nunes Maia Filho and STJ, DJU 14 Mar 2011, RMS 25219/PR, Rel. Min. Maria Thereza de Assis Moura.

the event there is a factual situation that has been consolidated by the passing of time, the student benefiting from the transfer shall not suffer the later revocation of the decisions that have granted him or her said right. A case in which the interested party is about to graduate.”²¹

V.2. Good faith and basic morality in the relationships between the State and the private agent

The obligation of the Public Administration to act in good faith derives logically from one of the fundamental principles of the Brazilian State: the decision to organize a democratic State based on the law²². This is because the relationship that exists between the Public Administration and the private agent does not oppose two private parties, each defending their own interests, although also among private parties there is the obligation of reciprocal good faith²³. As a matter of law, the Administration derives its authority from the people it governs, acting in the name and on behalf of the whole population and not in its own right, and therefore it is not conceivable that it acts in a disloyal manner towards its own people. Besides being a direct corollary of any democratic State based on the law, good faith is directly associated to the duty of morality of the Administration (CF, Art. 37, *caput*²⁴), and is also fully regulated by the Brazilian infra-constitutional order²⁵.

21 STJ, DJU 7 Mar 2005, REsp 653383/RS, Rel. Min. Teori Albino Zavascki.

22 CF: “Article 1. The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and the Federal District, is a legal democratic state and is founded on:...” See on this point Celso Antônio Bandeira de Mello, *Direito administrativo na Constituição de 1988*, 1991.

23 See, among others, NEGREIROS, Teresa. *Fundamentos para uma interpretação constitucional do princípio da boa-fé*. Rio de Janeiro: Renovar, 1998; and MARTINS-COSTA, Judith. *A boa-fé no direito privado*, São Paulo: RT, 2000.

24 FIGUEIREDO, Marcelo. *O controle da moralidade na Constituição*. São Paulo: Malheiros, 1999, p. 104. See, also DELGADO, José Augusto, O princípio da moralidade administrativa e a Constituição Federal de 1988, *Revista dos Tribunais* v. 680, 1992, p. 34. “The observance of the principle of administrative morality imposes on the public agent the duty to imbue all of its acts with the characteristics of good faith, veracity, dignity, sincerity, respect, absence of falseness, fraud and willful misconduct”..

25 Law No. 9.784/99 (Regulates the administrative proceedings in the sphere of the federal public administration): “Article 2. Public Administration will obey, among others, the principles of legality, finality, motivation, reasonableness, proportionality, morality, right to present one’s defense, confrontation, legal certainty, public interest and efficiency. Sole paragraph. In administrative proceedings, shall be observed, among others, the criteria of: (...) IV – conduct in accordance with ethical values of propriety, decorum and good faith.”

From another perspective, good faith is considered by legal commentators as a general principle of law²⁶, applicable to public and private entities, which for this reason alone would characterize it as part of the Brazilian substantive public policy. Hence, either because it derives from one of the fundamental principles of the Brazilian State or because it is part of the general principles of law, foreign decisions that violate a minimum level of good faith in the relationships between the State and private agents should not be recognized in Brazil.

This premise having been established, it is important to analyze the content of the principle of good faith. In addition to the widespread general definitions mentioned by legal commentators – *absence of malice and absence of desire to defraud or to seek an unconscionable* – it is also possible to affirm that the principle of good faith demands from the public authorities an specific duty: it imposes respect to be given to the legitimate expectations of the private agents, created as a result of acts performed by the Administration itself.

That is to say, the duty of good faith imposes on the Administration the obligation to act coherently and logically, respecting the legitimate expectations of the citizens, created as a result of their having observed the behavior of the Administration itself. By endeavoring to adjust to this pattern of behavior, the private agents practice acts that produce effects within the sphere of their rights and obligations, in the belief that the Administration will behave, in the present and in the future, in a manner that is coherent with its practices in the past. The protection of the trust or legitimate expectations is a principle aimed, primarily, for the Public Administration²⁷ and the Judiciary²⁸. It is incumbent upon

26 MELLO, Celso Antonio Bandeira de. Contrato administrativo: Fundamentos da preservação do equilíbrio econômico financeiro, *Revista de Direito Administrativo* v. 211, 1992, p.22: “Well, the duty to act in accordance with the principle of loyalty and good faith is not only found in the relationships between private agents. Above all, it corresponds to one of the most important general principles of law, applicable also to the relations constituted in the public law arena.”; and BORGES, Alice Gonzalez, Valores a serem considerados no controle jurisdicional da Administração Pública: segurança jurídica – boa-fé – conceitos indeterminados – interesse público, *Interesse Público* v. 15, 2002, p. 89. See also, among foreign legal commentators, PEREZ, Jesus Gonzalez, *El principio general de la buena fe en el derecho administrativo*. Madrid: Civitas S/A, 1989.

27 On this, see DI PIETRO, Maria Sylvia Zanella, *Direito administrativo*. São Paulo: Atlas 2012, p. 85.

28 STJ, DJU 27 Mar 2000, REsp 227940/AL, Rel. Min. Jorge Scartezzini: “The Judiciary owes to the citizen, in identical situations, a firm, certain and homogeneous answer. In this manner, the values protected in the political-constitutional and juridical material order, with the correct jurisdictional conduct, are attained, as means of certainty and security for the society. The technical procedural strictness is set aside, according to which the applicability of substantive law is denied, to reach the adequate goal of the judicial task, that is security of a uniform result to identical situations”. See, also, STJ, DJU 2 Apr 2001, AGA 304282/SP, Rel. Min. Francisco

these powers to apply the law to the situations on a case-by-case basis and, in this task, they should behave in a consistent and predictable manner, as it is their duty to preserve the existing legal order and to ensure equality before the law.

Clearly, not every single expectation of the private agent deserves juridical protection. For that reason, Brazilian and foreign legal commentators have established some parameters to confer greater legal substance and density to the notion of legitimate expectation that deserves protection. Two out of these merit special mention. *Firstly*, it will be deemed legally legitimate, and will deserve protection, an expectation that derives from objective behavior of the Public Administration, that is, which is not just wishful thinking, unconnected to real and objective elements of State practice²⁹. *Secondly*, an expectation will be deemed worthy of protection if the state behavior that originated it lasted for a reasonable length of time, so that it can be deemed consistent and able to transmit the idea of stability, leading the private agent to practice acts based on this conduct.

There are mechanisms that the State can legitimately resort to in order to enforce its political decisions, but even these mechanisms are subject to juridical limitations that cannot be put aside. A pertinent example of this point is expropriation – admissible in many countries. The State is allowed to expropriate the property of private agents, but is obliged to indemnify the owners. This is because good faith requires coherence from the State – as a permanent entity – and not just from each government, with regard to its acts or past acts with which it happens to agree. This minimum level of good faith in the relationships between the Public Administration and private agents constitutes an essential element of Brazilian public policy.

In summary: good faith in the relationships between the State and private agents is part of Brazilian substantive public policy as a fundamental principle. To disrespect expectations of the public, created as a result of a constant and consistent conduct of the Administration itself, represents manifest disloyalty and fraud of the confidence placed by the public in the Administration as a whole. A decision that encompasses this type of violation to Brazilian public policy should not produce effects in Brazil.

Falcão.

29 See the decision of the European Court of Justice, in which a similar criterion was adopted. Case 375/03, decision of March 10, 2005: “Any trader on the part of whom an institution has inspired reasonable expectations may rely on the principle of the protection of legitimate expectations. (...) However, if those traders can foresee the adoption of the Community measure which affects their interests, the benefit of the principle of the protection of legitimate expectations cannot be invoked (Case C-22/94 Irish Farmers Association and Others [1997] ECR I-1809, paragraph 25, and Di Lenardo and Dilexport, cited above, paragraph 70)”.

V.3. Property rights and equality before the law: impossibility of expropriation without indemnification and prohibition of unjust enrichment

Two other elements of Brazilian substantive public policy, relevant to the case under analysis, are the right to property and equality before the law. The Brazilian Constitution guarantees the right to property not only as an individual right (Article 5, XXII), but also as a principle of the economic order (Article 170, II), guaranteed with regard to the infra-constitutional legislator and also with regard to the constitutional legislator (Article 60, § 4, IV).

As it is intuitive, the right to property is not absolute³⁰. The Constitution itself regulates the social function of property (Articles 5, XXIII, 182 et seqq. and 186 et seqq.) and establishes the various forms through which this right may be limited. This does not mean that the State can freely intervene in private property. As is the case with all other individual rights, any restriction to its enjoyment shall only be valid if the constitutional parameters have been properly observed.

There is no need to mention here all the constitutionally admissible forms of restrictions to the right to property³¹, it will suffice to refer to just one of them, directly pertinent to the case under analysis: expropriation. Brazilian law admits that the Public Administration may take from the private agent the enjoyment of a specific asset when this is necessary or convenient in order to fulfill a particular public interest. In any case, however, the private agent will have to be indemnified for the reduction of his or her assets (Articles 5, XXIV and XXV, 182, § 4, III and 184). As a matter of interest, it should be mentioned that within the concept of property, all disposable rights are included, not only the ownership of corporeal, tangible goods³². Intellectual property

30 See, on the matter, TEPEDINO, Gustavo. A nova propriedade (O seu conteúdo mínimo, entre o Código Civil, a legislação ordinária e a Constituição), *Revista Forense* v. 306, 1989, p.73.

31 The 1988 Charter, when dealing with the topic, not only regulated the social function of the property but also authorized, exhaustively, four manners of state intervention in private property, namely: **a)** institution and charging of taxes, respecting the constitutional limitations of the power to tax (Article 148 et seq, especially Article 150), among which there is the prohibition of the use of taxation as means of confiscation; **b)** through due process of law, according to which the parties are granted the right to present their defense and to confrontation (Article 5, LIV and LV); **c)** the taking of property (Article 5, XLVI, b) and the expropriation, without indemnification, of the assets involved in the growing of psychotropic plants and traffic of drugs (Article 243), as a means of punishment; and **d)** the expropriation, guaranteeing always prior and fair indemnification, and the request for temporary occupation, also guaranteeing the indemnification, if there is any damage (Articles 5, XXIV, 182, § 4, III, 184 and 5, XXV).

32 ASCENSÃO, José de Oliveira, A violação da garantia constitucional da propriedade privada

(related to trademarks and patents) is, undoubtedly, comprised within this concept.

So, Brazilian law does not admit expropriation of property without indemnification³³. In this situation, the conduct of the Public Administration would be equivalent to plunder by private agents, which when carried out by the State would be called confiscation. It is interesting to observe that, nowadays, it is more common to discuss so-called *indirect expropriation* – cases in which the State, without employing the formal means to expropriate, takes in practice the assets of the private agent, in which case indemnification is also required³⁴ – rather than confiscation, given that, for a long time now, the idea of allowed confiscation by the State has simply ceased to exist³⁵.

In a very known case, Professor Haroldo Valladão has issued a declaration stating that a certain foreign decision should not be recognized in Brazil. In that particular case, Czechoslovakia had nationalized a private company without the payment of any indemnification to its shareholders. Basing his opinion on several legal commentators, the Professor affirmed that “*nationalization without indemnification, in the event of incorporation to the State without payment to the shareholders – are laws and acts openly contrary to our public policy, which will be ineffective in Brazil*”³⁶. The Federal Tribunal of Appeals upheld the

por disposição retroativa, *Revista da Consultoria Geral do Estado do Rio Grande do Sul* v.18, p.73.

33 TORRES, Ricardo Lobo Torres, *Os direitos humanos e a tributação – Imunidades e isonomia*. Rio de Janeiro: Renovar, 1995, p. 109 et ss.

34 Court decisions have already consolidated the prohibition of the so-called indirect expropriation, since very seldom the state measure reaches unequivocally the core of the property. V. STF, DJU 22 Sept 1995, RE 134297/SP, Rel. Min. Celso de Mello; STJ, DJU 14 abr 1991, REsp 5989/PR, Rel. Min. Garcia Vieira; STJ, DJU 3 Nov 1992, REsp 8680/PR, Rel. Min. Milton Luiz Pereira; STJ, DJU 8 Aug 1994, REsp 37950/SP, Rel. Min. José de Jesus Filho; STJ, DJU 5 Sept 1994, REsp 47865/SP, Rel. Min. Demócrito Reinaldo; STJ, DJU 6 Mar 1995, REsp 45330/SP, Rel. Min. Antônio de Pádua Ribeiro; and STJ, DJU 24 Aug 1998, REsp 70412/SP, Rel. Min. Ari Pargendler.

35 See on taxes with confiscatory effects, TORRES, Ricardo Lobo Torres, *A idéia de liberdade no Estado patrimonial e no Estado fiscal*. Rio de Janeiro: Renovar, 1991.

36 “Well, the nationalization of (...), which took the form of confiscation, without just indemnification, openly and violently violates the fundamental principles of Brazilian law, already quoted, present in our Constitution. *Contrary, consequently, to public policy, it will not be effective in Brazil, Article 17 of the New Introductory Law*” (emphasis in the original). And the author continued: “It is interesting to point out that the affidavit refers to cases of nationalization without indemnification practiced by the former Soviet Union, which were not recognized with regard to assets located abroad due to the practice of confiscation. As a matter of fact, this is exactly what the decision under analysis aims to achieve”. VALLADÃO, Haroldo. Ineficácia, no Brasil, da nacionalização por Estado estrangeiro, de pessoa jurídica de direito privado, sem indenização aos respectivos sócios, *Boletim da Sociedade Brasileira de*

opinion, so that, in Brazil, the effects of expropriation, without the payment of any indemnification, were not granted recognition.

In this particular aspect, one should take into account the fundamental principle of equality before the law, guaranteed by the Constitution (CF, Article 5, *caput*). This point is of no complexity whatsoever. Whenever expropriating a private property, the State incorporates a benefit that will be enjoyed by the whole population, resulting from the sacrifice of a single individual³⁷. Hence, the principle of equality before the law does not admit that a single person be obliged to take the burden of an advantage that will be enjoyed by society as a whole; in such cases, as everyone will be benefited, likewise the cost should also be borne by all, and the duty to indemnify is imposed³⁸.

If it were not so, there would be unjust enrichment of the State to the detriment of the individual. The prohibition of unjust enrichment is a general principle applicable both in the private and the public law arena³⁹, considered by court decisions as implicit in the

Direito Internacional 9/10:151.

37 “In truth, the juridical principle raised by the topic is the equal distribution of public burdens. Anyone who renders a service to the population, under the circumstances to be discussed further on, will be paid for it, even without a formal juridical relationship, because, due to an action or omission of the State, he was unfairly disadvantaged as compared to his fellow citizens, with regard to the division of general public burdens”. FIGUEIREDO, Lúcia Valle e Sérgio Ferraz. *Dispensa e Inexigibilidade de Licitação*. São Paulo: Malheiros, 1994, p. 128.

38 “The most important issue is the principle of fair division of the burdens or advantages, comprised in the principle of equality before the law (...). The expropriation, when it is not a punishment, implicates a special burden on the property of a certain individual for the fulfillment of a public interest. Everyone will benefit, but only one particular individual will be prejudiced. This is not fair and represents a violation of the rule of equality before the law. Fair indemnification entails sharing the burden with the population as a whole and compensating as much as possible the owner of the property, who receives a compensation equivalent in value to the property taken”. ASCENSÃO, José de Oliveira, A violação da garantia constitucional da propriedade privada por disposição retroativa, *Revista da Consultoria Geral do Estado do Rio Grande do Sul* v.18, p.87.

39 “We were lacking, as a consequence, the construction of the unjust enrichment as an institution with autonomy and its own rules. In the development of these rules, it will be necessary to take into account the specific requirements, based on the German legal commentators, as follows: 1) reduction in the assets of the harmed individual, either with the transfer to someone else’s assets, of some property which belonged to him, or which the obstruction that such property – which acquisition was already certain – becomes part of his assets; 2) the enrichment of the benefited, without the existence of a juridical cause to justify the acquisition or retention; and 3) the connection between both, that is the enrichment of one party must derive from the reduction of the assets of the other, in such a way that the one to had his assets reduced can argue towards the other a juridical cause non-existent or that has disappeared, or to put it more simply, the enrichment of one individual and the reduction of the assets of the other originate from the same circumstance.” PEREIRA, Caio Mário da Silva Pereira, *Instituições de direito civil*, vol. II. Rio de Janeiro: Forense, 2002, p. 276: and “Unjust enrichment is the increase of

Constitution⁴⁰. No one is allowed to increase his assets in prejudice of someone else's without legitimate cause. In the case of relationships between the Public Administration and private agents, this prohibition becomes even stricter⁴¹ due to the imbalance of power that exists between the parties.

Before examining procedural public policy, a last note should be made on this point. It is not incumbent upon the Judiciary or upon Brazilian law to discuss the validity of acts practiced abroad by the foreign government within the confines of its territory⁴². Only the foreign Judiciary has jurisdiction to adjudicate such cases⁴³. Neither would it be admissible for the harmed party to requested indemnification in Brazil because of the expropriation that took place abroad. The foreign Judiciary would be solely competent for that matter as well. The point here at stake are the effects of the foreign decision in Brazil.

VI. PROCEDURAL PUBLIC POLICY

As mentioned earlier, procedural grounds are also part of the

someone's assets in detriment to someone else's assets, without a reasonable juridical cause to justify it. It is widely accepted that its prohibition is a general principle of law. Given that unjust enrichment is a *general principle of law* – and not only a principle located in one of its branches: public or private – it certainly also applies to administrative law” (emphasis in the original). MELLO, Celso Antônio Baneira de. O princípio do enriquecimento sem causa em direito administrativo, *Revista de Direito Administrativo*, v 210, 1992, p. 28.

40 On several occasions, the Federal Supreme Court has deemed the principle which prohibits unjust enrichment as an implicit constitutional principle, also to justify the filing of extraordinary appeals. This can be observed in the following decisions: DJU 8 Mar 2002, RE 222368, Rel. Min. Celso de Mello; *Informativo STF* 181, RE 231655, Rel. Min. Moreira Alves; *Informativo STF* 286, RE 282120, Rel. Min. Maurício Corrêa; and *Informativo STF* 31, RE 141298, Rel. Min. Marco Aurélio.

41 MELLO, Celso Antônio Baneira de. O princípio do enriquecimento sem causa em direito administrativo, *Revista de Direito Administrativo*, v 210, 1992, p. 24 et ss.

42 Jacob Dolinger refers to this understanding as the “theory that considers that the acts originated from the *ius imperii* of the other country cannot be examined by the Judiciary of another country. DOLINGER, Jacob. *A dívida externa brasileira: solução pela via arbitral*. Rio de Janeiro: Renovar, 1988, p. 99.

43 See the classic opinion of the President of the US Supreme Court in the case *Underhill v. Hernandez* (168 U.S. 250 – 1897): “Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves. Nor can the principle be confined to lawful or recognized governments, or to cases where redress can manifestly be had through public channels. The immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact”.

concept of public policy and can prevent the recognition of a foreign decision. Although the concept of public policy was developed at first in the context of substantive rights, the rights inherent to the procedural due process clause, such as the right to confrontation, to present one's claim or defense and to the respect of *res judicata*, e.g., of essentially procedural nature, are also part of the fundamental rights and guarantees, mentioned and protected by the Constitution. It is not possible to deny its importance in relation to the concept of second grade public policy – the one able to prevent the recognition of foreign decisions.

Indeed, the 1988 Brazilian Constitution has contemplated procedural due process within the set of individual rights and guarantees, setting forth that “*no one shall be deprived of freedom or of his assets without the due process of law*” (Article 5, LIV). In addition to this, the constitutional legislator has expressly mentioned some of the contents of the clause, such as the impossibility of setting aside judicial control⁴⁴, confrontation and the right to present one's defense⁴⁵, and the requirement that all judicial decisions must have grounds⁴⁶. These principles, although individually contemplated in the constitutional text, derive from the right to procedural due process⁴⁷.

It is certain that some aspects of the procedural due process of law clause – particularly regarding the competence of the judicial authority and validity of service – are expressly mentioned in the applicable legislation (Articles 15 and 17 of the LICC, already mentioned, and Articles 5 and 6 of Resolution No. 9/2005 of STJ) as formal requirements essential for recognition to be granted. These requirements are part of a more comprehensive guarantee, fundamental to the Brazilian legal system and which is associated to a procedural aspect of public policy, referred to in Article 17 of the LINDB⁴⁸. The

44 CF, Article 5, XXXV: “the law shall not exclude any injury or threat to a right from the appreciation of the Judiciary”.

45 CF, Article 5, LV: “litigants, in judicial or administrative processes, as well defendants in general are ensured of the adversarial system and of full defense with the means and resources inherent to it”.

46 CF, Article 93, IX: “all judgments of the Judiciary shall be public, and all decisions shall be motivated, under penalty of nullity, and the law may, if the public interest so requires, limit attendance in given acts to the interested parties and their lawyers, or only to the latter”.

47 See, regarding the treatment of the due process of law clause by the 1988 Brazilian Constitution, BARROSO, Luís Roberto, *Tutela e efetividade do direito constitucional à liberdade*. In: *Anais da XVII Conferência Nacional dos Advogados*, 1999, and also *Temas de direito constitucional*, volume I. Rio de Janeiro: Renovar, 2000.

48 It is worth pointing out that there are some procedural requirements expressly mentioned in the legislation which prevent recognition, such as the international incompetence of the foreign authority and the service of the defendant domiciled in Brazil through other means than through rogatory (letters a and b of Article 15 of the LICC, cited above), in which cases there is no need to resort to the concept of procedural public policy.

Federal Supreme Court has not failed to perceive this point, as can be observed from the analysis of the decision below:

“1. With regard to recognition, the indispensability of the judicial proceeding of rogatory letters in the service of persons resident in Brazil, who are defendants in suits filed abroad, has acquired greater legitimacy after the enactment of the 1988 Brazilian Constitution, as it became a guarantee of effectiveness of the due process of law, of confrontation and the right to present one’s defense, principles expressly consecrated in items LIV and LV of Article 5 of the Charter. 2. Precedents of this Court in relation to the subject: SEC 6.729, Rel. Min. Maurício Corrêa, DJ 07.06.2002, SEC 6.304, Rel. Min. Sepúlveda Pertence, SE 4.605-AgR, Rel. Min. Carlos Velloso, DJ 13.12.96, SE 4.248, Rel. Min. Carlos Velloso, DJ 20.11.91, SE 3.495, Rel. Min. Octavio Gallotti, DJ 25.10.85 and SE 2.582-AgR, Rel. Min. Xavier de Albuquerque, DJ 28.08.81. 3. Request of recognition of foreign judgment denied.”⁴⁹

Precisely along the same lines, the Federal Supreme Court has already denied recognition to foreign decisions because some rights inherent to the procedural due process clause had been disregarded in the proceedings abroad, even if these rights were not the ones expressly mentioned in Article 15 of the LNDB. The following decisions are representative of this point:

“(…) 3. Essential for the recognition of a foreign decision granting exequatur to an arbitral award is that in the proceedings abroad the right to confrontation was granted to the parties. Precedents of the STF. (...)”⁵⁰

“Foreign decision. Administrative decision. Limitation of jurisdiction. A hybrid administrative decision and rendered outside the Judiciary may not be recognized, nor the judicial decision that ratifies or incorporates it, as it would greatly violate the principles of civil jurisdiction and the

49 STF, DJU 7 May 2004, SEC 7394/Portugal, Rel. Min. Ellen Gracie.

50 STF, DJU 26 May 1995, SEC 3897/IN, Rel. Min. Néri da Silveira.

right to confrontation."⁵¹

As a matter of law, normally the legislation of States does not expressly refer to procedural public policy – and neither does Brazilian legislation. Nevertheless, these grounds have been employed by the competent authorities of several states, for the same reasons that justify the application of substantive public policy, to prevent recognition of foreign decisions in violation of basic guarantees of procedural due process. It is worth mentioning some examples.

In **Switzerland**, the concept of second grade public policy has been built by a series of court decisions⁵². On December 18, 1987 the concept of procedural public policy, developed by court decisions, was incorporated in the *Loi fédérale du 18 décembre 1987 sur le droit international privé* (legislation on private international law). After the enactment of this law, the subject was again examined by the Swiss Federal Tribunal, which has continued to affirm the need to assure the parties of some minimum procedural rights for the decision to be recognized in Switzerland⁵³.

In **France**, the requirements for the recognition of foreign judgments (including procedural due process) were listed by the Cour de Cassation⁵⁴. The Court set forth five conditions without which recognition

51 STF, DJU 2 Jan 1974, SE 2161, Rel. Min. Bilac Pinto.

52 Among many decisions of the Swiss Federal Tribunal (the highest court of the country) two are worth mentioning: (i) decision of the First Chamber of Public Law, of May 20, 1981, in which it was affirmed that public policy encompasses not only aspects of merits, but also elements related to the proceeding in which the foreign decisions, object of the request for recognition in Switzerland, were rendered (Swiss Federal Tribunal, *I.S. Kano Trading Limited gegen The Sanko Steamship Company Limited und Kassationsgericht des Kantons Zürich*, I. Öffentlichrechtlichen Abteilung, 20. Mai 1981, BGE 107 IA 198) and (ii) decision of the same tribunal, dated March 13, 1985, which did not recognize the foreign decision since both its merits and the proceeding abroad violated the Swiss public policy (Swiss Federal Tribunal, *Beyeler Machines S.A. contre Alipoor et Vaud*, Ire Cour de droit public, 13 March 1985, BGE 111 IA 12).

53 Along these lines, among many others, the following decisions of the Swiss Federal Tribunal: *Société R. contre P. et Cour de justice du canton de Genève*, Ire Cour civile, 19 décembre 1990, BGE 116 II 625; and *C. contre C.-E.*, Ile Cour civile, 4 juillet 2000, BGE 126 III 327.

54 The first decision about this point was rendered in the famous case Munzer. This is the precedent in France in relation to recognition of foreign decisions, in which the requirements for recognition were first established. French Cour de Cassation, Munzer, 1er ch. civ., 7 janvier 1964, *Revue Critique de Droit International Privé*, p. 344, with comments from Batiffol. See an extract of the decision, in the original: "(...) pour accorder l'exequatur, le juge français doit s'assurer que cinq conditions se trouvent remplies, à savoir la compétence du tribunal étranger qui a rendu la décision, la régularité de la procédure suivie devant cette juridiction, l'application de la loi compétente d'après les règles françaises de conflit, la conformité à l'ordre public international et l'absence de toute fraude à la loi." "to grant the exequatur, the French judge

is not possible: (i) competence of the foreign court that rendered the decision; (ii) regularity of the proceeding abroad; (iii) applicability of the competent legislation in accordance with the French connecting rules; (iv) conformity with international public policy; and (v) absence of fraud to the law (*fraude à la loi*). Soon afterwards⁵⁵, this same Court delineated the concept of “regularity of the proceedings” (*régularité de la procédure*), emphasizing, together with legal commentators⁵⁶, that it should be examined in the light of French international public policy and in respect of the right to present one’s defense.

Also with regard to the legislation in force within the **European Union**, the regularity of the proceeding abroad is comprehended within the concept of public policy. Communitarian law does not expressly mention procedural public policy⁵⁷, as it only goes so far as to say that the foreign decision will not be recognized if the defendant is not served or if service is defective⁵⁸. Nevertheless, the Tribunal of Justice of the

should make sure that five conditions are fulfilled, namely, the competence of the foreign court which rendered the decision, regularity of the proceedings in that foreign jurisdiction, applicability of the competent legislation in accordance with French connecting rules, agreement with international public policy and absence of all fraud.” More recently, in the case these conditions have been reduced to three: “Mais attendu que, pour accorder l’exequatur hors de toute convention internationale, le juge français doit s’assurer que trois conditions sont remplies, à savoir la compétence indirecte du juge étranger, fondée sur le rattachement du litige au juge saisi, la conformité à l’ordre public international de fond et de procédure et l’absence de fraude à la loi ; que le juge de l’exequatur n’a donc pas à vérifier que la loi appliquée par le juge étranger est celle désignée par la règle de conflit de lois française ; que, par ce motif de pur droit, substitué à ceux que critique le moyen, l’arrêt attaqué se trouve légalement justifié”. Cour de Cassation, 1er ch. civ., 20 février 2007, (pourvoi n° 05-14082), available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEX-T000017636147&fastReqId=471729688&fastPos=1>.

55 French Cour de Cassation, Bachir, 1er ch. civ., 4 octobre 1967, *Revue Critique de Droit International Privé*, p. 98, with notes by Lagarde. See, in the original: “(...) si le juge de l’exequatur doit vérifier si le déroulement du procès devant la juridiction étrangère a été régulier, cette condition de régularité doit s’apprécier uniquement par rapport à l’ordre public international français et au respect des droits de défense. “ “ (...) as the judge of the exequatur should verify whether the development of the proceedings abroad was regular, this condition should be analyzed solely with regard French international public policy and in relation to the right to present one’s defense. “

56 In the same sense, see among French legal commentators, AUDIT, Bernard. *Droit international privé*, p. 402.

57 Neither the Brussels Convention, nor Regulation (EU) No. 44/2001 deals with this point. The Regulation was published in the Jornal Oficial das Comunidades Europeias, série L, no 12 of January 16, 2000, p. 1-23, and is in force in all member-states of the European Union, with the exception of Denmark.

58 The subject is regulated in §2 of Article 34 of Council Regulation (EU) No. 44/200. The provision lists the grounds on which to deny recognition of a decision rendered by a member-state. See Hélène Gaudemet-Tallon, *Compétence et exécution de jugements en Europe* 402-405,

European Community – TJCE – has consolidated the understanding that within the general public policy provision⁵⁹ other violations of a procedural nature are included⁶⁰, in addition to those related to service, such as, for instance, the right to present one's defense and confrontation⁶¹.

In sum: just like in other States, also in Brazil the foreign decision shall not be recognized if some basic elements of procedural due process were not observed abroad, as this guarantee is part of Brazilian procedural public policy, which is deemed to be a fundamental principle.

CONCLUSIONS

It is possible to summarize the main ideas developed throughout this study in the following objective propositions:

p. 323-8.

59 §1 of the same Article 34 sets forth that a decision will not be recognized if the recognition is contrary to the public policy of the forum.

60 Stressing the connection between the fundamental procedural rights and the public policy clause, WATT, Horatia Muir, *Revue critique de droit international privé*, 2000, p. 492, emphasizes: “*En effet, alors même qu’il aurait pu sembler légitime de rattacher le grief invoqué à l’hypothèse envisagée par l’article 27-2o, en tant qu’étaient en cause les droits procéduraux du défendeur défaillant, la Cour n’hésite pas à confier à l’ordre public de l’article 27-1o la fonction de veiller au respect des droits fondamentaux de la procédure. Faisant primer à nouveau la protection due à ces derniers sur le sens apparent de la lettre de la Convention de Bruxelles, elle refuse de réduire cette protection à la sauvegarde très réduite qu’offre l’alinéa 2 du même texte aux droits de la défense*”.” Indeed, even if seemed reasonable to limit the defense of the defendant in default to the circumstances mentioned in Article 27.2, the Court has not hesitated to employ the concept of public policy mentioned in Article 27.1 to assure protection to the procedural due process of law clause. The protection due to these rights prevail over the apparent meaning of the Brussels Convention and the Court refuses to reduce this protection to the few requirements mentioned in number 2 of the same text.”

61 The decision was rendered in the case *Krombach*, which dealt with a request addressed to the Court of Justice of the European Communities, as per the covenant of June 3, 1971 relating to the interpretation by the Court of the convention of September 27, 1968 on jurisdiction and execution of decision in civil and commercial matters. It is interesting to quote the following extract of the decision: “44. From this evolution in court decisions it is possible to conclude that the public policy clause must be resorted to in the exceptional circumstances in which the guarantees established in the State of origin of the decision and in the convention itself are not enough to protect the defendant of a clear violation in his right to present his defense in front of the foreign tribunal, such as guaranteed by the ECHR”. (Court of Justice of the European Communities, *Krombach*, Case C-7/98, j. 28.03.2000, *Coletânea da Jurisprudência do Tribunal de Justiça e do Tribunal de Primeira Instância*, 2000, p. I-1935, also published in *Journal du Droit International*, p. 690, 2001, notes by Huet; *Revue Critique de Droit International Privé*, 2000, p. 481, notes by Muir-Watt; *Revue Trimestrielle de Droit Civil*, 2000, p. 944, notes by Raynard).

A) A foreign decision can be recognized by the STJ and produce effects in Brazil once some formal requirements are observed (LINDB, Article 15) and as long as it does not violate national sovereignty, good morals and Brazilian public policy (LINDB, Article 17). For the purposes of the present study, the relevant element to be considered is public policy.

B) The public policy that prevents recognition of foreign decisions, known as *second grade public policy*, corresponds to a selection of the most important mandatory rules of Brazilian law. This selection comprises the fundamental elements of the legal system, and their importance prevents the production of effects, in Brazil, of a foreign decision that disrespects them.

C) The meaning of the public policy clause should resort to the category of *fundamental principles*, which is referred to in Article 102, § 1 of the Constitution, in which are included the principles mentioned in Articles 1 to 4 and the fundamental rights, listed under Article 5 of the constitutional text. The concept of public policy presents a substantive dimension, related to the content of the decision (merits) and another one, of a procedural nature, related to the regularity of the proceedings which originated the foreign decision, taking into account the minimum guarantees of the procedural due process clause.

REFERENCES

- ASCENSÃO, José de Oliveira. A violação da garantia constitucional da propriedade privada por disposição retroativa, *Revista da Consultoria Geral do Estado do Rio Grande do Sul*, Porto Alegre, n. 18, p. 73, 1973.
- AUDIT, Bernard. *Droit international privé*. Paris: Economica, 2013.
- ÁVILA, Humberto. *Sistema Constitucional Tributário*. São Paulo: Saraiva, 2006.
- BARROSO, Luís Roberto. *O controle de constitucionalidade no direito brasileiro: exposição sistemática da doutrina e análise crítica da jurisprudência*. São Paulo: Saraiva, 2012.
- BARROSO, Luís Roberto. Tutela e efetividade do direito constitucional à liberdade, *Anais da XVII Conferência Nacional dos Advogados*, Brasília: EDITORA OAB, 2000.
- BORGES, Alice Gonzalez. Valores a serem considerados no controle jurisdicional da Administração Pública: Segurança Jurídica – Boa-fé – Conceitos indeterminados – Interesse público. *Revista Interesse Público*, Salvador: Fórum, v.15, p. 83-96, jul./set. 2002.
- COSTA, Judith Martins. *Boa-fé no Direito Privado*. São Paulo: RT,

2000.

DELGADO, José Augusto. O princípio da moralidade administrativa e a Constituição Federal de 1988, *Revista dos Tribunais*, São Paulo: Revista dos Tribunais, Ano 81, nº 680, p. 34, Jun/1992.

DI PIETRO, Maria Sylvia Zanella. *Direito Administrativo*. São Paulo: Atlas, 2012.

DOLINGER, Jacob. Ordem pública mundial; ordem pública verdadeiramente internacional no direito internacional privado, *Revista de Informação Legislativa do Senado Federal*, Brasília, Ano 23, nº 90, p. 211, abr./jun. 1986.

DOLINGER, Jacob. *Direito Internacional Privado – parte geral*. Rio de Janeiro: Renovar, 2008.

DOLINGER, Jacob. *A dívida externa brasileira: solução pela via arbitral*. Rio de Janeiro: Nova Fronteira, 1988.

FIGUEIREDO, Lúcia Valle e Sérgio Ferraz. *Dispensa e Inexigibilidade de Licitação*. São Paulo: Malheiros, 1994.

FIGUEIREDO, Marcelo. *Controle da moralidade na Constituição*, SP: Malheiros, 1999.

GAUDEMET-TALLON Hélène, *Compétence et exécution des jugements en Europe*, Paris: LGDJ, 2002.

MELLO, Celso Antonio Bandeira. Contrato administrativo: Fundamentos da preservação do equilíbrio econômico financeiro, *Revista de Direito Administrativo*, nº 211, p. 22, Jan/1998.

NEGREIROS, Teresa. *Fundamentos para uma interpretação constitucional do princípio da boa-fé*. Rio de Janeiro: Renovar, 1998.

PEREIRA, Caio Mário da Silva. *Instituições de Direito Civil*. vol. II, Rio de Janeiro: Forense, 2009.

PEREZ, Jesus Gonzalez. *El principio general de la buena fe en el Derecho Administrativo*. Madrid: Civitas S/A, 1989.

TEPEDINO, Gustavo. A nova propriedade (O seu conteúdo mínimo, entre o Código Civil, a legislação ordinária e a Constituição), *Revista Forense*, Rio de Janeiro: Forense, V. 85, nº 306, p. 73, abr./jun. 1989.

TORRES, Ricardo Lobo. *Os direitos humanos e a tributação: imunidades e isonomia*. Rio de Janeiro: Renovar, 1995.

TORRES, Ricardo Lobo. *A Ideia de Liberdade no Estado Patrimonial e no Estado Fiscal*. Rio de Janeiro, Renovar, 1991

VALLADÃO, Haroldo. Ineficácia, no Brasil, da nacionalização por Estado estrangeiro, de pessoa jurídica de direito privado, sem indenização aos respectivos sócios, *Boletim da Sociedade Brasileira de Direito Internacional* 9/10:151

Colectânea da Jurisprudência do Tribunal de Justiça e do Tribunal de Primeira Instância, 2000.

BRIEF ANALYSIS OF COMPETITION DEFENSE IN BRAZIL

Augusto Jaeger Junior

Master of Law/UFSC and PhD/UFRGS. Professor of Law
School at UFRGS, Porto Alegre, Brazil.

Daniela Copetti Cravo

Social Policy Analyst, Federal Government, Brazil. Master of
Law /UFRGS.

Abstract: The primary aim of this article is to analyse the Brazilian Competition Policy System (BCPS) in terms of its design, its challenges and its evolution. Furthermore, it seeks to give an overview of the large and recent modifications experienced by the antitrust institutional and normative drawing in Brazil, which will greatly contribute to the freedom of the market and the welfare of the consumers.

Keywords: Antitrust - Brazilian Competition Policy System - Freedom of the market - Welfare of the consumers.

1. INTRODUCTION

The defense of free competition aims to ensure an efficient allocation of resources in the economy, in order to promote the increase of the overall levels of employment and population income, as well as economic growth, and prevent undue shift income between supplier and consumer, and even the exclusion of a portion of the population from the consumer markets. Antitrust, therefore, transcends the interest of the parties directly involved, being the society the owner of the legal interests protected by that.

In Brazil, the protection of competition begins to take on a greater role from the Federal Constitution of 1988, that listed free competition as a principle of economic order, and, additionally, from the edition of the Law 8.884/94. This Federal legislation sketched the antitrust system, inaugurating the Brazilian Competition Policy System (BCPS).

The primary objective of this article is to analyze this system, with regard to its design, its challenges and its evolution. Furthermore, it seeks to give an overview of the large and recent modifications

experienced by the antitrust institutional and normative drawing in Brazil, which will greatly contribute to the freedom of the market and to the welfare of the consumers.

2. ANTITRUST IN BRAZIL

Brazilian State assumes, with the guidance given by The Constitution of 1988, a new phase, as a normative and regulating agent. Therefore, it gradually ceases to be an economic agent and starts to ensure the access, to private enterprise, of sectors so far reserved to itself.

The praise of free enterprise and, consequently, the capitalist system, however, is not absolute, being limited by the precepts and principles established in the Constitution, that besides restricting the exercise of economic activity, also impose on the State a normative and regulatory role, constituting, according to Claudia Lima Marques¹, the “public economic order”². In this catalog, likewise, lie the free competition³ and the consumer protection, which were raised for the first time in 1988, to principles of Economic Order⁴.

The protection of free competition intends to ensure the efficient allocation of resources in the economy, in order to encourage an increase in overall employment levels, population income levels and economic growth, and prevent undue shift income between supplier and the exclusion of a portion of the population from the consumer markets. Antitrust, therefore, transcend the interest of the parties directly involved, being the society the owner of the legal interests protected by that, as already seen.

In order to improve and systematize the matter relating to the

1 MARQUES, Cláudia Lima. *Contratos no Código de Defesa do Consumidor: O Novo Regime das Relações Contratuais*. 5. Ed. São Paulo: Revista dos Tribunais, 2005, p. 597.

2 Bruno Miragem complements the information, stating that as part of the positive constitutional order, the Consumer Protection, by express determination of the Federal Constitution of 1988, can not be dismissed or overlooked in the activity of economic regulation. MARQUES, Claudia Lima; BENJAMIN, Antonio Herman; MIRAGEM, Bruno. *Comentários ao código de defesa do consumidor*. São Paulo, Revista dos Tribunais, 2006, p. 1149.

3 To Isabel Vaz, free competition is “the action developed by a large number of competitors, acting freely on the market of a given product, so that supply and demand come from buyers or sellers whose equal conditions prevent them from influencing, in a permanent and lasting way, at the the prices of goods or services”. VAZ, Isabel. *Direito Econômico da Concorrência*. Rio de Janeiro, Forense, 1993, p. 27.

4 In that sense, Marques exposes: “The Constitution of 1988, for the first time in the history of Brazilian constitutional texts, expressly provides for the protection of consumers, identifying them as a group to be especially protected by State action”. MARQUES, Cláudia Lima. *Contratos no Código de Defesa do Consumidor: O Novo Regime das Relações Contratuais*. 5. Ed. São Paulo, Revista dos Tribunais, 2005, p. 595.

constitutional principle of free competition, the Law n°. 8.884/94 was issued. The enactment of this legislation, in the words of Paula Forgioni⁵, “systematizes antitrust matters, in order to improve its legislative treatment”, with the implementation of the BCPS, which is the main responsible, in Brazil, for the protection of competition. This system, under the aegis of the Law n° 8.884/94, was mainly composed by CADE (Administrative Council of Competitive Defense) and two more bodies attached to different ministries: the Secretariat of Economic Law (SDE), of the Ministry of Justice, and the Secretariat for Economic Monitoring (SEAE), of the Ministry of Finance.

The BCPS works with a view to two different approaches. The first refers to the repressive role, also known as behaviors control, which seeks to investigate and prosecute possible violations of the economic order committed by economic agents. The second, is the preventive or structures control role, where the concentration acts, regardless of its manifestation, which may limit or otherwise restrain open competition, or result in the domination of relevant goods or services, shall be submitted for examination to the SBDC.

Although the defense of competition is held in essence by the BCPS agencies, it is no less true that the Regulatory Agencies also exercise powers regarding to the competition matters, within their respective sectors. Clear that such assignment, with some exception, is generic, but not nonexistent.

3. PARADIGMATIC CASES OF BCPS

During the term of the Law n° 8.884/94, the BCPS has acted in a fairly intense manner - and with great visibility – in defense and dissemination of competitive environment. To well illustrate this governance of the institutions involved, we collate some paradigmatic cases.

In the framework of preventive control, we cite the case AMBEV. The firms ‘Companhia Antarctica Paulista’ and ‘Companhia Cervejaria Brahma’ celebrated corporate acts in order to bring together under common control their respective subsidiaries, through the establishment of a new corporation, called ‘Companhia de Bebidas das Americas – AmBev’⁶. In the Concentration Act N°. 08012.005846/1999-12⁷, CADE

5 FORGIONI, Paula Andréa. *Os Fundamentos do Antitruste*. 3. ed. São Paulo, Editora Revista dos Tribunais, 2008, p. 143.

6 CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA – CADE. *Guia Prático do CADE: A Defesa da Concorrência no Brasil*. São Paulo, CIEE, 2007.

7 BRASIL. CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA. Concentration Act n° 08012.005846/1999-12. Parts: Cervejarias Kaiser Brasil Ltda, Companhia Cervejaria Brahma and others. Reporter: Councillor Hebe Teixeira Romano Pereira da Silva.

understood that the constitution of AMBEV “would result in increased productivity, improvement in the quality of goods offered and generate efficiencies and technological development to outweigh the potential harm to competition arising from the association”. Nevertheless, CADE has not ignored the fact that the substantial elimination of the portion of the competition in the beer market, approving, thus, the operation with restrictions embodied in a Performance Term of Commitment (TCD), which stated:

The TCD determined the implementation of the so-called “integrated set of measures” (subclause 2.1), that comprised the selling of the trade mark ‘Bavária’, the sale of 5 (five) factories and the sharing of the distribution. Besides, AMBEV should share its distribution network in each of the five relevant markets defined (subclause 2.2), disable other factories only through public offering (subclause 2.3), maintain the level of employment, and any layoffs associated with the corporate restructuring should be accompanied by programs of retraining and relocation (subclause 2.4), not to impose exclusivity outlets (subsection 2.5) and adopt all measures to achieve the relevant efficiencies to fusion (subsection 2.6).⁸

Still in control of structures, it must be mentioned the case ‘Sadia’ and ‘Perdigão’⁹. The parties have signed, in 2009, an Association Agreement, unifying its operations, to the extent that ‘Sadia’ became a wholly owned subsidiary of ‘BRF - Brazil Foods’.

When the act was submitted to the assessment of BCPS, thus stood Councillor Emmanuel Joppert Carlos Ragazzo:

In reality, the fact is that even if, ad argumentandum, were all considered synergy gains claimed by the parties, the magnitude of such efficiencies, still proves insignificant in the light of the serious harm to the community that this merger will generate. The potential harm to consumers arising from this operation, as was demonstrated to exhaustion, is

⁸ CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA – CADE. Guia Prático do CADE: A Defesa da Concorrência no Brasil. São Paulo: CIEE, 2007.

⁹ BRASIL. CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA. Concentration Act n.º 08012.004423/2009-18. Parts: Perdigão S. A. e Sadia S. A. Reporter: Councillor Carlos Emmanuel Joppert Ragazzo.

substantial to a degree rarely seen (...).Certainly, the mere comparison of alleged synergy gains with the results of price increases arising from simulation tests and UPPs not serve by itself, to attest that there was a transfer of efficiencies to consumers (...).This probably occur because, still, the transfer of the efficiencies to consumers would be too uncertain (...).That said, it is concluded, quite clearly, that the potential efficiencies resulting from the operation are not even remotely sufficient to compensate for the extreme damage to consumers and the community generated by this merger¹⁰.

Although the Reporting Commissioner Emmanuel Joppert Ragazzo have understood by non-approval of the act, the operation remains endorsed, with restrictions, through the assignment of the Term of Commitment to Performance on July 13, 2011. This term has established a number of requirements for the approval of the transaction, such as selling assets and brands.

In relation to repressive control, the BCPS, in recent years, has been spending much of its energy to combat cartels. Proof of this is the formulation and implementation of the Brazilian Program on Fighting Cartels, recognized, by the way, even internationally.

One of the most visible cases was, undoubtedly, the Administrative Proceeding N° 08012009888/2003-70, which had as rapporteur the Councillor Fernando Magalhães Furlan¹¹. In this case, CADE understood that there was a cartel formation in the gas sector, whether industrial or healthcare related.

As a result of such conviction, there was a fine totaling R\$ 2.3 billion, to companies ‘White Martins Gases Industriais Ltda.’, ‘Air Liquide Brazil Ltda.’, ‘Air Products Brazil Ltda.’, ‘Linde Gases Ltda.’, successor of ‘AGA S.A.’, and ‘Industria Brasileira de Gases’ and its officers and employees. This fine was regarded as the highest fine in the history of CADE, confirmed in 2012 by the Brazilian Federal Court of the 1st Region (TRF 1ª Região).

Nevertheless, CADE has also been making effort in order to repress unilateral conduct of abuse of dominant position. This is the case of the administrative process n.º 08700.003070/2010-14, which

10 BRASIL. CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA. Concentration Act n.º 08012.004423/2009-18. Parts: Perdigão S. A. e Sadia S. A. Reporter: Councillor Carlos Emmanuel Joppert Ragazzo.

11 BRASIL. CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA. Administrative Process n° 08012009888/2003-70. Reporter: Coucillor Fernando Magalhães Furlan. Judged on September 1st, 2010.

aims to establish violations of the Law n° 8.884/94, practiced by the Bank of Brazil, through the celebration of contracts with public entities with exclusivity clause for the assignment on the payroll.

The case was resolved through the celebration of a Term Commitment of Cessation of Practice between Bank of Brazil and CADE, pledging the Bank of Brazil to end the requirement of exclusivity in credit factored in all contracts with public agencies. The Term also established the payment by the Bank of Brazil, of a contribution to the Fund for the Defence of Diffused Rights of R\$ 99,476,840.00.

It is clear, therefore, that the performance of Brazilian antitrust authorities was very relevant during the term of Law n° 8.884/94. Despite international recognition and consolidation of CADE as an institution, reforms to the system were needed, for at least a decade, both for new challenges, or to preserve gains already achieved.

4. REFORMS IN THE SYSTEM

The triggering event to the reform of the rules in antitrust in Brazil lies in the design of the BCPS, which was considered by many as inefficient. In view of the inability to optimize the system by infralegal means, arises the proposal for a legislative amendment.

The proposal began in the House of Representatives with the Bill n° 3.937/2004, which considered specific and punctual changes on the Competition Law. The legislative process was complemented with another Bill, n° 5.877/2005, which was appended to the Bill n° 3.937/2004 and a substitute, which aimed to repeal the Law n° 8.884/94.

Being the restructuring of the BCPS included in the Growth Acceleration Program (PAC), the bill was approved in plenary by the House of Representatives and transformed into a legal norm, subject to presidential approval. On December 1st, 2011, was then enacted the Law n° 12.529/11, which had a *vacatio legis* period of 180 days from the date of its publication. This, finally, came into being on May 29th, 2012.

The change stamped on this Act, as noted by César Costa Alves Mattos¹², embeds deep institutional change, which seeks, by decreasing the relationship of economic agents with three branches, namely, SDE, SEAE and CADE, to rationalize the Brazilian System of Competition Defense. Within the proposed format, the new structure of CADE includes a General-Superintendence with an Attorney General, a Department of Economic Studies and an Administrative Tribunal.

Thus, in order to eliminate the *Via Crucis* of three counters, the

12 MATTOS, César. Bill n° 5877/2005 - Reestrutura o Sistema Brasileiro de Defesa da Concorrência (SBDC) <<http://www.econ.puc-rio.br/pdf/seminario/2007/Resumo%20Projeto%20de%20Lei%205877.pdf>>. Accessed on February 11, 2012.

SDE withdraws from BCPS: their competencies are now assigned to the General-Superintendence of CADE. Already SEAE becomes the true advocate of competition.

One of the major innovations brought with the edition of the new law refers to the notification of concentration acts, that ceases to be after the consummation of the act. The approval of CADE, therefore, will be a previous condition to the implementation of the operation.

The appraisal by CADE, as well, shall have a fixed term, which will be a maximum of 240 (two hundred and forty) days from the date of application protocol or its amendment. This period may be extended, if necessary, in only two hypothesis: (i) upon parties involved in the transaction request, for up to sixty (60) unextendable days; or (ii) by informed decision of the Court for up to ninety (90) unextendable days. Beyond this period, it was determined that, with the new law, the concentration acts will be given priority over processes tha investigate anticompetitive behaviours.

The criteria for notification of mergers have also changed. As the original wording, shall be subject to approval by CADE transactions in which (i) at least one of the economic groups involved in the operation have registered in the last balance sheet, annual gross sales in Brazil, in the year preceding the operation, equal or greater than R\$ 400,000,000.00 (four hundred million reais), and (ii) at least one business group involved in the operation have been registered in the last balance sheet, annual gross sales in Brazil, greater than or equal to R\$ 30.000.000,00 (thirty million reais).

Worth mentioning that as soon as the legislation came into force the concentration acts have already started to observe new minimum, in view of the Interministerial Ordinance MJ / MF n.º 994 of May 30, 2012¹³. The billing of R\$ 400,000,000.00 (four hundred million reais), initially required by Law, was replaced by R\$ 750,000,000.00 (seven hundred and fifty million reais) and the billing of R\$ 30.000.000,00 (thirty million reais), by the R\$ 75.000.000,00 (seventy five million reais)¹⁴.

13 BRASIL. Interministerial Ordinance MJ/MF n.º 994 de 30 de maio de 2012. *Diário Oficial*: May 30, 2012.

14 To Elizabete Farina and Fabiana Tito, “the effect of this change will be the reduction of the number of notified cases, releasing tangible and intangible resources for a more careful analysis of complex cases and also for investigation of anticompetitive, the heart of competition defense. Earns up process efficiency”. FARINA, Elizabete; TITO, Fabiana. *Nova Era de Defesa da Concorrência Brasileira*. <<http://www.ibrac.org.br/Noticias.aspx?id=1639>>. Accessed on March 4, 2013. However, we must warn that this criterion very high, comparable to that criterion quite sophisticated economies, can be a setback to the achievements of Antitrust, allowing agents with significant market power, but far from reaching the new criteria billing exemptions from the antitrust prior control.

In addition, the new Antitrust Act embraced new criteria for setting penalties for commission of offenses against the economic order. According to the letter of the law, the practice of violations of the economic order, in the case of a firm, will subject to a fine of 0.1% (one tenth percent) to 20% (twenty percent) of the gross value obtained by the company, group or conglomerate, in the last year prior to the initiation of administrative proceedings, in the field of business activity in which the offense occurred, which will never be less than the benefit received, when it is possible its estimation¹⁵.

Another relevant change implemented by the new law refers to a fine for litigants in bad faith, foreseen in the third paragraph of article 65, in the Law nº 12.529/11. Interestingly, there was no equivalent prediction in the Law nº 8.884/94.

On the catalog of violations of the economic order, specific changes can be seen, particularly the removal of certain behaviors, such as exclusivity agreements. Nevertheless, it should be emphasized that even the conducts that were removed from the list may be configured as an infraction of economic order, as long as they have as object or may produce the effects enumerated in the article 36, of Law Nº. 12.529/11 (items I to IV), even though not achieved, which supports the exemplary nature of the list.

These were, in general, the major changes brought to the BCPS, which came to be with the promulgation of Law Nº. 12.529/11. We conclude that the system and, in particular, the CADE has come to an apparatus legislative and institutional modern enough to face the new challenges that lie ahead.

¹⁵ Among the novelties introduced by the new law, no doubt, the issue of penalty will be one that will bring much discussion to CADE, academy, economic agents, consumers and even the judiciary. The first question would be to check if, indeed, the law was more beneficial or not to run, passive part of an administrative procedure within CADE. Second, and most beneficial, we must study the compulsory or not their feedback, extending and applying the rule contained in Article 5., Item XL 1988 Constitution. Finally, again considering that the standard would be more beneficial, is to be concluded by the setback of the new law, which will ultimately encouraging the practice of violations of the economic order, as well raised by Gabriel Pinto Moreira. MOREIRA, Gabriel Pinto. *A infração Compensa na Nova Lei de Defesa da Concorrência?* <<http://www.valor.com.br/opiniao/3004748/infracao-compensa-na-nova-lei-de-defesa-da-concorrancia#ixzz2Mc1d7oN3>>. Accessed on March 4, 2013. We must have in mind, only complementing the negative aspect of the new law in order to decrease the sentencing criteria, that although it emphasizes that the penalty will never be less than the benefit, in practice this is very difficult to estimate. In that sense, we have the OECD study on the effectiveness of sanctions, and that highlights this problem: ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT. *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency programmes*. Paris, 2002. <<http://www.oecd.org/dataoecd/41/44/1841891.pdf>>. Accessed on April 20, 2012.

5. CONCLUSION

As seen in this article, the Competition Defense in Brazil is getting closer to its maturity. Despite the wide spread of activities undertaken by the BCPS and the consolidation of the institutional authorities of the system during the term of the Law nº 8.884/94, it is only with the enactment of the Law nº 12.529/11 that the BCPS, now with reduced number of members, starts to have a modern normative apparatus and fit for the performance of its institutional missions.

Facing difficult cases, which often stress the need to ensure political and economic independence of the antitrust authorities, the BCPS gained prominence in society and before the economic agents. So much is that, this year, through the work of the CADE, Brazil has reached record position among the world's antitrust authorities and obtained, for the first time, four in five possible stars, on the ranking in the "Global Competition Review", British magazine specialized in antitrust.

Evidently there is not only praise for the system. Many challenges are put to CADE and the BCPS with this new legislation. Among these are the need for a speedy trial by CADE of concentration acts, considering, mainly, that the analysis becomes prior to the implementation of the act. At the same time, BCPS must expend the same energy to the repression of anticompetitive behavior, which can not be neglected, lest there be a great loss to society as a whole.

6. REFERENCES

BRASIL. CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA. Concentration Act nº 08012.005846/1999-12. Parts: Cervejarias Kaiser Brasil Ltda, Companhia Cervejaria Brahma e outras. Reporter: Coucillor Hebe Teixeira Romano Pereira da Silva.

_____. CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA. Administrative Process nº 08012.009888/2003-70. Reporter: Coucillor Fernando Magalhães Furlan. Judged on September 1st, 2010.

_____. CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA. Concentration Act nº 08012.004423/2009-18. Parts: Perdigão S. A. e Sadia S. A. Reporter: Coucillor Carlos Emmanuel Joppert Ragazzo.

_____. Interministerial Ordinance MJ/MF nº 994 de 30 de maio de 2012. *Diário Oficial*: May 30, 2012.

CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA – CADE. *Guia Prático do CADE: A Defesa da Concorrência no Brasil*. São Paulo, CIEE, 2007.

FARINA, Elizabete; TITO, Fabiana. *Nova Era de Defesa da Concorrência Brasileira*. <<http://www.ibrac.org.br/Noticias.aspx?id=1639>>. Accessed on March 4, 2013.

FORGIONI, Paula Andréa. *Os Fundamentos do Antitruste*. 3. ed. São Paulo, Editora Revista dos Tribunais, 2008.

MARQUES, Cláudia Lima. *Contratos no Código de Defesa do Consumidor: O Novo Regime das Relações Contratuais*. 5. Ed. São Paulo, Revista dos Tribunais, 2005.

_____; BENJAMIN, Antonio Herman; MIRAGEM, Bruno. *Comentários ao código de defesa do consumidor*. São Paulo, Revista dos Tribunais, 2006.

MATTOS, César. Projeto de Lei 5877/2005 - *Reestrutura o Sistema Brasileiro de Defesa da Concorrência* (SBDC). <<http://www.econ.puc-rio.br/pdf/seminario/2007/Resumo%20Projeto%20de%20Lei%205877.pdf>>. Accessed on February 11, 2012.

MOREIRA, Gabriel Pinto. *A infração Compensa na Nova Lei de Defesa da Concorrência?* <<http://www.valor.com.br/opiniao/3004748/infracao-compensa-na-nova-lei-de-defesa-da-concorrenca#ixzz2Mc1d7oN3>>. Accessed on March 4, 2013.

ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT. *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency programmes*. Paris, 2002. <<http://www.oecd.org/dataoecd/41/44/1841891.pdf>>. Accessed April 20, 2012.

VAZ, Isabel. *Direito Econômico da Concorrência*. Rio de Janeiro, Forense, 1993.

JUDICIARY REFORM IN BRAZIL AND THE NATIONAL COUNCIL OF JUSTICE: *IMPROVING COMMUNITY INVOLVEMENT IN OFFENDER TREATMENT*

Márcio Schiefler Fontes

Auxiliary Judge to Minister Teori Zavascki, Associate Justice of the Brazilian Supreme Court. MSc in Translation Studies (Universidade Federal de Santa Catarina). MBA in Tax Law (Fundação Getúlio Vargas).

Contact: marcio.schiefler@amc.org.br

Abstract: This paper intends to provide an overview of the Brazilian judicial system, its recent reform, and how the National Council of Justice (whose creation was the major goal of that reform) started to address the issues of improving the efficiency of criminal justice and increasing the use of alternatives to detention and imprisonment. The concept behind applying and enforcing convictions aims to remove the convict from society, to avoid further harm, allowing the prisoner to return to society after they have reabsorbed social values. The current challenge facing prison systems is to foster effective methods of rehabilitating and reintegrating these people into society, so that they are capable of living in society when they have finished their sentences. Community involvement in offender treatment is a current worldwide trend that has found the desirable echo in important initiatives championed by the National Council of Justice.

Keywords: Brazilian judicial system - National Council of Justice - Community involvement in offender treatment.

“It is better to prevent crimes than to punish them. This is the fundamental principle of good legislation, which is the art of conducting men to the maximum of happiness, and to the minimum of misery, if we may apply this mathematical expression to the good and evil of life”

Cesare Beccaria, On crimes and punishments, 1764.

“10. With the participation and help of the community

and social institutions, and with due regard to the interests of victims, favourable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible conditions”

UN Basic Principles for the Treatment of Prisoners, adopted and proclaimed by General Assembly Resolution 45/111 - 14 December 1990.

I. INTRODUCTION

A. Foreword: the Brazilian Judicial System

Brazil, despite its liberal stereotype and the present political predominance of leftwing parties both in government and in opposition, is a deeply conservative nation¹. And among all its institutions, the Judiciary is undoubtedly the most conservative. So when one says that in Brazil the community's involvement in the treatment of offenders is scarce or insignificant, he or she should take into account that the average Brazilian does not see any reason to improve the lives of inmates, or to pave their way for a better life in the future. For, after all, why should a huge country with huge social problems, and so eager to grow, worry about their criminals? As lawmakers reflect their voters, society reflects the consensus that the treatment of offenders is no priority at all².

Although court proceedings are very similar to those in force in Europe, as Brazil inherited its law institutes mainly from Germany, France and Italy, apart from its ancient colonial power Portugal, it is

1 According with almost every poll, a majority of Brazilians support social and political positions generally seen as conservative: oppose abortion; view the nuclear family model, based on the marriage of one man and one women, as society's foundational unit; support the prohibition of drugs, prostitution, and euthanasia; and support the death penalty. In the 2010 Census, for instance, more than 190 thousand enumerators visited 67.6 million housing units in the 5,565 Brazilian municipalities. The website <<http://censo2010.ibge.gov.br/en/>> brings information (also in English) about all the steps of the 2010 Census, with special highlight to the survey results. Another important survey institute in Brazil, Datafolha, has reached similar conclusions in 2012 (<<http://datafolha.folha.uol.com.br/>>, in Portuguese).

2 In November 2012, the Brazilian Minister of Justice (the highest Brazilian authority in charge of the national criminal system) described the nation's prison system as “medieval” and declared that he would prefer to die rather than pass a period in Brazilian jails. Folha de S. Paulo daily reported the statement, which sparked controversy mainly because it was made one day after the Supreme Court sentenced a former senior presidential officer to ten years in prison on corruption charges (<http://frombrazil.blogfolha.uol.com.br/2012/11/21/brazilian-justice-front-and-center/>).

not easy for a foreigner to understand the range of competences inside a many-sided Judiciary of a federative country, with state-level justice and federal-level justice with equal ranks, not rarely unwilling to change anything.

The Brazilian Judiciary is organized into federal and state spheres, consisting of several courts. Municipalities do not have their own justice systems, and must, therefore, resort to state or federal justice systems, depending on the nature of the dispute. The apex of the judicial system is the Federal Supreme Court³, which is the guardian of the current Federal Constitution, in force since 5 October 1988, after twenty years of military regime (1964-1985). The 1988 Constitution empowered the Judiciary with enormous administrative and financial autonomy. In all spheres⁴, judges are nominated after a strict public selection process, enjoying the guarantees of life tenure, irremovability, and irreducibility of compensation.

B. State-Level Justice

State-level justice in Brazil upholds the vast majority of competences, and consists of state courts and judges. The Brazilian states organize their own judicial systems, with court jurisdiction defined in each State Constitution, observing that their legal scope is limited by those that do not concern the Federal Constitution. Each state territory is divided into judicial districts (counties) named *comarcas*, which are composed of one or more municipalities. Each *comarca* has at least one trial court, the first instance, with a judge and a public prosecutor. The judge decides alone in all civil cases and in most criminal cases. Only intentional crimes against life are judged by jury.

The 27 states' Supreme Courts (actually Courts of Justice, "Tribunais de Justiça" in Portuguese⁵) are the highest courts of each

3 The Brazilian Federal Supreme Court is composed by eleven justices (titled as ministers), chosen among native Brazilian citizens, who are more than thirty-five and less than sixty-five years old and have notable legal knowledge and soundness of character (articles 12 and 101, both from the Federal Constitution).

4 Excluding second instance, which has many particularities, as well as national courts, where the president nominates their justices (in Brazil called ministers).

5 The German philosopher Friedrich Schleiermacher, in his famous lecture "*On the Different Methods of Translation*" (1813), distinguished between translation methods: "there are only two. Either the translator leaves the author in peace, as much as possible, and moves the reader toward him. Or he leaves the reader in peace, as much as possible, and moves the author toward him". Lawrence Venutti uses this quotation as a basis for what he labeled "foreignizing translation" and "domesticating translation", herein warning: "Strategies can be defined as 'foreignizing' or 'domesticating' only in relation to specific cultural situations, specific moments in the changing reception of a foreign literature, or in the changing hierarchy of domestic values" (Venutti, L. (1995) *The Translator's Invisibility*. Routledge: London and New York, p.

state judicial system, representing the second instance. They are the states' courts of last resort, have their headquarters in the capital of each state and have jurisdiction over their respective territories. Albeit exceptionally having original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, or prohibition, and in certain *habeas corpus* proceedings, the states' Courts of Justice are basically appellate courts, meaning they can review any decisions taken by the trial courts (district courts), and have the final word on decisions at state level. Their decisions may be overturned only under special conditions, and only by national courts, headquartered in the Federal Capital (Brasília). Second instance judgments in state level are usually made by three justices, called *desembargadores* (an ancient Portuguese title).

C. Federal-Level Justice

Alongside with specialized courts to deal with electoral, labour and military disputes, federal-level justice in Brazil has very specific competences, mainly related to social security law⁶, being responsible for hearing most disputes in which one of the parties is the Federal Union and its agencies; ruling on lawsuits between a foreign Nation or international organization and a municipality or a person residing in Brazil; and judging cases based on treaties or international agreements against a foreign Nation or international body. Few crimes are under exclusive federal jurisdiction, for example smuggling, although there are others that may be submitted to federal courts depending on their circumstances (money laundering when related to certain crimes, international drug trafficking, etc.). The second instance in the federal judicial system is represented by five Regional Federal Courts (“*Tribunais Regionais Federais*” in Portuguese), which have jurisdiction over circuits of several states on lawsuits involving appeals towards the decisions ruled by federal judges, and tend to be headquartered in the largest city of the territory under their jurisdiction. Second instance judgments in federal level are also usually made in a three-judge panel.

D. National Courts

The Superior Court of Justice (“*Superior Tribunal de Justiça*” in Portuguese, shorthand STJ) reviews decisions taken by either federal or

272). Legal translation, a culture-dependent subject field, is no exception to the rule (Šarčević, S. (2000) *Legal translation and translation theory: a receiver-oriented approach*, accessible at: <http://www.tradulex.org/Actes2000/sarcevic.pdf>).

6 In Brazil, the major branches of social security (social insurance, income maintenance, and public funded medical care) are mostly under the administration of a federal agency.

state second instance, as responsible for upholding federal legislation and international treaties. STJ is the Brazilian highest court in non-constitutional issues and grants a Special Appeal (“Recurso Especial” in Portuguese) when a judgment of a court of second instance offends a federal statute disposition or when two or more second instance courts make different rulings on the same federal statute.

Finally, above all courts stands the Federal Supreme Court (“Supremo Tribunal Federal” in Portuguese, shorthand STF), which has exclusive jurisdiction to: (i) declare laws unconstitutional; (ii) order extradition requests from foreign Nations; and (iii) rule over cases decided in sole instance courts, when the challenged decision may violate the Constitution⁷. As national court of last resort, STF grants Extraordinary Appeals (“Recurso Extraordinário” in Portuguese) when judgments of second instance courts violate the Federal Constitution.

II. THE NATIONAL COUNCIL OF JUSTICE

A. Insertion

The National Council of Justice (“Conselho Nacional de Justiça” in Portuguese, shorthand CNJ) is an independent organ inside the Brazilian judicial system, regardless of being under the authority of the Federal Supreme Court. It was created by a 2004 Constitutional Amendment (nº 45) as part of the Judiciary Reform, to be the official

⁷ The main role of the Federal Supreme Court is to guard and interpret the Federal Constitution, deciding matters related to it or about which there is doubt or controversy through special legal actions that work as instruments to evaluate the constitutionality of laws and matters, such as: (i) direct action of unconstitutionality, directed to uphold a law or normative act contrary to the Constitutional text; (ii) declaratory action of constitutionality, an instrument directed to declare constitutional any law or federal norm about which there is controversy or relevant doubt as to the interpretation of the Constitution; (iii) action of unconstitutionality by omission, directed to gauging of unconstitutionality in face of an omission from lawmakers to legislate, thus limiting the exercise of certain rights due to lack of regulamentation; (iv) allegation of disobedience of fundamental precept, an action directed to protect fundamental precepts, mostly guidelines and principles present in the Constitution, from contrary laws or normative acts in case of relevant constitutional controversy. As already pointed, the Supreme Court also decides appeals in last instance and matters of its jurisdiction such as: (i) *habeas corpus* when the constrained party are the Republic’s highest authorities, including the Court’s own justices, or when it is to be decided as an appeal in last instance; (ii) *writ of security* and *habeas data*: the *writ of security* is an legal action designed to quickly protect a manifest right, and the *habeas data* guards the right to knowledge of personal information in records or data banks, both when issued against acts of the Republic’s highest authorities, including the Court’s own justices (more information is available at: http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us).

board responsible for supervision of Judicial Branch, both federal and state spheres, including the autonomous states' Courts of Justice, and has acted in several fields. Among its attributions are ensuring that the judicial system remains autonomous, conducting disciplinary proceedings against members of the Judiciary, and compiling and publishing statistics on the Brazilian court system. More than that, it provides a national supervision of all courts administration.

The majority of the fifteen councillors (“conselheiros”) are appointed by the Superior Court of Justice and by the Federal Supreme Court – whose chief justice is perforce the president of the National Council of Justice. However, there are members appointed by the Public Prosecutors Office, by the Brazilian BAR Association (“Ordem dos Advogados do Brasil” in Portuguese, shorthand OAB), and by the National Congress.

B. Initiatives and Controversies

Before the Judiciary Reform⁸, for example, all matters regarding the conduct of judges and courts were considered *interna corporis* and, as such, were examined by judges only; it became a consensus that judges were being too corporative in handling these matters. If Judiciary was corporative when judging their members, it was even more difficult to place any kind of complaint against judges. It was (and still is) possible to appeal against the legality of decisions, but there was not much to be done in cases where, for example, the judge was overbusy and could not look into a lawsuit for years. One of the functions of the National Council of Justice is to give the population a means to oversee the performance of judges, and express their discontentment. The first relevant decision by the Council was to forbid the so-called *nepotism* in the appointment of ancillary judicial staff, determining that all relatives of judges who are occupying trusting positions had to quit their offices immediately.

Not surprisingly, the creation and the attitudes of the National Council of Justice raised vehement reactions, since its acts seem – and in some events truly are – sweeping intrusion into the states' management. Notwithstanding, the Council keeps operating, instigated by a public opinion not always aware of the real interests at stake, mostly fomenting positive movements for alternative dispute resolution or, sometimes, establishing controversial goals aimed at ensuring a faster processing of lawsuits. Recently it has turned over the issues of improving the efficiency of criminal justice and increasing the use of alternatives to detention

⁸ For more information about the Brazilian Judiciary reform, see <http://www.icj.org/dwn/database/Brazil-AttacksonJustice-11072008.pdf>

and imprisonment⁹, on the basis of the principle of imprisonment as a last resort, under the principle of proportionality. One sound measure was to order all judges to carry out month inspections on the prisons under their jurisdiction, having to present electronic reports of these inspections to the Council itself. Finally, it started fostering the idea of citizenship of former prisoners, and soon after began stressing the need of providing new opportunities for them (the “Begin Again” project¹⁰).

C. Deployments

These initiatives have aroused reflection amongst judges on how to deal with the cultural shift demanded by the National Council of Justice about legal and paralegal services offering advice and representation to help to reduce the unnecessary use of pre-trial detention¹¹ (Tokyo Rules¹², n° 6) as well as informal and restorative justice¹³ approaches, which divert and resolve cases outside the formal criminal justice process.

A parallel situation are the Council demands on matters of strengthening access to justice and public defense mechanisms, partially attended by “Mutirões Carcerários” (task forces of public defenders, public prosecutors or even judges assigned to verify the legal situation of prisoners who may have fulfilled the requirements to be released or to gain certain legal benefits but cannot afford to hire a privately retained attorney). Even a rich Brazilian state as Santa Catarina (with one of the highest standards of living in Latin America), in southern Brazil, remains up to this day without organizing its publicly funded public defender office. Other states have organized their public defender offices only formally, without actually providing them with minimum conditions for effective action.

9 In Brazil there are alternatives to prison before conviction (pre-trial: bail, provisional release, conditional suspension) and after conviction (alternative penalties, fines, probation, parole, pardon).

10 See below, section VI.

11 In Brazil there are three species of caution arrest: red-handed arrest, when the offender is caught committing or immediately after committing the crime; temporary arrest, determined by a judge for a period of five to thirty days, depending on how serious the offence is, extendable for one equal period, in order to ensure the investigations by the police; preventive arrest, ordered by a judge when the criminal prosecution, the public order or the fulfilment of the punishment are at risk.

12 United Nations Standard Minimum Rules for Non-custodial Measures, adopted and proclaimed by General Assembly Resolution 45/110, 14 December 1990.

13 Restorative justice has been a constant topic since the 1990s in Brazil, where a new Code of Criminal Procedure is presently (January 2010) under Congress’ final analysis. However, penal mediation is not included.

III. THE APPLICATION OF PENALTIES AND CRIME PREVENTION

A. Overcrowding Pushing the System to the Brink

As engaging the attention of the community and enhancing their involvement in the treatment of offenders is not an easy task, Brazil suffers the additional and severe problem of prison overcrowding. Indeed, according to the National Penitentiary Department (“Departamento Penitenciário Nacional” in Portuguese, shorthand DEPEN¹⁴), Brazil is about to reach half million prisoners among 195 million inhabitants. This is the third largest prison population in the world¹⁵, and the country has been struggling to find creative solutions to deal with it. The same organ estimates that Brazil has a correctional facilities capacity for only 300,000 inmates. The National Council of Justice has repeatedly exhorted the state-level justice (responsible for legal supervision over the vast majority of the correctional facilities) to implement solutions such as diversion, sentencing alternatives to imprisonment, and early release programmes, as recently highlighted in the *Twelfth UN Congress on Crime Prevention and Criminal Justice*, held in Salvador, Brazil, from 12-19 April 2010, with the aim to promote more effective crime prevention policies and criminal justice measures throughout the world.

B. Alternative Penalties and Alternative Measures: Ineffectiveness

At this point it is essential to add some information about Brazilian non-custodial penalties and the relation between this issue and overcrowding correctional facilities.

During an workshop on “Strategies and Best Practices against Overcrowding in Correctional Facilities”, held at the *Twelfth UN*

14 An agency linked to the Ministry of Justice, whose attributions are, among others, to plan and co-ordinate the national politics regarding correctional facilities. It is very important to notice that the correctional facilities are under direct control of the states’ Executive Branch, even though criminal judges are in charge of legal supervision over the prisons. Moreover, it was not before 2006 that federal correctional facilities were created, in number of only five.

15 According to Rob Allen (*Effective Countermeasures against Overcrowding of Correctional Facilities*, UNAFEI Resources Material Series n° 80, p. 4), “particularly large rises have recently occurred in Europe, in Turkey and Georgia (both up more than 50 per cent since mid 2006). The largest recent falls in prison population in Europe are in Romania (down 2 per cent since September 2006) and the Netherlands (down 22 per cent since mid 2006, although changes in counting practices may play a part in explaining this). Notable rises elsewhere include those since mid 2006 in Chile (up 28 per cent), Brazil (up 18 per cent) and Indonesia (up 17 per cent)”.

Congress on Crime Prevention and Criminal Justice, Ela Wiecko Volkmer de Castilho comprehensively pointed out that in recent years Brazil carried out legislative and administrative provisions necessary to reduce the use of prison as penalty, following international guidelines, in particular the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules).

They had already started, even though timidly, with the Penal Code reform in 1984. It took better shape with the Law 9.099 of 1995, which created the Summary Courts (in Brazil called Special Courts).

According to Brazilian law, as well recorded by Ela Castilho, alternative penalties are the criminal sanctions other than imprisonment. Among them, the restricting of certain rights, which replace the deprivation of liberty. But there are more and more alternatives that are not substitutive. In turn, alternative measures consist in a large number of legal instruments which avoid sentencing and the application of a penalty, or, post-sentencing, the imprisonment.

Actually, the application of alternative penalties is limited to crimes whose sentencing do not surpass four years imprisonment and that have not been committed with violence or serious threat to the person, or whatever the sentence, if the crime is non-intentional. It requires as objective condition that the defendant is not a recidivist in intentional crimes, as well as an analysis of the reasons, the circumstances of the crime and subjective elements, such as culpability, previous records, social behaviour and personality.

On the other hand, alternative measures are in a minority. Include civil composition, criminal transaction, suspended process, sursis (on probation¹⁶), conditional release (which is similar to parole¹⁷), judicial and legal pardon. The most usual alternative measures are criminal transaction, by which the suspect accepts some restraint in change of not being formally accused, and suspended process, on probation, in crimes for which the maximum penalty, in abstract, not exceed two years in prison. The way both are fulfilled often get mixed up with the pecuniary installment and the community or public services.

However, Castilho remarked (citing Curt Griffiths, Danielle Murdoch and Rodrigo Azevedo) that Brazilian experience shows that these measures are not guarantees of preventing the prison system to get overcrowded. On the contrary, there is the concrete risk that alternative measures and penalties, rather than act as promised to reduce the prison population, increase the punitive control. A key concern with the development of alternatives to prison is that net-widening will occur, wherein additional numbers of persons are brought into the criminal justice system. If this occurs, the net effect will be to increase

¹⁶ An offender on probation is ordered to follow certain conditions set forth by the court.

¹⁷ The release of prisoners based on prisoners promising to abide by certain restrictions.

the numbers of persons under supervision by the justice system and prison population is unlikely to be reduced. This is what happened in Brazil. By creating summary courts, the law boosted the application of alternatives, included cases considered less offensive in the formal justice system, through informal mechanisms for entry and processing. The exemption to the police investigation for crimes submitted to the summary courts retired police authority, which had the prerogative to select the cases considered more relevant, and so close the proceedings of most of small crimes.

Moreover, many Brazilian judges are not likely to either apply nor really enforce these penalties, often seen as waste of time, since they are always overbusy, and a risk of achieving contradicting results.

C. Back to Theory: Sentencing Law

As remarked by Cooter and Ulen¹⁸, any theory of crime must answer two questions: “What acts should be punished?” and “To what extent?” An examination of the sentencing law in a specific country basically involves evaluating the foundations of the right to punish in that country. Although there are valid movements demanding for a stricter criminal justice system, especially in relation to violent and property crime, through harsher criminal penalties (well illustrated by the “Law and order” theme, mainly in the United States, where, for example, “three strikes” and similar laws have been enforced), the right to punish in democratic societies is regarded to be based on its social utility, which means not using the criminal system as a means of dispensing vengeance. The direct goal of criminal punishment is to avoid crimes through the fear of punishment that is instilled in those who may be inclined towards criminal activity.

Sentences are mainly used to avoid potential criminal acts that could harm the social body, guiding citizens away from reprehensible activity. In order to achieve this, the choice of punishment and the way in which it is applied should be seen by the public as more effective and longer lasting (preventive) and, at the same time, less cruel. For a punishment to produce its desired effect, the system seeks to ensure that the penalty applied to the guilty party exceeds any supposed advantage obtained by the offender from his acts. On the other hand, a fair punishment will seek to the least possible severity needed to turn man away from crime. The current trend is that the severe punishment is not the most expedient way of preventing crime, what works best is to fight impunity.

Based on this, sentencing must demonstrate a fair balance

18 Cooter, R. & Ulen, T. (2008). *Law and Economics*. 5 ed. Boston: Pearson, p. 485.

between the crime and the punishment (Tokyo Rules, nº 1), removing the convict from society, if needed, in order to avoid further harm being caused, while allowing this person to return after supposedly being reimbued, in spirit, with the social values of integration and respect in general.

D. Returning to Society

However, if the government and the society refuse to use or do not create effective mechanisms for subsequent reinsertion into the social group, for example by not offering opportunities for work and education, it is practically impossible for such a person to return to society with any kind of outlook for a better future, or to be aware of their dignity as a human being and their obligation to the society they are returning to.

In his seminal treatise *On crime and punishment*, dated from 1764, Cesare Beccaria had already pointed out that the safest, but at the same time most difficult way of discouraging people from crime is by improving their education and through work. Work and education are the best methods of rehabilitation and could be considered a “passport” towards social reinsertion.

In any event, a prisoner has previously been a full member of society and wishes to return to society having fulfilled their sentence. On returning, it is in the prisoner’s best interest to be able to comply with the society’s laws and to avoid returning to a life of crime, otherwise he may place the safety and well-being of others at risk.

Furthermore, Beccaria acknowledges the reciprocal obligations of citizens and society: “If every individual be bound to society, society is equally bound to him, by a contract which from its nature equally binds both parties. This obligation, which descends from the throne to the cottage, and equally binds the highest and lowest of mankind, signifies nothing more than that it is the interest of all, that conventions, which are useful to the greatest number, should be punctually observed. The violation of this compact by any individual is an introduction to anarchy”.

Apart from the psychological approach¹⁹, a convict’s reintegration into society is based on our acknowledgement of human rights and the supreme value of justice, because by continuing to punish a person who was already settled their debt with society, for example by not offering alternative paths upon their release apart from an undesirable return to a life of crime, is a clear violation of the ancient principle *ne bis in idem*, of human rights consecrated by constitutional or statute law all over the

19 SILVA, J. F. da (2012). Psychological discourse in Brazilian criminology. *International Journal of Criminology and Sociological Theory*, vol. 5, nº.3. p. 1016-1035.

world (the “doubled jeopardy clause”), and is in manifest opposition to the broad value of justice.

IV. CENTRAL CONCEPTS: REHABILITATION AND SOCIAL RESPONSIBILITY

A. The Need of Rehabilitation

Despite acknowledging the fact that the goal of any sentence is to rehabilitate, the reality in Brazilian prisons, especially in poorer regions, is a sorry one. Overcrowded prisons generally look more like dirty warehouses for the undesirable, and clearly fail to provide any sort of re-socialization. Another issue we need to look at is re-socialization and re-education for people who have never been taught how to act in society or educated when they were at liberty, as prisoners are very often people who were excluded from society even before they were incarcerated; people with few social opportunities, with little education and unable to live with dignity, whose involvement in a life of delinquency is simply the easiest way of life.

Therefore, the real challenge for the Brazilian prison system is to find effective methods of changing prisoners into citizens, so that when they conclude their sentences, they are able to live in society, as law-abiding citizens. As we have seen, work and education are normally held up as exemplary methods of rehabilitating and re-integrating these individuals into society.

B. Work and Education

According to express provisions of the 1988 Federal Constitution, Brazilian society is founded on the value of work and freedom of initiative, to ensure a dignified existence for everybody, in accordance with the dictates of social justice (article 170).

By acknowledging that work is the driving force behind every society, the State, as the sole holder of the power to punish, is compelled to provide opportunities to prepare convicts in its custody for work, readying them for a return to society and ensuring they can live with dignity. By not putting prisoners on this path, other than simply not qualifying them for their new life outside prison, this attitude puts them back on the tightrope between unemployment, which they are forced to endure because of their lack of qualifications, and a life of crime, which offers them quicker and easier methods of obtaining a livelihood.

The federal law that regulates penalties enforcement (the Prisons

Act²⁰, from 1984) states that we have a social duty and a basic condition of human dignity to offer prisoners work, because of the educational and productive aspects of labour (article 28). Through work, we seek to reinsert the prisoner into society, as work is both educational and productive, representing a social duty and helping re-establish human dignity. Failure to qualify prisoners for the job market facilitates their return to a life of delinquency. Excluding prisoners from the job market can be compared to being sentenced to a slow and gradual decay, without any chance of a return to a productive life in society.

Work and study are siblings: educational objectives, which are also set down in law, especially when the prisoner does not display any professional qualifications, are achieved through activities which take place at the prison in order to teach a profession; productive objectives help avoid idleness and generate financial resources for the convict so that he can meet his civil obligations, support his family, cover his personal expenses and even reimburse the government for maintaining him.

Work distances convicts from vagrancy and provides them with an opportunity to recover their self-esteem. Work, whether manual or intellectual, provides the individual with dignity within his social and family circles. However, prison work clearly does not mean simply executing tasks that nobody else wants to do, or making prisoners work in a situation akin to slavery. This is not the goal of work as part of the process of re-socializing prisoners and recovering their dignity. When enabling the prisoner's return to work, the State should give greater emphasis to skills which have already been acquired and strengthened the sense of involvement in society, and avoid giving the prisoner another reason to believe that he is a pariah.

By educating prisoners through work, we must also take market requirements and realities into account, which includes offering educational support for schooling and professional training. Additionally, education is one of the main paths towards man's evolution and dignity, helping people to fully develop at a personal level and preparing them for citizenship. With this goal in mind, we need to strengthen the values of social awareness and the basic educational process.

C. Right to Remuneration implies Employability

According to article 29 of the Brazilian Prisons Act, remuneration from a prisoner's work should be used to indemnify harm caused by their crime, once provided this has been determined by the courts and reparations have not been made through other channels; to support

20 Known in Portuguese as Penalty Execution Law. It vainly assures humanitarian treatment, the right to health, the right to learn a profession, medical care, legal aid, etc.

the family; for small personal expenses and to reimburse the State for accommodating him in the prison system. It also states that part of any remuneration must be used to create a financial reserve, deposited in a savings account and delivered to the prisoner upon his release. This reserve, which can be redeemed upon returning to society, is a means of covering the cost of the prisoner's basic needs until he can rejoin the job market and sustain himself.

To do that, it is indispensable to level up inmates' employability, marketable skills, thus boosting their possibilities of finding a job after being released.

Beyond remuneration, in Brazil there have been some major initiatives adopted to offer convicts opportunities, including: creating jobs for convicts, agreements between the government and private companies, agreements with educational institutions, greater involvement of society through the Community Boards²¹ and even through nongovernmental organizations (NGOs).

D. Social Responsibility and the Private Sector

The term "social responsibility" has been used with greater emphasis in recent years and is principally an expression that refers to the business ethics and transparency adopted by public or private organizations. It means that the everyday decisions that could have an impact on society, on the environment and on the future of these organizations should be ethical. This idea cannot be prevented from being related to the benefits companies are supposed to arouse in society or even to the participation of private enterprises in the administration of correctional institutions.

From a business standpoint, for example, we can say that something is ethical when the decisions taken by company respect the law and the values and interests of all stakeholders, in this case including common citizens.

E. Business and Social Ethics

From a wider standpoint, we can say that being socially responsible means acting transparently to meet social expectations, maintaining a coherent link between words and actions. This commitment is used to ensure that there is a good relationship between

²¹ According to Brazilian Prisons Act (article 80), Community Boards are community based groups of citizens, appointed by municipalities, entrepreneur associations, and trial courts, whose main function is to help authorities support and supervise released offenders. Although the law is dated from 1984, many judicial districts have not yet seen their members appointed. They can be compared to Canadian "Citizens Advisory Comittes".

a company and its relevant audience.

To expand on the same example, it is no longer acceptable the position that companies only have a duty to their shareholders. They are also accountable to employees, the media, government, nongovernmental agencies and the environmental sector as well as the communities within which they operate. This is because alongside ethics, we also uphold the principle that companies, as social actors, have an active role to play in social progress.

This creates an opening, or rather a need, for the private sector to take on a proactive, committed and socially responsible stance, to the extent that entrepreneurs have become agents of wide-ranging cultural change, contributing to the construction of a fairer and more united society, especially through acknowledgment of their responsibility for developing such a society. Companies (the market), the State (the politically organized society) and individuals (community) are what make up society, in the widest sense, in which each actor has a responsibility for ensuring social balance.

Therefore, private social investment, one of many facets of social responsibility, can be described as the voluntary and planned use of private funds in public interest projects. And contrary to what many people think, private social investment should not be confused with welfare.

F. Private Specific Collaboration: Partnership

While addressing the polemics relying on private companies managing correctional facilities²², we cannot allow prison labour to be

22 While in Japan the PFI correctional facilities (maintained with private management, for sentenced inmates with low criminal tendencies) seem to be well-grounded, Marialda Lima Justino da Cruz argues that in Brazil “discussion of private ownership of correctional facilities is common. Would it be the solution to all problems? Some people are in favour. They believe that those who are imprisoned should compensate society for their crimes, but, in the end, it is the society itself that bears all the expenses. In Brazil, there is not work for all the inmates in the penitentiary system, so, if the administration of the correctional facilities could become private, and was taken out of the obligation of the State, inmates would form ‘potential workers’, because all the inmates could work and all would leave the prison ready to be reintegrated into society. On the other hand, some people are against this proposal. The Brazilian Constitution provides that correctional facilities must be administrated by the State, so some people think that making the administration private would be an unconstitutional measure, that something pertinent to the State itself cannot be delegated to the private sector. Other options are that the State administrates the correctional facilities but it can give other attributions, such as the supplying of food, clothes, legal aid, medical care, etc. to third parties. The delegation of some activities could be implemented without violating the Federal Constitution, and one of the main forms to make this happen is Public Private Partnership” (*Current Legal Regime of Imprisonment in Brazil and Effective Countermeasures against Overcrowding of Correctional*

used solely for a company's economic benefit. Prison labour should also comply with the dictates of social responsibility and be part of the process that seeks to ensure the prisoner's place in society and recover his self-esteem. Therefore, companies willing to invest in helping to rehabilitate these individuals should account for these actions on their social balance sheet and not simply benefit from possible tax breaks to steal a march on their competitors.

When a company uses prison labour solely to minimize costs and thereby avoid the strictures of market competition, this is not social responsibility; government collusion justifying this type of activity is even more reprehensible.

Because of this risk of prison labour being misused, the State is responsible for oversight and enforcement of companies and individuals willing to become involved in re-socialization actions.

VI. REHABILITATION INITIATIVES: THE “BEGIN AGAIN” PROGRAMME

A. Legal Possibilities and Judicial Initiative

There are several possible avenues for convicts' rehabilitation, which can either be applied during the prisoner's sentence or application of other safety measures (restrictions applied to those who are unable to comprehend the criminal nature of their conduct). They can also be applied upon release from prison, after the sentence has been served and the offender is back on the streets.

Despite all the problems regularly brought up, there are some actions, initiatives and programmes currently underway in Brazil which merit our praise²³. One of the programmes that must be highlighted is the “Begin Again” (“Começar de Novo”) project being run by the National Council of Justice, the judicial body created by the recent Constitutional Reform in order to improve the Judiciary administration.

Facilities, UNAFEI Resources Material Series n° 80, pp. 73-74). The same discussion occurs in the United States (Cooter, R. & Ulen, T. (2008). *Law and Economics*. 5 ed. Boston: Pearson, p. 537).

²³ Well-known examples are the Association for Protection and Assistance of Convicted Persons (“Associação de Proteção e Assistência ao Condenado” in Portuguese, shorthand APAC) and the Foundation for Support of Prison Released Offenders (“Fundação de Apoio ao Egresso do Sistema Prisional” in Portuguese, shorthand FAESP). Both are philanthropic organizations: the former is connected to the Catholic Church and can have its roots traced back to the 1980s; the latter was created in 1997 in the southern state of Rio Grande do Sul.

B. “Begin Again” Programme: Background

The “Begin Again” project was created by Resolution 96, dated 27 October 2009, issued by the president of the National Council of Justice. As a backdrop to the project, we need to understand that in Brazil, around 60 to 70% of prisoners are re-offenders, according to estimates from prisoner surveys carried out in criminal and enforcement courts. People are very aware that recidivism has a direct effect on public safety (final *Report of the Twelfth United Nations Congress on Crime Prevention and Criminal Justice*, nº 58), so we should use this as a basis for implementing consistent rehabilitation programmes, alongside other measures.

In addition to its preventive and punitive goals, sentencing should also provide a basis for a prisoner’s return to society. Within this context, there is clearly a need for participation and integration involving the government – in this case the National Council of Justice – and society in the sentencing process, specifically its preventive, punitive and social reintegration functions.

The main stakeholders are the prisoners themselves, mainly those who have left the prison system, as well as those serving alternative sentences (for lesser crimes, some criminals are not sentenced to incarceration but lose certain liberties²⁴). Secondary stakeholders are public bodies, the Judiciary, organizations involved in public safety, Community Boards, companies, nongovernmental organizations and everybody who wants to see a rehabilitated individual returning to society and who wants to prevent crime and increase public safety.

According to the terms of article 1 of Brazilian Prisons Act, prisons and sentencing law aims to apply the sentence or decision and help those convicted or imprisoned return to society. The act covers a range of issues, not just sentencing but also measures for social rehabilitation as well as a minimum set of rules on how to treat convicts and persons serving alternative sentences.

C. “Begin Again” Programme: Framework

The “Begin Again” programme involves a range of activities to increase awareness in government bodies and throughout society in order to coordinate a nationwide work and professional training programmes for prisoners and those leaving the prison system, in order to establish citizenship programmes and reduce re-offending.

To achieve this, the programme’s initiatives include: (i) a

24 As weekend limitation (remain at home), temporary rights interdiction (prohibition of going to specific places), rendering of community services (performed for the benefit of hospitals, schools, orphanages, etc.).

mobilization campaign to create a citizenship network supporting re-socialization; (ii) partnerships with industry associations, civil organizations and government bodies, to support rehabilitation activities; (iii) strengthen the Community Boards (“Conselhos da Comunidade”) so that they can fulfil their main legal role – providing social reintegration for prisoners or persons serving alternative sentences; (iv) play a role in social services in order to select project beneficiaries; (v) create a database of professional training, education and work opportunities; (vi) oversee targets and indicators accompanying social reinsertion.

These activities include prison surveys, permanently underway throughout the country, to evaluate the prisoners’ conditions in terms of their sentences, and agreements supposed to be concluded between the prison facilities boards and civic associations or private companies, or even with business and union organizations (e.g. SENAI²⁵, SENAC²⁶, SESI²⁷ and FIESP²⁸), always to provide prisoners with training and professional relocation. These agreements are core instruments of action proposed by the programme, and the most fruitful among them are expected to be disseminated nationwide by the Council itself.

The programme also created the “Jobs Market” so that the National Council of Justice can centralize job offers from companies wishing to take part in the project. Information on positions open is submitted to the criminal enforcement courts in each state.

Project indicators and targets evaluate prisoners, former prisoners and those serving alternative sentences; the number of prisoners in each state; and the number of jobs offered.

The advertisement of the programme includes films produced for TV²⁹ and spots for radio³⁰, in addition to flyers distributed in courts, police stations, correctional facilities, schools, and stadiums, trying to draw attention to the necessity of the reintegration of ex-offenders in the work market and in society.

D. “Begin Again” Programme: Recidivism as a Main Target

The level of repeat offenses – the recidivism rates – is periodically calculated based on the percentage of people involved in the project

25 National Service for Industrial Apprenticeship, “Serviço Nacional de Aprendizagem Industrial” in Portuguese.

26 National Service for Commercial Apprenticeship, “Serviço Nacional de Aprendizagem Comercial” in Portuguese.

27 Industry Social Service, “Serviço Social da Indústria” in Portuguese.

28 Industrial Federation of São Paulo Industries, “Federação das Indústrias do Estado de São Paulo” – the most powerful industries association in Latin America.

29 See <http://www.youtube.com/cnj#p/search/2/jB0ye2qmZGM> (in Portuguese).

30 See <http://www.youtube.com/cnj#p/search/0/yDxbrk8TkWE> (in Portuguese).

who have been imprisoned, indicted or convicted after beginning the course or job.

In the short term, the target is to reduce the recidivism rate to 20% and to maintain this level for a number of years and monitoring figures quarterly. The jobs index is based on the number of courses or job openings offered to the local prison population.

Another major problem that the National Council of Justice has sought to address is the high level of social rejection of former prisoners, who bear the stigma of being ex-convicts. Social prejudice convicts these people for their criminal behaviour, and rejects them when they leave jail, is one of the main drivers behind the high levels of re-offending, creating a situation which favours an increase in violence and general insecurity.

The National Council of Justice has been running campaigns in the media and with public security organizations (the Judiciary, the Public Prosecutors Offices and the Police), to increase society's awareness of this fact and minimize it (Tokyo Rules, nº 18). In 2009 there were frequent spots on TV and radio drawing attention to the "second chance" offenders should receive.

E. "Begin Again" Programme: Preliminary Results and Future Directions

As stressed by Supreme Court Justice Gilmar Mendes at the 10th High-Level Plenary Meeting of the *Twelfth UN Congress on Crime Prevention and Criminal Justice*, agreed that criminal justice systems throughout the world faced similar problems, especially in relation to their prison systems. The Brazilian groups that had studied the country's prison situation reported it as "chaotic": there had been great failures in prosecution procedures, wracked by inertia and inefficiency. On the other hand, there is a prevailing sense of impunity amongst common citizens, high rates of recidivism and prison rebellions. The criminal justice system is considered to make excessive use of pre-trial detention.

Another problem is that some courts lack well trained-personnel, with the specific technical knowledge their functions require, and there are not enough defenders to represent the thousands of individuals in custody while awaiting trial. The accurate studies provided by the programme had shown a sort of "prison deficit", with the number of inmates overshooting the actual space in prisons by almost 200,000 places. That number was growing by roughly 7% each year, apart from the fact that there are thousands of arrest warrants still to be executed. Initial efforts to reduce overcrowding by releasing individuals found to be "unduly imprisoned" had helped, as had guidelines issued to rationalize prison expenditure. Those actions had resulted in the

equivalent of 50 midsized prisons in freed-up space.

Justice Gilmar Mendes, however, warned that all those efforts would go for nought unless Brazil moved on to a second stage, in which the prison situation is able to change permanently. To start with, the country would require voluntary to strengthen the already existing task forces, as it would also need a management plan for criminal courts. The central part of the “Begin Again” project (to reduce re-offending) should be expanded, with a view to reducing recidivism to 20% in the first year, reducing the prison population by 10% each year. The programme, which has been seen positively by the public, made provisions to help find jobs for 10,000 ex-offenders in 2010, with the help of civil society and business.

In the mentioned period (2009-2010) the National Council of Justice worked closely on such efforts with various other relevant ministries, including the Ministry of Justice. In addition to modernizing the penal system, the goal is to increase transparency and make procedural processes effective and efficient.

VII. FINAL COMMENTS

The concept behind applying and enforcing convictions aims to remove the convict from society, to avoid further harm, allowing the prisoner to return to society after they have reabsorbed social values. In other words, offenders are considered harmful and are removed from society in order to preserve society’s benefits (life, liberty, property), offering a possibility of social reintegration when they are ready to live according to socially acceptable rules.

Therefore, we need effective mechanisms that support reintegration, so that the former convict can reclaim his status as a citizen who is aware of his dignity as a human being and his obligations to the society in which he will live.

Prisoner re-socialization is a key concept in preventing crime. Re-socialization is in society’s own interests, as the convict will return to society after completing his sentence and, on his return, he must be able to abide by society’s laws and not return to crime, otherwise he may place the security and well-being of other members of society at risk.

The current challenge facing prison systems is finding effective methods of rehabilitating and reintegrating these people into society, so that they are capable of living in society when they have finished their sentences. Work and education are common themes.

Offering work to a prisoner, however, clearly does not mean simply executing tasks that nobody else wants to do, or making him work in a situation akin to slavery. This is not the goal of work as part

of the process of re-socializing prisoners and recovering their dignity.

Prisoner work qualifications are strengthened through professional training and education, taking into account individual skills and capabilities and market requirements, while also instilling a sense of societal participation. The whole of society must share the responsibility for re-socializing the individual: the State, companies and civil society.

From the initiatives we have looked at in Brazil, where the *Twelfth UN Congress on Crime Prevention and Criminal Justice* took place (Salvador, Bahia, April 2010), the “Begin Again” programme, being run by the National Council of Justice, is one of the most promising and merits the attention of everybody interested in new methods of crime prevention, because by re-socializing former prisoners and giving them a second chance, we will have a better chance of building a fairer, more solid and fraternal society, echoing the high priority the *Workshop on Strategies and Best Practices against Overcrowding in Correctional Facilities* called upon since its background papers.

This is not a Sisyphean distraction. Many initiatives of job placement for ex-offenders, perhaps better, have been seen around the world³¹, as the British Business in the Community³², whose sound perspective outfits an excellent summary of what this paper tried to focus on: “A good stable job is the single greatest factor in reducing reoffending. Not only does it provide individuals with the necessary resources and self-esteem to improve their lives but benefits all sections of society through reduced levels of crime”. What distinguishes the initiative championed by the National Council of Justice is that it stems from the Judiciary itself, and that is something that deserves special attention.

CITED REFERENCES

31 A good example is given by Yun Young Lee in UNAFEI Resources Material Series n° 82, pp. 66-71: the “Support Comitee for Job Finding and Business Start-ups”, established by the Korea Correctional Service.

32 Steve Pitts clarifies that “Business in the Community (BIC) is an independent business-led charity with more than 830 companies in membership. Through its ‘Unlocking Talent’ programme, BIC aims to develop the skills and talent of the workforce as some of its members work in support of Corporate Social Responsibility. BIC has a specific offender-employment initiative: this work is itself as example of partnership between National Offender Management Service and the private sector: work on employing ex-offenders is sponsored by the Barrow Cadbury Trust” (*The Effective Resettlement of Offenders by Strengthening ‘Community Reintegration Factors’*, UNAFEI Resources Material Series n° 82, p. 18).

- ALLEN, R. (2010). *Effective Countermeasures against Overcrowding of Correctional Facilities*, UNAFEI Resources Material Series n° 80. Tokyo: UNAFEI. p. 3-16.
- CRUZ, M. L. J. da (2010). *Current Legal Regime of Imprisonment in Brazil and Effective Countermeasures against Overcrowding of Correctional Facilities*, UNAFEI Resources Material Series n° 80. Tokyo: UNAFEI. p. 72-85.
- COOTER, R. & ULEN, T. (2008). *Law and Economics*. 5 ed. Boston: Pearson.
- LEE, Y. Y. (2010) *Effective Resettlement of Offenders by Strengthening 'Community Reintegration Factors'*: Country Report – Korea, UNAFEI Resources Material Series n° 82. Tokyo: UNAFEI. p. 66-71.
- PITTS, S. (2010). *The Effective Resettlement of Offenders by Strengthening 'Community Reintegration Factors'*, UNAFEI Resources Material Series n° 82. Tokyo: UNAFEI. p. 3-26.
- ŠARCEVIC, S. (2000). Legal translation and translation theory: a receiver-oriented approach, *Legal translation: history, theory/ies and practice*. International colloquium University of Geneva, February 17-19, 2000: [proceedings]. - Berne: ASTTI.
- SILVA, J. F. da (2012). Psychological discourse in Brazilian criminology. *International Journal of Criminology and Sociological Theory*, vol. 5, n° 3. p. 1016-1035.
- VENUTTI, L. (1995). *The Translator's Invisibility*. Routledge: London and New York.

SOME THOUGHTS ON PRISON CONDITIONS, HUMAN DIGNITY AND URBAN VIOLENCE UNDER BRAZILIAN LAW¹

Ana Paula Barcellos

Professor of Constitutional Law at Universidade do Estado do
Rio de Janeiro, Brazil.

Abstract: The paper deals with a situation that perhaps represents one of the most radical and profound challenges to the claim that contemporaneous western societies – and Brazilian society in particular – share the values concerning equality and essential or ontological dignity of mankind. It is an attempt to investigate how Brazilian society, immersed in a context of fear as a result of urban violence, deals with its prison population. This paper is divided into three main parts. Part one deals with a situation of fact: traditional, ongoing, generalized, serious and practically institutionalized violation of the fundamental rights of prison inmates in Brazil. This situation of fact easily leads one to conclude that inmates in Brazil are not treated like human beings (and are probably not even considered as human beings). Part two is an attempt to examine some possible explanations of why this situation exists. In part three, the paper tries to suggest that there is a connection between how prisoners are treated and the current level of urban violence in Brazil as a contributing factor. Considering that neither the principle of human dignity nor the actions of the legal system have been able to change the scenario that has built up in recent decades, perhaps it would be useful to suggest that inhumane treatment of inmates is not just a problem restricted to prisons: society as a whole receives the effects of this policy in the form of more violence.

Keywords: Aprison Conditions - Urban Violence - Human Rights - Brazil.

I. APPALLING PRISON CONDITIONS IN BRAZIL

The Brazilian penal system has many serious problems. So many, in fact, that the President of the Brazilian Federal Supreme Court

¹ Version of the paper published in the annals of the *Seminario en Latinoamérica de Teoría Constitucional y Política* (SELA) organized by Yale University. Available at: http://www.law.yale.edu/documents/pdf/sela/Barcellos_Eng_CV_20100504.pdf Accessed on October 03, 2014.

was quoted as saying at the 12th United Nations Congress on Crime Prevention and Criminal Justice held in Salvador, Brazil in April 2010 that Brazil's "prison system is on the brink of total collapse."² All of these problems cannot be described here in a comprehensive way, but one in particular is worth to highlight. It is perhaps the most elementary of all - one that leads to various others: overcrowding. According to official data published in June of 2014, Brazil's prisons have exceeded their capacity by (at least) 210 thousand inmates, for whom there is no physical space.³ Consequently, inmates are literally crammed into prison and jail cells. At several locations in Brazil, prisoners are kept standing in the corridors of police stations and confinement in containers was also reported. This overcrowding makes impossible to separate inmates by their age or the seriousness of their crimes. Brazil is experiencing situations where women and men are kept together in the same cell.⁴ Below is some concrete data that will give the reader a better idea of how real this situation is.

From mid-2007 to mid-2008, a Congressional Investigating Committee (CPI) organized by the Chamber of Deputies investigated the Brazilian penal system, arriving at alarming conclusions that were widely publicized.⁵ According to December 2007 data, the Brazilian inmate population was estimated at 422,590. However, Brazil's prison capacity was only 275,194. The CPI report concluded that none of the existing prisons are in compliance with Brazilian legislation that has been in effect since 1984, requiring that each convict be lodged in an individual cell equipped with a bed, a toilet and a sink, with a minimum of 6m² of space each. The CPI reported that overcrowding is not a new problem: it has existed at least since the beginning of the 19th century. Specialized historians confirm that, in fact, overcrowding in the prison system is not a recent phenomenon.⁶ The 'New Diagnostic about Inmates in Brazil'⁷, published by the National Council of Justice in June

2 Available online at: <www.conjur.com.br/2010-abr-15/deficiencia-sistema-carcerario-beira-falencia-total-peluso>. Accessed on April 18, 2010. Interesting enough, the comment the National Penitentiary Department Chief made about the Chief Justice of the Brazilian Supreme Court's statement was that this problem has existed for decades.

3 This is official information (relative to year 2014) contained on the website of the National Council of Justice (CNJ). Available at: <http://www.cnj.jus.br/images/imprensa/diagnostico_de_pessoas_presas_correcao.pdf> Accessed on July 09, 2014.

4 In the year 2007 at least 5 cases were reported of woman who were kept in the same cell as men. At least one of them reported having been sexually abused (available at: <noticias.terra.com.br/brasil/interna/0,OI2099518-EI5030,00.html>; accessed on April 16, 2010).

5 The entire final report is available at <bd.camara.gov.br/bd/handle/bdcamara/2701>. Accessed on July 14, 2014.

6 MAIA, Clarissa Nunes, SÁ NETO, Flávio de, COSTA, Marcos, BRETAS, Marcos Luiz (org.), *História das prisões no Brasil* [History of the Prisons in Brazil] (volumes I and II), 2009.

7 This report, already referred on the 3rd note of this paper, can be accessed through the

2014, is still more frightful and confirms that the prison conditions are getting worse as time passes. In accordance to the mentioned report, the Brazilian prisons house about 563.526 inmates, but they could offer appropriate places for just 357.219 of them.

If we consider the total number of people arrested (including those who are in home confinement) plus the number of warrants of arrests issued but not executed, we would achieve the impressive number of 1.085.454 people, and the vacancy deficit would be over 720 thousand.

Returning to the CPI's report, besides overcrowding, other serious but routine problems were observed in several states of the Brazilian Federation. Prisoners often lacked access to what we would consider minimum amounts of water necessary for basic hygiene or consumption. Another problem is that cells were frequently contaminated by overflowing sewage lines and the permanent accumulation of garbage, including human feces. In addition, urine was often kept in soft-drink bottles in the corners of cells, since there are not enough sanitary facilities. The CPI report cited several examples in which there was only one toilet for more than 70 inmates in a single cell, whose flush mechanism did not work and in which water was poured just once a day for flushing purposes. The result, obviously, was a total lack of hygiene, intolerable odor and proliferation of various types of insects and vermin. These toilet stalls often had no doors and the inmates were forced to use them in full view of dozens of other inmates who occupied the same cell, that is, when the toilet was more than just a hole in the floor. Water for the prisoners to wash their hands after using the toilet was quite rare.

The CPI also described cases where, as a rule, there were no mattresses or not nearly enough, when they existed at all. The food was usually insufficient and of poor quality, when not spoiled. In many prisons the food was served in plastic bags and inmates had to eat it with their bare hands because eating utensils were not provided. Clothing was also not provided. Lack of these items (mattress, clothing, food, etc.) has led to the growth of a flourishing black market inside these establishments. Another problem observed was the lack of any means to control the temperature in the cells, which often rose to almost 50 degrees Celsius in the summer.

A document dated September 2007, prepared by the Ministry of Justice, part of the Federal Executive Branch, titled the "National Penitentiary Policy Plan," stipulated as the first of its priorities for officials responsible for conducting and carrying out the penitentiary policy in Brazil the need to release funds for the construction and

following link: <http://www.cnj.jus.br/images/impressa/diagnostico_de_pessoas_presas_correcao.pdf> Accessed on July 09, 2014.

remodeling of prisons.⁸ In June 2008, the National Department of Penitentiaries, also part of the Federal Executive Branch, issued a publication identified as “Consolidated Data,” containing information regarding the profile and evolution of the Brazilian prison population from 2003 to 2007, in which overcrowding was evident.⁹

In spite of the work and conclusions of the CPI and the documents referred to above, produced within the Federal Executive Branch, the reality of Brazil’s prison conditions does not appear to have changed significantly in recent years. According to information provided by the Office of Public Defenders of São Paulo – the richest and most developed state in Brazil – in 2008, 59 of the 64 public women’s jails in São Paulo were operating greatly beyond their capacity. There were 4,057 female inmates in a system that could house only 1,687. In September 2008, a lower-court judge granted a request by the Office of Public Defenders to close down one of these units - a Public Women’s Jail located in the municipality of São Bernardo do Campo, São Paulo. It held 193 inmates but only had a capacity for 32. It lacked mattresses and hygienic and medical supplies for the prisoners. At the public women’s prison in Indaiatuba, also in the state of São Paulo, each single-size mattress was being shared by three inmates. Others were forced to sleep in the bathroom due to lack of space. Without any personal hygienic supplies, the prisoners had to use the insides of bread loaves as an absorbent.¹⁰

In February 2009, the overcrowding in the central prison of Porto Alegre, in the state of Rio Grande do Sul, was so bad that each inmate occupied an average of just 1.71m², with many cells averaging as little as 0.45m² per inmate. The prison held 4 thousand inmates more than its capacity.¹¹ In the state of Espírito Santo, one cell with a capacity for 36 inmates housed 256 inmates, all of whom shared a single bathroom (data in May 2009). That same state also kept prisoners, in containers, including minors.¹² One report told of 34 people housed in

8 V. <<http://portal.mj.gov.br/cnpecp>>.

9 Available online at: <<http://portal.mj.gov.br/cnpecp/data/Pages/MJD574E9CEITEMIDC-37B2AE94C6840068B1624D28407509CPTBRNN.htm>>. Accessed on: July 14, 2014.

10 Available online at: <www.defensoria.sp.gov.br/dpesp/Conteudos/Noticias/NoticiaMostra.aspx?idItem=3109&idPagina=3260>, accessed on July 14, 2014. After several riots, the jail at Indaiatuba was officially deactivated in June 2009 and the inmates were transferred to other prisons in the state.

11 Available online at: <www.conjur.com.br/2009-fev-09/juiza-manda-estado-rs-criar-mil-vagas-presidios> (accessed on July 14, 2014). Faced with this situation, the court’s decision called for the progressive creation of space for almost 4 thousand inmates in the state. The decision was appealed by the state of Rio Grande do Sul and, on July 14, 2014, a decision of the State Court of Appeals was still pending.

12 Available online at: <http://ultimainstancia.uol.com.br/new_site/novonoticias/CNJ+PE-DE+SOCORRO+MEDICO+A+PRESOS+EM+CELA+HIPERLOTADA+NO+ES_63953.shtml>. Accessed on April 11, 2010.

a container with no bars or windows who were not allowed out in the sunlight and fresh air. The states of Santa Catarina and Pará also kept prisoners in containers as a way of emptying out the local jails, which were overcrowded with inmates.¹³ In the state of Paraíba (data from May 2009), the situation was critical at all the prison units. Just as an example, one prison with a capacity for 400 inmates was housing 1,100. The available bathrooms had no doors, the toilets were broken and the floor was wet from backed-up sewer lines.¹⁴

The news about the degrading situation of Brazil's prison population has already had repercussions abroad and even mobilized intervention by international human rights organizations. In 2002 the Interamerican Court of Human Rights ordered Brazil to implement a series of measures to guarantee the life and physical integrity of the prisoners at one of the biggest prisons in the country's northern region (*Urso Branco* Prison in *Rondônia*). The orders of the OAS Court were not complied with and in October 2009 Brazil was required to go before the Court once again to explain what was going on at that same prison¹⁵. In 2011 The Court suspended the orders in view of an agreement signed by federal and state Brazilian authorities to deal with the problems¹⁶. In 2014, however, it seems not much has been accomplished. A report from the National Council of Justice continued to point out the dramatic conditions of *Urso Branco*¹⁷. The conditions at the prisons in the state of *Espírito Santo* also resulted in Brazil being summoned by the UN to provide explanations in 2010. At a parallel session of the 13th Meeting of the UN's Council on Human Rights held in March 2010, Brazil's representatives had to respond to accusations received by that organization¹⁸. A report from 2012, produced by the Ministry of Justice, shows that some progress has been made since then, although many problems persist¹⁹.

13 Available online at: <http://ultimainstancia.uol.com.br/noticia/SUPERLOTACAO+CARCERARIA+FAZ+COM+QUE+ESTADOS+MANTENHAM+PRESOS+EM+CONTEINERES_67177.shtml>. Accessed on April 11, 2010.

14 Available online at: <http://ultimainstancia.uol.com.br/new_site/novonoticias/SITUACAO+DE+PRESIDIO+NA+PARAIBA+NAO+PODERIA+SER+PIOR+DIZ+PROCURADOR_64067.shtml>. Accessed on April 11, 2010.

15 Available online at: <http://ultimainstancia.uol.com.br/noticia/BRASIL+SE+EXPLICA+A+CORTE+DA+OEA+POR+CAOS+EM+PRESIDIO+DE+RONDONIA_66000.shtml>. Accessed on April 18, 2010.

16 The agreement is available at http://portal.mj.gov.br/sedh/internacional/Pacto%20-%20Urso%20Branco_assinado.pdf. Accessed on July 11, 2014.

17 <http://www.cnj.jus.br/noticias/cnj/28812:relatorio-do-cnj-cobra-providencias-para-frear-mortes-no-presidio-urso-brancoro>. Accessed on July 11, 2014.

18 <http://noticias.uol.com.br/cotidiano/ultimas-noticias/2010/03/15/violacao-de-direitos-humanos-em-presidios-do-es-sera-discutida-na-onu.htm>. Accessed on July 11, 2014.

19 <http://portal.mj.gov.br/main.asp?View={E9614C8C-C25C-4BF3-A238-98576348F0B6>

There is no need to continue describing this spectacle of horrors, but some conclusions can be drawn at this point. Although it is a kind of truism, the first conclusion we can arrive at is that the treatment given to inmates in Brazil, as described above, is a gross violation of human rights and it will be able for us to get further into this point later on. The second conclusion is that the violation of prisoners' human rights in Brazil constitutes normal treatment (from a statistical standpoint) of that segment of the population. It seems correct to say that in any prison system anywhere in the world eventual violations of the rights of prisoners can always be observed. The difference is that in other parts of the world these violations are an exception, a deviation from the norm, to be punished by Law. Just as in any other area in which individuals can exercise their liberty, there will always be a certain percentage that deviates from the standard defined by Law. This is why the very existence of the Law is necessary. In Brazil, however, violation is not the exception: it is the rule. This is not a case of occasional or localized deviation, but of a general standard observed in Brazil as a whole. Adequate treatment is the exception. The third conclusion is that this inhumane treatment of prisoners does not constitute anything new in the history of Brazil.

II. WHY? TESTING SOME EXPLANATIONS

What explanations could there be for the picture it has just been painted? Why has Brazil treated its prison population so cruelly and inhumanely for so long? Why did this picture not change, for example, after the return of democracy in the 1980s and, particularly, after the enactment of the Constitution of 1988? It is necessary to recognize that the theoretical effort to identify these explanations will require a comprehensive multi-disciplined investigation that is outside the scope of this paper. Nevertheless, although it is not feasible to demonstrate fundamentally what causes led directly to the picture described above, it is possible to identify some "non-explanations," that is: some causes one could even cogitate to explain the problem but which, in reality, are not relevant or whose relevance is significantly reduced. The usefulness of identifying non-explanations is to exclude them at the beginning of the debate (or at least demonstrate their lack of relevance to the debate) in order to facilitate our approximation to the causes that, in fact, are relevant. Some *non-explanations* will be enunciated and examined below and, at the end of this topic, a positive explanation for this phenomenon will also be considered.

1. The first possible explanation for the deplorable conditions in Brazil's penal system – which is, strictly speaking, a non-explanation, as we will show – is the following. Brazil, for particular cultural reasons, perhaps does not share the international consensus regarding human rights in general, and of prison inmates in particular, resulting in the Brazilian penal system described above. It so happens that this statement clearly does not correspond to the reality of Brazilian manifestations regarding this subject. Besides supporting major international documents for the protection of human rights, such as the Universal Declaration of Human Rights,²⁰ the Interamerican Convention on Human Rights²¹ and,²² the International Pact on Civil and Political Rights^{23 24} –, which already contain provisions regarding the rights of inmates –, Brazil has also endorsed international documents dealing specifically with the rights of suspects, convicts and prisoners. Some examples are the United Nations Convention against Torture and Other Forms of Cruel, Inhumane or Degrading Treatment or Punishment²⁵ (and Additional Protocol ²⁶), the Interamerican Convention to Prevent and Punish Those Who Commit Torture,²⁷ the Convention relative

20 Universal Declaration of Human Rights: “Article V. No one shall be subjected to torture or cruel, inhumane or degrading treatment or punishment.”

21 Decree no. 678/1992.

22 ICHR: “Article 7 Right to personal liberty: 5. Any person detained or held must be taken without delay to the presence of a judge or other authority authorized by law to exercise judicial functions and has the right to be judged within a reasonable period of time or else be set free, without detriment to the prosecution of the case. His/her freedom can be conditioned to guarantees that assure his/her appearance in court. 6. Any person deprived of freedom has the right to seek recourse from an authorized judge or court, and for the latter to decide, without delay, the legality of his/her arrest or detention and order his/her release if his/her arrest or detention are deemed illegal. In the States whose laws stipulate that any person threatened with loss of his/her freedom has the right to seek recourse from an authorized judge or court to decide the legality of such threat, such recourse may not be restricted or abolished. The request for recourse may be filed directly by the person or by another person. 7. No one may be detained for debts. This principle does not limit the orders of the authorized judicial authority issued by virtue of default of an obligation to provide food.”

23 Decree no. 592/92.

24 International Pact on Civil and Political Rights: “Article 7 – No one may be subjected to torture or to cruel, inhumane or degrading treatment. Above all, it is forbidden to subject any person to medical or scientific experiments without that person's consent. Article 10 - 3. The penitentiary regimen shall consist of a treatment whose purpose is to morally reform and rehabilitate the prisoners. Juvenile delinquents shall be separated from the adults and receive treatment appropriate to their age and legal condition.”

25 Decree no. 40/1991.

26 Decree no. 6.085/2007.

27 Decree no. 98.386/1989.

to the Treatment of Prisoners of War,²⁸ the Minimum Rules for the Treatment of Prisoners²⁹ and the Tokyo Rules – minimum rules of the United Nations for the preparation of non-private measures of liberty.³⁰ Thus, to attribute the degradation of the Brazilian penal system to an alleged cultural trait of the country, saying that it has a different view of human rights, would simply not be a true explanation of the problem.

2. A second possible explanation – also, in reality, a non-explanation – involves the fragility of Brazilian Law in relation to this topic. As we all know, it is not uncommon for countries to commit themselves to certain policies on the international stage, but with no intention of implementing them domestically. Thus, it would be possible to cogitate the following explanation for the appalling conditions of Brazil's penal system: in spite of Brazil's international commitment to human rights in general and to the rights of prison inmates in particular, Brazil's domestic legislation does not reflect this concern. But it just so happens that this explanation also fails to correspond to the reality of internal Brazilian law. The Brazilian Constitution of 1988 guarantees prison inmates a series of specific rights, in addition to the traditional rights of due process of law. The Constitution expressly stipulates, for example, the prison inmates' right to physical and moral integrity, the right to serve their prison sentence in different establishments depending on the nature of their crime, their age and gender and the right of female inmates to be with their children during the breast-feeding phase. The Constitution forbids cruel punishment and establishes the dignity of man and woman as a principle of the Republic.³¹

Even before the Constitution of 1988, a law had been enacted that describes in great detail the rights of inmates in the context of their incarceration: Law no. 7.210, of July 11, 1984 – the Law of Penal Execution. Ten years later, in 1994, Supplemental Law no. 79 was

28 Decree no. 22.435/1933.

29 Incorporated in Brazil by Resolution no. 14/1994 of the National Council of Criminal and Penal Policy (CNPCP), which establishes the minimum rules for the treatment of inmates in Brazil. Their text is not identical.

30 Successive revisions to the Penal Code and Law of Alternative Penalties (Law no. 9.714, of November 25, 1998, which also altered the Penal Code) incorporated some guidance to the Rules.

31 The Brazilian Constitution of 1988: "Article 1, III – establishes the principle of the dignity of man as a fundamental [principle] of the Federative Republic of Brazil; (...) Article 5 (...) XLVII – there will be no penalty: (a) of death, except in the case of declared war, according to the terms of article 84, XIX; (b) of a perpetual nature; (c) of forced labor; (d) of banishment; (e) of a cruel nature; XLVIII – the sentence shall be served in different establishments, according to the nature of the crime, the age and gender of the convict; XLIX – prisoners are assured that their physical and moral integrity will be respected; L – female prisoners shall be assured conditions that allow them to remain with their children during the breastfeeding period."

enacted, creating the National Penitentiary Fund (FUNPEN) and listing the resources that ought to be directed to it. FUNPEN's resources should be used to build, remodel, expand and improve penal establishments, as well as for other activities necessary to modernize and improve Brazilian penitentiaries.³² Among the rights of prisoners included in Law no. 7.201/84 were the right to be housed in an individual cell with a minimum of 6m² of area, equipped with a bed, a toilet and a sink and some means to control air flow and temperature, the right to receive food and clothing and have access to hygienic installations, the right to receive medical treatment, including medical, dental and pharmaceutical service, the right to educational instruction and the right to legal assistance if unable to afford an attorney, among other things.³³ With regard to legal assistance and with the purpose of expanding access thereto by those who cannot afford it, the Constitution of 1988 called for the creation of the Office of Public Defenders to serve those in need of legal service, who are also able to file judicial actions free of charge (article 5, LXXIV and article 134). The Constitution also attributed to the Public Prosecutor Office [Ministério Público] the duty to defend class and diffused interests (article 129).

The conclusion here is also that it is not possible to explain the picture of disrespect of the rights of inmates based on the argument that Brazilian Law is fragile or remiss in regard to this subject. On the

32 Supplemental Law no. 79/94: "Article 1 This law hereby institutes within the Ministry of Justice, the National Penitentiary Fund (FUNPEN), to be governed by the Department of Penitentiary Matters of the Office of the Secretary of Rights, Citizenship and Justice, with the purpose of providing funds and the means for financing and supporting the activities and programs for the modernization and improvement of the Brazilian Penitentiary System. (...) Article 3 The FUNPEN funds will be applied in: I - constructing, remodeling, expanding and improving penal establishments."

33 Law no. 7.210/84: "Article 10. The State has the duty to provide assistance to prisoners and interned persons aimed at preventing crime and guiding their return to life in society. Sole paragraph. The assistance shall extend to their release. Article 11. Assistance shall be: I - material; II - medical; III - legal; IV - educational; V - social; VI - religious. Article 12. Material assistance to prisoners and inmates shall consist of the supply of food, clothing and hygienic installations. (...) Article 14. Healthcare assistance to prisoners and interned persons of a preventive and curative nature shall include medical, pharmaceutical and dental care. Article 15. Legal assistance is intended for prisoners and interned persons who do not have the financial resources necessary to hire an attorney. (...) Article 17. Educational assistance will include providing the prisoner and interned person with scholastic instruction and professional training. (...) Article 22. The purpose of social assistance is to help prisoners and interned persons prepare for their return to liberty. (...) Article 88. Convicts shall be housed in individual cells that will contain a bed, a toilet and a sink. Sole paragraph. The following are basic cell requirements: a) healthy environment in terms of air circulation, protection from the sun, and adequate temperature control for human existence; b) a minimum of 6.0 m² (six square meters)."

contrary, although inmates probably constitute the group least capable of participating in a public debate regarding their rights, Brazilian legislation is considered one of the most progressive in the world. We cannot blame the Law.

3. A third explanation that may refer to the overcrowded Brazilian prison system would be that this is a very recent and unexpected problem and that, for this reason, the public authorities were unprepared. Everything was fine until, suddenly, something unexpected triggered enormous overcrowding in the prisons and there was not enough time for the public policies that were adopted to produce the desired effects of minimizing the problem. This explanation is also unreal but deserves specific attention. It is true that the prison population grew 37% between 2003 and 2007, whereas the Brazilian population grew little more than 5% in the same period. So there was a relevant increase in the prison population in recent years. It is also true that many temporary arrests were made in Brazil (namely: persons arrested but not officially sentenced) that contributed to the system's overcrowded conditions.³⁴

Nevertheless, although one cannot ignore the impact of the recent increase in prison inmates on the problem of overcrowded prisons, it would not be correct to conclude that this phenomenon observed above all from 2003 to 2007, is *the* explanation for the chaos that exists in the Brazilian penal system. First of all, the overcrowding of Brazilian prisons did not suddenly begin in 2003. The problem goes way back to the 19th Century and continuously worsened throughout the 20th century. The Brazilian authorities responsible for penitentiary policy recognize that the overcrowding situation has been very serious for at least the past 40 years,³⁵ with specific legislation having been enacted more than 25 years ago to establish standard prison condition requirements that, so far, have not been met by practically any of Brazil's prisons.

On the other hand, strictly speaking there was nothing unpredictable about the progressive and relevant increase in the Brazilian prison population. Although there are no precise statistics in Brazil in this regard, it is estimated that there could be as many as 300 thousand outstanding arrest warrants.³⁶ Data gathered in the state of Rio

34 One of the recent initiatives of the National Council of Justice in the attempt to minimize overcrowding is the performance of free work (*mutirões*) to examine the situation of temporary prisoners and release those held illegally (<www.cnj.jus.br>).

35 Available online at: <www.conjur.com.br/2010-abr-15/deficiencia-sistema-carcerario-beira-falencia-total-peluso>. Accessed on April 18, 2010.

36 Available online at: <www.conjur.com.br/2010-fev-27/ninguem-sabe-quantos-sao-mandados-prisao-nao-cumpridos-brasil>. Accessed on July 14, 2014. As long these same lines, see the Report of the Institute for Human Rights of the International Bar Association (*Um em cada cinco: a crise nas prisões e no sistema de justiça criminal brasileiro*) [One in

de Janeiro reveals that in 2002 only 2% of all reported³⁷ homicides in the state resulted in arrest and conviction and, considering the period 2002 to 2004, that number did not exceed 10%.³⁸ In other words: in spite of the growth in the prison population observed since 2003, the level of overcrowding did not worsen only because the Brazilian criminal justice system's operates precariously, to say the least. And, considering that improvement in criminal investigation will have to be a permanent goal of the public authorities, it is certain that any level of improvement would aggravate the problem of overcrowding in the prison system. In short: it would be wrong to attribute the problem of overcrowded prisons to an increase in the number of arrests in the period 2003 to 2007.

4. A fourth explanation one could imagine for why Brazil's overcrowded prison problem cannot be solved is the following: Brazil is a very poor country or Brazil has suffered a major catastrophe recently and does not have the resources to invest in this area, either because there simply are not resources or because of other emergencies that have priority. Fortunately, none of these explanations is factual. Brazil is not an impoverished country. Nor has it suffered any recent catastrophes. In other areas, important – and costly – public policies have been implemented, unopposed by arguments alleging lack of resources, for example, free medicine³⁹ and free access to higher education at

every five: the crisis in the Brazilian prisons and criminal justice system], of February 2010, p. 18: "The Ministry of Justice estimated that in 1994 there were 275,000 outstanding arrest warrants significantly more than the number of individuals incarcerated. In Brasília alone, the Public Prosecutor announced in this report that of the 15,077 arrest warrants issued in its jurisdiction over the past three years, only one third were effectively carried out; the suspects in the remainder of the cases are effectively at large. (...) it is difficult to obtain updated, precise figures about this issue, but the most commonly cited number of outstanding arrest warrants is 300,000. Based on the same calculation that every five cases represents only one person, this means that there are approximately 60,000 persons convicted to prison sentences that were not served" (available online at: <<http://www.ibanet.org/>>, accessed on April 22, 2010).

37 Another problem is that only a small fraction of crimes are reported. See THOMPSON, Augusto. *Quem são os criminosos – o crime e o criminoso: agentes políticos* [Who are the criminals – the crime and the criminal: political agents], 2007.

38 Merely for comparison purposes, according to the United Nations, the average number of homicides solved in North American and European countries is 49%. These figures come from the National Concourse of Applied Public Safety Research, supported by the Ministry of Justice. Available online at: http://www.ucamcesec.com.br/arquivos/atividades/mensur_impun_sist_ignacio.pdf>. Accessed on July 14, 2014.

39 See for example, the legal determination that obliges the *Sistema Único de Saúde* [Single Health System] to distribute free medicine to HIV-positive patients – Law no. 9.313/96: "Article 1 Carriers of HIV (human immune-deficiency virus) and AIDS patients (Acquired Immune-Deficiency Syndrome) shall receive free of charge from the *Sistema Único de Saúde*

private institutions paid for by the State.⁴⁰ The debate involving the establishment of priorities for the allocation of public resources will always be relevant when discussing not only investments in the prison system, but also any kind of public spending, insofar as demands are unlimited but public resources are not. This obvious fact merely means that money will always be an issue for any public policy, but cannot be described as *the* cause of the chaos in the Brazilian penal system.

There is also some specific data to reveal that the generic argument of lack of money is far from being an adequate explanation for the problem of overcrowding in Brazilian prisons. As already mentioned above, in 1994 the Lawmakers created a specific fund fed by permanent sources of revenue to pay for the penitentiary policies. At the same time, the press reported at the end of 2009 that funds earmarked for implementation of public policy in that area have been sitting unused for years for various reasons.⁴¹ One of these reasons is that the municipalities refuse to allow the construction of new prisons within their borders. So, here again we cannot point to lack of resources as the central cause of the problem of overcrowding prisons in Brazil.

5. Finally, a fifth reason one could imagine as an explanation for the Brazilian prison situation is ignorance: for some reason, the authorities and society are not aware of what goes on inside these prisons and the human rights violations that occur there. Since they are unaware of the facts, nothing can be done to end these violations. As already shown, this explanation is far from reality. As mentioned above, the public authorities themselves have made a relevant diagnosis of the problem and the press has widely publicized their findings to the public, especially the overcrowding. Therefore, it is impossible to argue that general unawareness is responsible for perpetuating the problems in the Brazilian prison system. There is no need to go forward with any argumentation based on this point.

It is possible to extract a conclusion from what has been set forth above. The question initially posed - why has Brazil treated its prison population so inhumanely and cruelly for so long? – cannot be answered in a consistent manner by any of the explanations considered above. Strictly speaking, concerns about human rights are present

all the medicine necessary for their treatment.”

40 The Federal Government's University-for-All Program (PROUNI) was created by Law no. 11.096/95 and has the purpose of granting full and partial scholarships to attend private institutions of higher education to students who demonstrate a lack of funds to pay for their own studies and have no higher education diploma. Information available online at: <<http://siteprouni.mec.gov.br>>. Accessed on July 14, 2014.

41 Available online at: <www.prro.mpf.gov.br/clipping/bc1047d17922921c878572dc7884923f.pdf>. Accessed on July 14, 2014.

in Brazil (theoretically, at least); there is ample and detailed internal legislation about the rights of prison inmates and there is information about the disrespect that exists for that legislation. The problem of overcrowded prisons is not recent. There are even resources to counter it. But the situation persists with no significant changes and without any relevant approximation of reality to what rhetoric and the Law suggest.

If these answers are not relevant to an understanding of the problems or their relevance is limited, then how can they be explained? Why has Brazilian society coexisted passively for so many decades with the violation of prisoners' fundamental rights and with the repeated violation of pertinent legislation? Why has not the specific legislation referred to above "caught on?" Why is there such indifference on the part of society and the authorities, even though the legislation referred to above was approved by the same National Congress that has the authority to oversee the actions of the Executive Branch and the investment of public resources? Why does the population mobilize so easily to help victims of calamities both in Brazil and abroad but tolerates the situation of its own prisons, even though it is aware of the inmates' deplorable conditions? As already mentioned above, the construction of consistent answers to these questions requires complex, multi-disciplined investigations. Therefore, all this paper intends to do at the end of this topic is to suggest a possible explanation to reflect on.

A summary description has already been given above of how Brazil has explained its commitment to human rights in general and to the rights of prison inmates in particular by endorsing international conventions dealing with the subject and the by enacting internal laws. However, in spite of beautiful discourse and legislation, it seems that the formation of Brazilian culture has not yet been capable of incorporating the notions of the equality of individuals and the essential dignity of each human being. Thus, the formal commitments to human rights end up being constructed on a moral and philosophical foundation that is not really shared by the majority of society and, for that reason, when confronted by any threats – such as, for example, the threat of urban violence –, reveals its fragility.

The hypothesis raised here is that most of Brazilian society looks upon the concept of human dignity as being more linked to what the individual has or does than to the mere circumstance of being a human being. The dignity, therefore, is not something inherent to every human being, but rather, something circumstantial and tied to individual behavior. This would somewhat explain the permanent chaos that exists in the Brazilian penal system, in spite of all the formal legal structure described above. That non-ontological concept of human dignity can be described in the following terms: the prisoner committed (or is being accused of committing) crimes, so because of his/her reproachable

conduct, the prisoner does not possess human dignity and, therefore, really has no right to be treated with dignity. Society can even improve the conditions in the penal system, and some efforts to do so can even be worthy of praise, but of course only after other social needs - tied to individuals who are endowed with human dignity – are met. In other words: the rights of prison inmates are not really rights *per se* and the debate about them is confined to the space of benevolence. In a context of generalized fear due to the alarming levels of urban violence, benevolence simply does not find an adequate opportunity to flourish.⁴² Worse, fear brings out the fragility of the moral and philosophical conventions that form the basis of Brazilian society regarding the equality and dignity of individuals. Concrete acts or neglect by the public authorities, especially elected officials, seem to be molded to this concept held by the majority in Brazilian society.

It is interesting to note that the logic of this explanatory hypothesis seems to get very close to the underlying reasons for the debate initiated in various parts of the world, especially after the terrorist attacks of September, 11, 2001, regarding the flexibilization of the rights of individuals accused of terrorism. In effect, the discussion, for example, of the enemy's penal rights, presupposes precisely that the conditions of the holder of human rights (in the entire extent thereof), of human dignity and even the condition of being a human being are not irremediably associated to human beings for the simple fact that they are human beings. The individual does not have rights but rights are attributed by the community: certain crimes can lead to the individual's exclusion from the "community of rights" and generate his/her loss of the condition of being a person and a bearer of dignity and rights. Therefore, dignity is also not inherent to the human being but rather circumstantial and variable, depending on the way he/she behaves in society.⁴³

It is also impressive, from a philosophical standpoint, that once

42 According to worldwide research conducted in 2003 by *Instituto Vera de Justiça*, Brazil is the country where more people express their fear of going out for a walk at night than in any other country (followed by South Africa, Bolívia, Botsuana, Zimbabwe and Colombia). Information gathered in the Report of the Institute of Human Rights of the International Bar Association (*One in every five: the crisis in the Brazilian prisons and criminal justice system*), of February 2010, p. 37 (available online at: <<http://www.ibanet.org/>>; accessed on: April 22, 2010).

43 For some material about this discussion, see JAKOBS, Günther and CANCIO MELIÁ, Manuel, *Direito Penal do Inimigo – Noções e Críticas* [The enemy's penal rights: notions and critics], 2007; ZAFFARONI, Eugenio Raúl, *O Inimigo no Direito Penal* [The enemy in Criminal Law], 2007; CARVALHO, Thiago Fabres de, *O 'direito penal do inimigo' e o 'direito penal do homo sacer da baixada': exclusão e vitimização no campo penal brasileiro* [The enemy's penal rights and the Criminal Law for the slums' *homo sacer*: exclusion and victimization in Brazilian Criminal Justice System], 2008.

again in the history of mankind a debate is being waged around whether or not human dignity is inherent to all individuals, a debate that cogitates the flexibilization of rights for a given category of criminals and that works toward manipulating the concept of *human being*. The risk that this kind of theoretical interpretation represents to the protection of human rights throughout the world is quite obvious and needs no further consideration. The gravity of the situation in Brazil, however, is derived from some peculiarities that should be noted. In the case of Brazil, there is no theoretical debate intended to flexibilize an already existing and reasonably consolidated model of human rights guarantees, as is the case, for example, surrounding the penal rights of the enemy in Germany. Brazilian reality has not yet even constructed or consolidated a model of human rights guarantees. Furthermore, in Brazil the logic that identifies the criminal as an enemy, someone without rights and even a *non-person* – not explicitly or on the theoretical level – ends up being applied in the context of any criminal activity and not, as the theoretical defenders of the enemy's penal rights intend, to individuals involved in crimes of a specific degree of gravity.

In summary, the explanations imagined at the beginning of this topic do not adequately or consistently explain how Brazilian society treats its prison population. The explanatory hypothesis imagined for this phenomenon involves the moral and social formation of Brazilian society, which, in spite of the discourse and the wording of laws, did not incorporate the notions of the equality and essential dignity of individuals, working differently with a concept of dignity tied not to the human being but to what the human being does or does not do.

III. VIOLATION OF THE RIGHTS OF INMATES: MORE VIOLENCE. AN ATTEMPT TO SHIFT THE DISCUSSION TO ANOTHER PERSPECTIVE

If the explanatory hypothesis proposed in the preceding topic can in fact be confirmed, Brazilian Law will confront (or continue to confront) a structural problem of greater gravity, since the capacity of the law to modify people's moral and philosophical concepts is quite limited, even more so in an environment of fear in which people feel permanently threatened by violence, which takes on the face and appearance of prison inmates. Thus, without detriment to the role the Law can play in this context, it seems relevant to bring up - also to encourage some debate in regard thereto – society's mistaken belief that the way it treats its prisoners will not have any negative repercussions on society itself, as if it were possible to rigidly separate these two worlds: the world outside from the world inside prison walls.

Urban violence is a complex and multi-causal phenomenon. The purpose of this paper is not to discourse on its causes or the importance of each cause. What this paper intends to do is merely to note the following: that there are consistent indications that the inhumane treatment of prisoners in the Brazilian penal system ends up directly increasing the levels of urban crime and violence in at least two different ways - the large number of additional serious crimes committed by suspects in an attempt to avoid going to jail and the acutely high number of repeat offenders noted in Brazil.

As a matter of fact, suspects in Brazil frequently try at all costs to avoid prison by committing new and often much more violent crimes than the ones that led to their initial incarceration. Thus, it is common for suspects to resist arrest or even the mere approach of the police, shooting at them, stealing vehicles to flee from them and taking hostages. Unfortunately, it is very common for police chases to result in the death of the suspects themselves, the police and, especially, bystanders who unfortunately find themselves in the wrong place at the wrong time and end up getting caught in crossfire.⁴⁴

One of the more plausible explanations for the spread of this kind of behavior in Brazil is precisely the hatred suspects have of the conditions they are subjected to prison: overcrowding, hunger, bad treatment, violence, torture and various sexual abuses.⁴⁵ The perspective

44 Unfortunately, many deaths occur in the context of police pursuits and these are repeated continuously. Below are some examples (all accessed online on April 23, 2010): <g1.globo.com/rio-de-janeiro/noticia/2010/04/perseguido-policia-faz-4-mortos-e-2-feridos-em-bonsucesso.html>; <www.tribunadonorte.com.br/noticia/perseguido-acaba-em-tres-mortos/138364>; <noticias.r7.com/rio-e-cidades/noticias/doi-homens-sao-mortos-durante-perseguido-no-recreio-dos-bandeirantes-zona-oeste-do-rio-20100111.html>; and <noticias.terra.com.br/brasil/noticias/0,,OI4270124-EI5030,00-Tres+sao+mortos+em+perseguido+apos+assalto+a+banco+no+RS.html>; <www.parana-online.com.br/editoria/policia/news/437692/?noticia=PERSEGUIAO+POLICIAL+TERMINA+COM+DOIS+BANDIDOS+MORTOS+EM+CURITIBA>.

45 Overcrowding is not the only problem in the Brazilian prison system, nor is it an isolated one. Regarding the topic of violence in the prisons, see the comments contained in the UN Special Report on Summary or Arbitrary Extra-Judicial Executions: "Delays in the processing of transfers, violent acts by prison guards and poor conditions in general lead to the growth of factions inside the prisons that succeed in justifying their existence to the inmate population as a whole by saying that they act in defense of the inmates to obtain benefits and avoid violence. Poor administration and prison conditions not only facilitate the occurrence of rebellions but also contribute directly to the growth of criminal factions. At most units, the State fails to exercise sufficient control over the inmates and allows the factions (or other prisoners in the "neutral" units) to resolve issues of the units' internal security among themselves. Selected inmates sometimes receive more power over their fellow inmates than the guards themselves. They assume control (often brutal) over internal discipline and the distribution of food, medicine and hygiene kits. These practices often result in faction leaders taking control of the prisons." (available online at: <<http://www.iddh.org.br/v2/upload/09a88d3af9dd4328f461373078be620f>>.

produced by this picture causes the suspect to prefer avoiding arrest at any cost, even through more acts of violence and crime. This is also because, in spite of the possibility that the sentences for these new crimes – if applied – might be longer than those associated with earlier crimes, as already mentioned, the percentage of convictions is still very small when compared with the number of crimes committed. Thus the threat of future conviction is much less important than the present threat of arrest and the hatred of conditions in the Brazilian prison system.

A second environment in which one observes a significant causal relationship between prison conditions and the increase in urban violence is the high number of repeat offenders. It is estimated that, after being released, 70% to 85% of Brazil's inmates go back to prison for new crimes.⁴⁶ Even in Brazil,⁴⁷ these percentages are relatively smaller in cases in which the legislation allows and, in fact, applies alternate sentences that do not involve incarceration.⁴⁸ The reasons for that causal connection are varied and may differ in nature: the inmate considered potentially less dangerous ends up being recruited into criminal factions inside the prison in order to survive the reality of prison life and then returns to crime when released; the inmate becomes completely brutalized by the inhumane treatment he/she receives and

pdf>; accessed on: April 22, 2010). See also the Report of the Institute of Human Rights of the International Bar Association (*One in every five: the crisis in the Brazilian prisons and criminal justice system*), of February 2010, p. 13: "The effective domination of many Brazilian prisons by criminal groups underscores the dramatic failure of the criminal justice and penal system's administration." (available online at: <<http://www.ibanet.org/>>, accessed on April 22, 2010).

46 Information available online at: <<http://portal.mj.gov.br/data/Pages/MJ47E6462CITEMID38622B1FFD6142648AD402215F6598F2PTBRNN.htm>>, accessed on July 14, 2014.

47 It is not easy to make adequate comparison between data from different countries, not only because the *criteria* used can vary a lot but also because criminal justice systems work in a quite different rhythm. Anyway, some information about what happens in other countries can be useful. In India, according to the National Crime Records Bureau, 8,7% of the inmates go back to prison for new crimes (available online at: <http://ncrb.nic.in/cii2006/cii-2006/CHAP11.pdf>, accessed on April 26, 2010). Statistics Norway informs that, from 2001 to 2005, 47,1% of the released from prison committed another crime in the country (available online at: <http://www.ssb.no/english/subjects/03/05/a_krim_tab_en/tab/tab-2007-08-13-21-en.html>, accessed on April 26, 2010). The information provided by Swedish National Council for Crime Prevention is that, for 1991-2003, the number of repeat offenders varied from 23% to 36%, depending on the *criteria* adopted (available online at http://www.bra.se/extra/pod/?action=pod_show&id=19&module_instance=11, accessed on April 25, 2010). In 1994, considering 15 American States, 67% of the inmates committed another crime at some point of the three years after release from prison (available online at: <http://bjs.ojp.usdoj.gov/content/pub/press/rpr94pr.cfm>, accessed on April 26, 2010).

48 <<http://www.jus2.uol.com.br/DOCTRINA/texto.asp?id=11001>>; and <ultimainstancia.uol.com.br/noticia/ESTUDO+MOSTRA+QUE+CONDENADOS+A+PENAS+ALTERNATIVAS+TEM+BAIXA+REINCIDENCIA_68505.shtml>, accessed on April 23, 2010.

loses any perspective of a life outside of crime; the inmate receives no professional training or guidance so he/she can earn a living through work after being released, etc.⁴⁹ Nevertheless, what one observes is that the probability of the individual committing new crimes after doing time in a Brazilian prison is quite high.

IV. CONCLUSIONS

The main ideas set forth throughout this paper can be summarized in the following terms. For several decades the treatment of the prison population in Brazil has been, as a general rule – not the exception – degrading and inhumane. This is true, in spite of Brazil's tradition on the international stage of rhetoric favoring human rights and prisoners' rights in particular, its record of ample, detailed internal legislation regarding the rights of prisoners and the creation of funds reserved for prison reform. The explanation imagined for this situation of fact has to do with the cultural formation of Brazilian society, which has failed to incorporate notions of the equality and essential dignity of individuals, in spite of that rhetoric and legislation, working differently with a concept of dignity tied not to the human being but to what the human being does or does not do. Therefore, prison inmates are not considered worthy of dignity or human rights.

Finally, since the argument of human dignity has not produced its desired effects on the Brazilian reality and the laws already on the books have not been able to change prison conditions in recent decades, maybe it would be useful, in order to encourage more debate on the subject, to raise the perception that what society fears most – violence – might grow due to the way inmates are treated by the penal system. Two examples of this relationship between prison conditions and increased violence are the high number of repeat offenders and the new crimes frequently committed by suspects in their attempt to avoid arrest.

V. REFERENCES

Universal Declaration of Human Rights.
International Pact on Civil and Political Rights.
The Brazilian Constitution of 1988:
BRAZIL. Supplemental Law no. 79/94.
BRAZIL. Law no. 7.210/84.
BRAZIL. Law no. 9.313/96.

⁴⁹ It is also possible to imagine other reasons not directly related to the same explanatory hypothesis that, according to the above proposal, explain the perpetuation of these conditions. Once released, the ex-convict is largely shunned by society and this makes his/her integration difficult.

BRAZIL. Decree no. 678/1992.

BRAZIL. Decree no. 592/92.

BRAZIL. Decree no. 40/1991.

BRAZIL. Decree no. 6.085/2007.

BRAZIL. Decree no. 98.386/1989.

BRAZIL. Decree no. 22.435/1933.

BRAZIL. Resolution no. 14/1994 of the National Council of Criminal and Penal Policy (CNPCCP).

THOMPSON, Augusto. *Quem são os criminosos?: o crime e o criminoso: entes políticos [Who are the criminals – the crime and the criminal: political entities]*, Rio de Janeiro: Lumen Juris, 2007.

MAIA, Clarissa Nunes, SÁ NETO, Flávio de, COSTA, Marcos, BRETAS, Marcos Luiz (org.). *História das prisões no Brasil [History of the Prisons in Brazil]*, volumes I and II. Rio de Janeiro: Rocco, 2009.

JAKOBS, Günther. CANCIO MELIÁ, Manuel. *Direito Penal do Inimigo – Noções e Críticas [The enemy's penal rights: notions and critics]*. Porto Alegre: Livraria do Advogado, 2007.

ZAFFARONI, Eugenio Raúl. *O Inimigo no Direito Penal [The enemy in Criminal Law]*. Trad. Jorge Lamarão. Rio de Janeiro: Revan, 2007.

CARVALHO, Thiago Fabres de. O “Direito Penal do Inimigo” e o “Direito Penal do Homo Sacer da Baixada”. *Revista de Estudos Criminais*, v. 25, p. 85-120, 2007.

Novo Diagnóstico De Pessoas Presas No Brasil [New Diagnosis About People Prey In Brazil]. Report elaborated by the National Council of Justice (CNJ). Available at: <http://www.cnj.jus.br/images/imprensa/diagnostico_de_pessoas_presas_correcao.pdf> Accessed on July 09, 2014.

Relatório Final da Comissão Parlamentar de Inquérito do Sistema Carcerário [Final Report of the Congressional Investigating Committee of the Brazilian Prison System]. Available at: <bd.camara.gov.br/bd/handle/bdcamara/2701>. Accessed on July 14, 2014.

Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions presented to the Human Rights Council in August 29th, 2008. Available at: <http://www2.ohchr.org/english/issues/executions/docs/A_HRC_11_2_Add_2_English.pdf>. Accessed on July 14, 2014.

Dados Consolidados [Consolidated Data] - publication regarding the profile and evolution of the Brazilian prison population from 2003 to 2007: Available at: <<http://portal.mj.gov.br/cnpccp/data/Pages/MJ-D574E9CEITEMIDC37B2AE94C6840068B1624D28407509CPTBR-NN.htm>>. Accessed on July 14, 2014.

Plano Nacional de Política Penitenciária e Criminal [National Plan of Criminal and Penitentiary Policy], approved by the Ministry of Justice. Available for download at: <<http://portal.mj.gov.br/main.asp?View={E9614C8C-C25C-4BF3-A238-98576348F0B6}&BrowserT>>

ype=NN&LangID=pt-br¶ms=itemID%3D%7BD1903654-F845-4D59-82E8-39C80838708F%7D%3B&UIPartUID=%7B2868BA3C-1C72-4347-BE11-A26F70F4CB26%7D>. Accessed on July 14, 2014.

Oficial data about the evolution of alternative sentences in Brazil. Available at: <<http://portal.mj.gov.br/main.asp?View={47E6462C-55C9-457C-99EC-5A46AFC02DA7}&BrowserType=NN&LangID=pt-br¶ms=itemID%3D%7B38622B1F-FD61-4264-8AD4-02215F6598F2%7D%3B&UIPartUID=%7B2868BA3C-1C72-4347-BE11-A26F70F4CB26%7D>>. Accessed on July 14, 2014.

TOMAZ, Kleber. CARAMANTE, André. Folha de São Paulo. Cadeia tem 162 presas onde só cabem 24. Available at: <<http://www1.folha.uol.com.br/fsp/cotidiano/ff0511200801.htm>>. Accessed on July 14, 2014.

Revista Consultor Jurídico. Juíza manda estado criar vagas em presídios. Available at: <www.conjur.com.br/2009-fev-09/juiza-manda-estado-rs-criar-mil-vagas-presidios>. Accessed on July 14, 2014.

Última Instância. CNJ pede socorro médico a presos em cela hiperlotada no ES. Available at: <<http://ultimainstancia.uol.com.br/conteudo/noticias/22469/>>. Accessed on July 14, 2014.

Última Instância. Superlotação carcerária faz com que estados mantenham presos em contêineres. Available at: <http://ultimainstancia.uol.com.br/noticia/SUPERLOTACAO+CARCERARIA+FAZ+COM+QUE+ESTADOS+MANTENHAM+PRESOS+EM+CONTEINERES_67177.shtml>. Accessed on July 14, 2014.

Última Instância. Situação de presídio na Paraíba 'não poderia ser pior', diz procurador. Available at: <http://ultimainstancia.uol.com.br/new_site/novonoticias/SITUACAO+DE+PRESIDIO+NA+PARAIBA+NAO+PODERIA+SER+PIOR+DIZ+PROCURADOR_64067.shtml>. Accessed on July 14, 2014.

Última Instância. Brasil se explica à Corte da OEA por caos em presídio em Rondônia. Available at: <http://ultimainstancia.uol.com.br/noticia/BRASIL+SE+EXPLICA+A+CORTE+DA+OEA+POR+CAOS+EM+PRESIDIO+DE+RONDONIA_66000.shtml>. Accessed on July 14, 2014.

SILVEIRA, Luiz. Agência CNJ. Relatório do CNJ cobra providências para frear mortes no Presídio Urso Branco/RO. Available at: <<http://www.cnj.jus.br/noticias/cnj/28812:relatorio-do-cnj-cobra-providencias-para-frear-mortes-no-presidio-urso-brancoro>>. Accessed on July 11, 2014.

Uchinaka, Fabiana. UOL Notícias. *Violação de direitos humanos em presídios do ES será discutida na ONU*. Available at: <<http://noticias.uol.com.br/cotidiano/ultimas-noticias/2010/03/15/violacao-de-direitos-humanos-em-presidios-do-es-sera-discutida-na-onu.htm>>. Accessed on July 11, 2014.

Revista Consultor Jurídico. *Deficiência do sistema carcerário beira falência*. Available online at: <www.conjur.com.br/2010-abr-15/>

deficiencia-sistema-carcerario-beira-falencia-total-peluso>. Accessed on April 18, 2010.

G1. *Perseguição policial faz 4 mortos e 2 feridos em Bonsucesso*. Available at: <g1.globo.com/rio-de-janeiro/noticia/2010/04/perseguiacao-policial-faz-4-mortos-e-2-feridos-em-bonsucesso.html>. Accessed on July 14, 2014.

R7. *Dois homens são mortos durante perseguição no Recreio dos Bandeirantes, zona oeste do Rio*. Available at: <noticias.r7.com/rio-e-cidades/noticias/dois-homens-sao-mortos-durante-perseguiacao-no-recreio-dos-bandeirantes-zona-oeste-do-rio-20100111.html>. Accessed on July 14, 2014.

THE LEGAL FRAMEWORK OF MEDIATION IN BRAZILIAN LAW¹

Humberto Dalla Bernardina de Pinho

Associate Professor of Civil Procedural Law at UERJ.
Assistant Professor of Civil Procedural Law at UNESA. Public
Prosecutor for the State of Rio de Janeiro. Member of I.B.D.P.
and I.I.D.P. Member of the Commissions set up by the Ministry
of Justice (PLS 434/13) and by Senator Ricardo Ferraço (PLS
517/11) to prepare the Bill of the Mediation Law in Brazil.
www.humbertodalla.pro.br. [facebook.com/humberto.dalla](https://www.facebook.com/humberto.dalla).

Abstract: The text² analyzes the introduction and evolution of the legislative treatment given to the institute of mediation in Brazilian law, from Bill No. 4,827/98 up to the Bills of the Ministry of Justice (ENAM) and the Federal Senate. Along the way we also examine the text of the Project for a new CPC (Code of Civil Procedure) and Resolution No. 125/10 from the National Council of Justice. At the end the principal aspects and trends for our legal system are set out.

Keywords: Mediation - Bill - New CPC - Evolution.

1. A HISTORICAL SKETCH: FROM BILL 4827 TO CNJ RESOLUTION 125

In Brazil, starting from the 1990's, interest began to grow concerning the institute of mediation, especially under the influence of the Argentinean legislation enacted in 1995³.

Over here, the first lawmaking initiative took shape with Bill No. 4,827/98, arising from a proposal by Congresswoman Zulaê Cobra, and the initial draft submitted to the House contained a concise text, setting out the definition of mediation and listing some pertinent provisions.

In the House of Representatives, as far back as 2002, the bill

1 Text updated to December 2013, taking into consideration the available version of Senate Bill 517/11, and House Bills 94/02 (mediation) and 8046/10 (new Code of Civil Procedure).

2 Many thanks to Mariana Souza and to Paul Mason for their valuable comments and suggestions to this paper.

3 PINHO, Humberto Dalla Bernardina de [organizer]. *Teoria Geral da Mediação à luz do Projeto de Lei e do Direito Comparado*, Rio de Janeiro: Lumen Juris, 2008.

was approved by the Commission for the Constitution and Justice and sent to the Federal Senate, where it was given the number PLC 94, of 2002.

However, the Federal Government, as part of the “Republican Package” that followed Constitutional Amendment No. 45, dated December 08, 2004 (known as the “Judiciary Reform”), presented various Bills modifying the Code of Civil Procedure, which led to a new report for PLC94.

The Substitute (Amendment No. 1-CCJ) was approved, which impaired the initial bill. The substitute was sent to the House of Representatives on July 11, 2006. On August 01 the bill was forwarded to the CCJC, which received it on August 07,. After that, there were no further news of it until mid-2013, when it was once again addressed, probably inspired by the bills already under discussion before the Senate.

The Bill, in its latest version, right away in art. 1 proposed regulating mediation for civil procedural matters, which might take on the following features: a) prior; b) incidental; c) judicial; and d) out-of-court.

Prior mediation could be either judicial or out-of-court (art. 29). In the case of judicial mediation, a request for it would interrupt the statute of limitations and should be completed within a maximum period of 90 days.

Incidental mediation (art. 34), on the other hand, would be obligatory as a rule, in the fact-finding procedure, except in cases of: a) injunctions; b) when the plaintiff or defendant is a public-law entity and the controversy involves inalienable rights (*direitos indisponíveis*); c) in bankruptcy, judicial recovery and civil insolvency; d) in wills and estate proceedings; e) in writs of entry, claims and adverse possession of real estate; f) in lawsuits for rectification of a public record; g) when the plaintiff opts for the procedure of a special court or arbitration; i) when no agreement was reached in prior mediation held within one hundred and eighty days before bringing the suit.

Mediation should be held within a maximum of ninety days, and if no agreement is reached, the proceeding continues. Thus, mere distribution of the initial petition to the court would interrupt the statute of limitations, would induce *lis pendens* and produce the other effects set forth in art. 263 of the Civil Procedure Code.

Moreover, if a writ were applied for, mediation would only proceed following examination of this issue by the judge, although the lodging of an appeal against the provisional decision would not harm the process of mediation.

In 2010 the National Council of Justice published Resolution No. 125, based on the premise of the right of access to Justice, laid

down in art. 5, XXXV, of the Federal Constitution.

Art. 1 of the Resolution institutes the National Judiciary Policy for handling conflicts of interests, seeking to ensure everyone with the right to resolve disputes by suitable means, making it quite clear that it falls to the Judiciary Branch—not only via a resolution awarded by judicial decision - to afford other mechanisms for the resolution of conflicts, in particular the so-called consensual means, such as mediation and conciliation, while also providing the citizens with attention and guidance.

To achieve these targets, the Courts were to set up Permanent Centers for Consensual Methods of Resolution of Disputes, and install Judiciary Centers for Resolution of Disputes and Citizenship.

The Resolution also addresses qualification of the conciliators and mediators, the registry and statistical monitoring of their activities and management of the Centers⁴.

2. THE PROJECT FOR THE NEW CODE OF CIVIL PROCEDURE

In 2009 a Commission of Jurists was set up, chaired by Justice Luiz Fux, with the aim of presenting a new Code of Civil Procedure.

In record time a Preliminary Bill was presented, converted into a Legislative Bill (No. 166/10), submitted to discussion and examination by a Commission especially constituted by Senators, within the realm of the Federal Senate Commission for the Constitution and Justice.

In December 2010 a Substitute was presented by Senator Valter Pereira, which was approved by the Plenary Session of the Senate with two minor changes. The text was then sent on to the House of Representatives, where it was identified as Bill No. 8046/10⁵.

Early 2011 saw the first initiatives of reflection on the text of the new CPC, broadening the debate with civil society and the juridical milieu, with activities held jointly by the Commission, the House of Representatives and the Ministry of Justice.

In August, a special commission was created to examine the text, chaired by Congressman Fabio Trad.

In the year 2013, under the chairmanship of Congressman Paulo Teixeira, a Substitute was presented in the month of July and an Overall Cumulative Amendment in October. At the moment that this text is being concluded, the activities of revising the text have still to be completed.

4 PELUSO, Antonio Cezar. RICHÁ, Morgana de Almeida [coordinators]. *Conciliação e Mediação: estruturação da política judiciária nacional*, Rio de Janeiro: Forense, 2011.

5 All the steps of handling the Project for the New CPC can be followed on our blog: <http://humbertodalla.blogspot.com> and at <http://www.facebook.com/humberto.dalla>.

In the wording at present available of the Project for a new CPC, we can identify the Commission's concerns with the institution of conciliation and mediation, specifically in articles 166 to 176.

The Project shows special concern with the activity of mediation done within the structure of the Judiciary Branch, although it does not rule out prior mediation or even the possibility of using other means of dispute resolution (art. 176).

In the version initially presented in the House, the fundamental principles of conciliation and mediation were safeguarded, to wit: (i) independence; (ii) neutrality; (iii) autonomy of will; (iv) confidentiality; (v) oral expression; and (vi) informality. In the October, 2013 version (Overall Cumulative Amendment), such principles were omitted.

It is important to stress the relevance of the activity to be conducted by a professional mediator. In other words, the function of mediating should not, as a rule, be accumulated with other professions, such as judges, public defenders and prosecutors.

In art. 166, 3rd and 4th paragraphs, the Commission of Jurists, after noting that conciliation and mediation must be stimulated by all the players in the process, established an objective distinction between these two mechanisms. The differentiation comes about through the posture of the third party and the type of dispute.

Thus, the conciliator may suggest resolutions for the dispute, whereas the mediator assists the persons in conflict to identify, by themselves, alternatives of mutual benefit. Conciliation is the best suited tool for disputes involving material interests, whereas mediation is recommended in cases where it is sought to preserve or restore ties.

It is important to note that the original version of PLS 166/10 required the mediator to be registered as a member of the OAB (Brazilian Bar Association). The Report and Substitute presented on November 24, 2010 prioritized the understanding that any professional can exercise the functions of mediator.

There will be a judicial record with information on the mediator's performance, indicating, for example, the number of cases in which he/she took part, the success or failure of the activity and the issue involved in the dispute. This data will be published periodically and systematized for statistical purposes (art. 168 of the Project).

The Commission, using some of the provisions already present in the Bill of the Mediation Law, was also concerned with the ethical aspects of the mediators and conciliators, and in this regard made provision for the hypotheses of exclusion of names from the Court's record and providing for the opening of an administrative procedure to investigate the conduct (art. 174).

As to remuneration, art. 170 of the Bill states that a table of fees will be published by the National Council of Justice (CNJ).

As we see, the concern of the Commission is with judicial mediation. The Bill does not forbid prior or out-of-court mediation, but merely opts not to regulate it, making it clear that interested parties may make use of this modality, resorting to the professionals available on the market.

3. THE BILLS OF THE MINISTRY OF JUSTICE AND THE FEDERAL SENATE

With the advent of the Project for the Code of Civil Procedure, in the year 2011 Senator Ricardo Ferraço presented to the Senate Legislative Bill 517/11, proposing the regulation of judicial and out-of-court mediation, so as to create a system aligned with both the future CPC and with CNJ Resolution No. 125.

In 2013 two more legislative initiatives were attached to PLS 517: PLS 405/13, the outcome of the work performed by the Commission instituted by the Senate, and chaired by Justice Luis Felipe Salomão, of the Superior Court of Justice (STJ), and PLS 434/13, result of the works of the Commission instituted by the CNJ and the Ministry of Justice, chaired by Justices Nancy Andrighi and Marco Buzzi, both of the STJ, and by the Secretary of Judiciary Reform at the Ministry of Justice, Flavio Croce Caetano.

We shall first address the text of PLS 517.

With CNJ Resolution 125 already in effect, faced with the prospects of regulation of judicial mediation by the new CPC, and given the need to deal with issues concerning the integration between adjudication and self-composing forms, in August 2011 we had the opportunity to submit suggestions to Senator Ricardo Ferraço, then involved with the works of the third edition of the Republican Pact.

We made up a working group alongside Professors Tricia Navarro and Gabriela Asmar and devoted ourselves to the task of drafting a new Preliminary Bill for a Law of Civil Mediation. After examination by the Senate Consultancy, the Senate Bill was presented, taking the number 517⁶, and which is now following the legislative procedure in the Federal Senate.

The Bill works with concepts more updated and adapted to Brazilian reality. For example, in art. 2 it states that *“mediation is a decision-making process conducted by an impartial third party, with the aim of assisting the parties to identify or develop consensual resolutions”*.

With regard to modalities, art. 5 admits prior and judicial mediation, which in both cases may, chronologically, be prior, incidental

⁶ The text can be consulted on the Federal Senate site, at: <http://www.senado.gov.br>.

or even subsequent to the procedural relationship.

Also according to the text of the Bill, the judge must “*recommend judicial mediation, preferably, in disputes in which it is necessary to preserve or make good an interpersonal or social relationship, or when the decisions of the parties entail material consequences for third parties*” (art. 8).

On the other hand, if mediation should prove unsuitable for resolving that dispute,, the occasion may be transformed into a hearing for conciliation, provided that all of the involved parties agree to it (art. 13).

In closing, without going into the specific questions of the Bill, it is important to stress the intent of making the provisions of the new CPC and CNJ Resolution No. 125 uniform and compatible, regulating the points that still lacked legal treatment.

Early 2013 also saw the constitution of a commission chaired by Justice Luis Felipe Salomão, a member of the Higher Court of Justice, with the aim of presenting the preliminary bill for the New Law of Arbitration and Mediation⁷.

This Bill was given number 405/13 and addresses only out-of-court face-to-face and electronic mediation (on-line mediation).

In the text, mediation is defined in art. 1, sole paragraph, as

“the technical activity performed by an impartial third party, with no decision-making power, who, chosen or accepted by the interested parties, hears them and encourages them, without imposing resolutions, seeking to allow them to prevent or resolve disputes by consensual means”.

Art. 2 states that any issue that admits a settlement may be the subject to mediation. However, agreements that involve inalienable rights must be addressed in judicial ratification, and if interests of incapable parties are involved, the Public Prosecutor’s Office must be consulted before judicial ratification.

Art. 15 determines that mediation is deemed to be instituted on the date in which the initial terms of mediation are signed, while art. 5 states that “*the parties interested in submitting the solution of their dispute to mediation shall sign terms of mediation document, in writing, once the conflict has arisen, even if mediation was provided for in a contractual clause.*”

The final terms of mediation - signed by the parties, their attorneys and the mediator - constitutes an out-of-court title to execution,

⁷ <http://www12.senado.gov.br/noticias/materias/2013/04/03/comissao-de-juristas-apresentara-proposta-de-modernizacao-da-lei-de-arbitragem-em-seis-meses>. Consulted on April 202013.

irrespective of the signature of witnesses (arts. 22 and 23); the parties may request judicial ratification of the final terms of mediation, so as to constitute an out-of-court title to execution.

Lastly, art. 21 authorizes holding mediation via the internet or other form of remote communication.

In May 2013, the Ministry of Justice, through the Secretariat of Judiciary Reform, in partnership with the National Council of Justice, set up a commission of specialists to submit a preliminary bill on judicial, out-of-court, public and on-line mediation⁸.

In its art. 3, the text determines that any issue that addresses available rights or inalienable rights that are subject to a settlement may be the subject to mediation. If the agreements address inalienable rights, they will only be valid after consulting with the Public Prosecutors and going through judicial ratification.

On the other hand, there will be no judicial mediation in cases of: a) filiation, adoption, paternal power, and annulment of matrimony; b) restraint; c) judicial recovery and bankruptcy; and d) injunctive relief. This is, somehow, a consequence of the system adopted by art. 26, *“the initial petition will be distributed simultaneously to the court and the mediator, stopping the counting of the statute of limitations and lapse”*.

As to out-of-court mediation, art. 19 determines that the parties interested in submitting their disputes to mediation are to sign initial terms of mediation, in writing, once the dispute has arisen, even if mediation was provided for in a contractual clause. Also, art 25 states that the final terms of mediation enjoy the nature of an out-of-court title to execution and, once ratified in court, they become a judicial title to enforcement, similar to a final judgment in a court case.

With regard to public mediation, art. 33 authorizes the agencies of the direct and indirect Public Administration of the Federal Union, the States, Federal District and Municipalities, and also the Public Prosecutor's Office and Public Defender's Department, to submit disputes to which they are parties to public mediation.

Thus, public mediation may take place in disputes involving: a) public entities ; b) public entities and a private party; c) homogeneous individual, collective or diffused rights.

Lastly, on-line mediation, as set forth in art. 36, may be used as a means for resolution of conflicts in cases of sales of goods or provision of services via the internet, with the aim of resolving any domestic consumer disputes .

In November 2013, public hearings were scheduled to discuss the three bills and go into the controversial issues that still surround the

8 <http://www2.camara.leg.br/camaranoticias/radio/materias/ULTIMAS-NOTICIAS/441916-GRUPO-DE-JURISTAS-VAI-PROPOR-MARCO-LEGAL-DA-MEDIACAO-E-CONCILIACAO-NO-BRASIL.html>

theme. The Reporter for the subject in the Senate, Senator Vital do Rego, presented a substitute for PLS 517/11, seeking to bring together what is best in the three initiatives. Then, two amendments were presented by Senator Pedro Taques and three by Senator Gim Agnello. The first amendment from Senator Taques was accepted in full, and the second, partially. The three amendments presented by Senator Agnello were rejected⁹.

Thus, the final text that was approved and now goes to the House of Representatives is as follows:

*AMENDMENT No. – CCJ (SUBSTITUTE) SENATE
LEGISLATIVE BILL No. 517, OF 2011*

*Addresses mediation between private parties as
an alternative resolution of controversies and the
settlement of disputes within the realm of the Public
Administration.*

The NATIONAL CONGRESS decrees:

*Art. 1. This Law addresses mediation as an alternative
means for resolution of controversies between
private parties and the settlement of disputes within
the realm of the Public Administration.*

*1st Paragraph – Mediation is considered to be
the technical activity exercised by an impartial
third party, with no decision-making power, who,
chosen or accepted by the parties, assists them and
stimulates them to identify or develop consensual
resolutions for the controversy.*

*2nd Paragraph – Mediation is applied for the
consensual resolution of disputes involving natural
persons or private-law legal entities, as set forth in
Chapter I of this Law.*

*3rd Paragraph – Settlement of a conflict in which
at least one party is a public-law legal entity will
follow the regulations established in Chapter II of
this Law.*

⁹ <http://www12.senado.gov.br/noticias/materias/2013/12/11/projeto-que-disciplina-a-mediacao-judicial-e-extrajudicial-e-aprovado-pela-ccj>.

Chapter I – Mediation

Section I – General Provisions

Art. 2. Mediation will be oriented by the following principles:

I – impartiality of the mediator;

II – isonomy between the parties;

III – oral expression;

IV – informality;

V – autonomy of will of the parties;

VI – search for consensus;

VII – confidentiality.

Sole Paragraph – No-one shall be obliged to be submitted to a mediation procedure.

Art. 3. Only conflicts addressing an issue that admits a settlement may be the subject of mediation.

1st Paragraph – The mediation may address the whole conflict or part thereof.

2nd Paragraph – Agreements involving inalienable and non-negotiable rights must be ratified in court, requiring a consultation to the Public Prosecutor's Office when the interests of parties without legal capacity are involved.

3rd Paragraph – Disputes will not be submitted to mediation if they deal with:

I - filiation, adoption, paternal power, and/or annulment of matrimony;

II – restraint;

III - judicial recovery and bankruptcy;

Section II – The Mediators

Subsection I – Common Provisions

Art. 4. The mediator will be chosen by the parties or, if he/she is appointed, shall be accepted by them.

1st Paragraph –The mediator will conduct the process of communication between the parties, seeking understanding and consensus and easing resolution of the conflict by agreement.

2nd Paragraph – In the performance of his/her function, the mediator will proceed with impartiality, independence and discretion.

Art. 5. The same legal hypotheses of impediment and partiality of judges apply to the mediator.

Art. 6. The mediator will be prevented from advising, representing or acting for any party that was submitted to mediation conducted by him/her within the two preceding years.

Art. 7. Unless agreed upon otherwise, the mediator may not act as an arbitrator, nor function as a witness in arbitral or judicial proceedings pertinent to a conflict in which he/she acted as mediator.

Art. 8. The mediator and all those who advise him/her in the mediation procedure, when exercising their functions or by virtue of them, are held equivalent to a public servant, for purposes of criminal legislation.

Subsection II – Out-of-Court Mediators

Art. 9. Any capable person, enjoying the trust of the parties and who considers him/herself qualified to perform mediation may function as a mediator, without regard to membership in any type of council or association or being registered therein.

Subsection III – Judicial Mediators

Art. 10. A capable person, graduated more than two years ago from a course of higher education at an institution recognized by the Ministry of Education and who has achieved qualification at a school or entity for training mediators, recognized by the National Council of Justice or the National School of Mediation and Conciliation at the Ministry of Justice, may act as a judicial mediator.

1st Paragraph – The courts will maintain updated registries of mediators qualified and authorized to act in judicial mediation.

2nd Paragraph – Registry in the register of judicial mediators will be requested by the interested party from the court with jurisdiction over the area in which he/she intends to exercise mediation.

3rd Paragraph – A mediator will be compulsorily excluded from the register if he/she:

I – violates the principles set forth in this Law;

II – acts in a mediation procedure, in the event of impediment or partiality;

III – is definitively convicted as a result of a criminal proceeding or one of administrative malfeasance.

4th Paragraph – In the cases of sub-items I and II or the 3rd paragraph, the disciplinary procedure for exclusion from the register of mediators will be conducted and judged before the court under whose jurisdiction the infringement occurred, with the right of access to the adversarial system assured.

5th Paragraph – The court shall inform the name of mediators who are excluded from its register to the National Council of Justice, which will forward such information to the other courts, for them to effect immediate exclusion, with no need for a disciplinary procedure.

6th Paragraph – A mediator who is compulsorily excluded from the register of mediators of a court will no longer be admitted in any other.

Art. 11. The remuneration due to judicial mediators will be set by the courts and will be borne by the parties.

Sole Paragraph – A waiver of costs in relation to a party who alleges poverty in court will require acceptance from the mediator.

Section III – The Mediation Procedure

Subsection I - Common Provisions

Art. 12. A person appointed to function as mediator shall communicate to the parties any fact or circumstance that may raise a doubt in relation to his/her impartiality to mediate the conflict, at which time he/she may be refused by either of them.

Art. 13. At the start of the first mediation meeting, and whenever he/she deems it necessary, the mediator shall advise the parties of the rules of confidentiality applicable to the procedure.

Art. 14. At the request of the parties or the mediator, with their consent, other mediators may be admitted to function in the same procedure, when this is advisable by virtue of the nature and complexity of the dispute.

Art. 15. Even if there is a judicial or arbitral proceeding in progress, the parties may submit themselves to mediation, in which case they will ask the judge or arbitrator to suspend the proceeding for a period sufficient for a consensual solution to the dispute.

1st Paragraph – The decision to suspend the proceeding in the terms requested by mutual agreement of the parties allows for no appeal.

2nd Paragraph – Suspension of the proceeding does not prevent the granting of urgent measures by the judge or arbitrator.

Art. 16. The parties may be assisted by counsel.

Sole Paragraph – If just one of the parties is assisted by a legal professional, the others may request the appointment of an ad hoc defender.

Art. 17. Mediation is deemed instituted on the date on which its initial terms are signed.

1st Paragraph – The initial terms of mediation shall contain:

I – the qualification of the parties, and their attorneys, if any;

II – the name, profession and domicile of the mediator or mediators, and also, as the case may be, identification of the entity to which the parties delegated the appointment of mediators;

III – the description of the dispute submitted to mediation;

IV – a statement of responsibility for the payment of expenses with the mediation and the fees of the mediator, irrespective of whether a consensus is reached;

V – place, date, and signature of the mediator, the parties and their attorneys, if any.

2nd Paragraph – The parties may include in the initial terms of mediation other matters they may deem pertinent, including the limits of the duty of confidentiality applicable to all those involved in the procedure, and signatories of the initial terms of mediation.

3rd Paragraph – While the mediation procedure is in progress, the statute of limitations will be suspended

as from signature of the initial terms.

Art. 18. Once mediation is instituted, subsequent meetings attended by the parties may only be scheduled with their consent.

Art. 19. In the performance of his/her function, the mediator may meet with the parties, together or separately, hear third parties and ask the parties for information deemed necessary to clarify the facts and facilitate understanding between the parties.

Art. 20. The mediation procedure will be closed, drawing up its final terms, when an agreement is reached or when new efforts to obtain a consensus are not justified, either by a statement from the mediator in this regard or through a statement from either of the parties.

1st Paragraph – The final terms of mediation shall contain:

I – the qualification of the parties and their attorneys and representatives, if any;

II – a summary of the dispute;

III – the description of the agreement, with the rights and obligations of each party, or a statement or declaration that it is no longer possible to obtain a consensual resolution;

IV – place, date, signature of the mediator and, if an agreement has been reached, the signatures of the parties and their attorneys, if any.

2nd Paragraph – The final terms of mediation constitute an out-of-court title to execution and, when ratified in court, a judicial title to execution.

Subsection II – Out-of-Court Mediation

Art. 21. The invitation to start the procedure of out-of-court mediation may be made by any means of

communication.

Sole Paragraph – The invitation made by one party to another will be deemed rejected if not replied to in the timeframe stipulated in their contract if any, or in its absence, within thirty days from the date of its receipt.

Art. 22. If there is no stipulation addressing the procedure, the mediator shall establish one, taking into account the circumstances of the case, the interests expressed by the parties and the need for a speedy resolution to the dispute..

Art. 23. If, in the initial terms of mediation, the parties undertake not to begin an arbitration proceeding or lawsuit for a certain period or until implementation of a certain condition, the arbitrator or the judge will suspend the course of the arbitration or lawsuit for the period previously agreed upon or until implementation of that condition.

Sole Paragraph – The provisions of the main section of this article do not apply to urgent measures in which access to the Judiciary Branch is necessary to avoid the extinction of a right.

Subsection III – Judicial Mediation

Art. 24. In judicial mediation, the mediators will be appointed by distribution and submitted to the acceptance of the parties.

Art. 25. If the judge, on receipt of the initial petition, should verify that the controversy is suited to a resolution by means of mediation, he/she will forward the case to the judicial mediator, appointed by distribution, unless the petition is accompanied by a statement in which the plaintiff states his refusal to participate in the procedure.

1st Paragraph – On receiving the case file., the mediator will request the parties, by any means of communication, to make a statement within fifteen

days on their willingness to submit to the procedure and their acceptance of the mediator appointed.

2nd Paragraph – If there is no answer from either of the parties, the mediation procedure will be deemed rejected, and the mediator shall forthwith return the case file to the judge, for him to proceed with the case.

3rd Paragraph – If the parties decide to submit themselves to mediation and the mediator is accepted, he/she will schedule the initial session of mediation, on a day and time previously agreed on, respecting the timeframe of thirty days.

4th Paragraph – If the procedure is accepted, but the mediator rejected, the latter shall communicate forthwith to the registry office or court secretariat, which will redistribute the case records to another mediator.

Art. 26. The judicial mediation procedure shall be concluded within sixty days, counting from the first session, unless the parties, by mutual agreement, request its extension.

1st Paragraph – If the mediation is concluded without an agreement being reached, the initial and final terms of mediation will be forwarded to the judge, who will proceed with the case.

2nd Paragraph – If there is an agreement, the records will be forwarded to the judge, who will order closure of the initial petition and, provided this is requested by the parties, will ratify, through a non-appealable ruling, the final terms of the mediation.

Art. 27. If the dispute is resolved by mediation before the defendant is cited, final court costs will not be due.

Section IV – Confidentiality and its Exceptions

Art. 28. All and any information concerning the

mediation procedure shall be confidential in relation to third parties, and may not be revealed, even in an arbitral or court proceeding, unless the parties expressly decide otherwise or when its disclosure is required by law or necessary for implementation of the agreement obtained by mediation.

1st Paragraph – The duty of confidentiality applies to the mediator, the parties, their representatives, counsel, technical advisors and other persons in their trust who directly or indirectly took part in the mediation procedure, encompassing:

I – a statement, opinion, suggestion, promise or proposal made by one party to the other in the search for understanding in the conflict;

II – recognition of a fact by either of the parties in the course of the mediation procedure;

III – a statement of acceptance of a proposal for agreement presented by the mediator;

IV – a document prepared solely for purposes of the mediation procedure.

2nd Paragraph – Evidence submitted which is non-compliant with this article will not be admitted in a judicial or arbitral proceeding.

3rd Paragraph – The rule of confidentiality will not cover information concerning the occurrence of a criminal action.

Art. 29. Information furnished by a party in a private session will be confidential, and the mediator may not reveal it to the others, unless expressly authorized.

Chapter II

The Settlement of Disputes to which a Public-law Legal Entity is Party

Section I – Common Provisions

Art. 30. The Federal Union, States, the Federal District and Municipalities may create chambers for the administrative prevention and resolution of disputes, with competency to:

I – settle conflicts between entities and bodies of the public administration;

II –appraise the admissibility of requests for resolution of disputes, by means of settlement, in the case of controversy between a private party and a public-law legal entity.

III – promote, when fitting, execution of an undertaking of adjustment of conduct.

1st Paragraph – The mode of settlement and functioning of the chambers addressed in the main section will be established in regulations by each entity of the federation.

2nd Paragraph –Submission of a conflict to the chambers addressed in the main section is optional and will be fitting only in the cases addressed in the regulations of the respective entity of the federation.

3rd Paragraph – If there is a consensus between the parties, an agreement will be drawn up, and except in the case of sub-item I, will constitute an out-of-court title to execution.

4th Paragraph – Not included in the competency of the bodies mentioned in the main section of this article are controversies that can only be resolved by acts or concession of rights subject to authorization from the Legislative Branch or which may entail excessive burdens for the Public Administration.

5th Paragraph – The provisions of sub-items II and III of the main section do not apply to legal controversies in taxation matters.

Art. 31. Opening an administrative proceeding for the consensual resolution of a conflict within the realm of the Public Administration suspends the statute of limitations.

1st Paragraph – The procedure is deemed opened when the public entity or body issues a positive judgment of admissibility, with suspension of the statute of limitations retroactive to the date of formalizing the request for consensual resolution of the conflict.

2nd Paragraph – In cases of taxation matters, suspension of the statute of limitations shall observe the provisions of Law No. 5,172, of October 25 1966 – National Taxation Code.

Section II –Conflicts Involving the Direct Federal Public Administration, its Autarkies and Foundations

Art. 32. The solution of legal controversies that involve the direct Federal Public Administration, its autarkies and foundations, may be addressed in settlement by adhesion, based upon:

I –authorization from the Federal Attorney-General, based on unanimous case law at the higher courts or the Federal Supreme Court; or

II – an opinion from the Federal Attorney-General, approved by the President of the Republic.

1st Paragraph – The requirements and conditions of settlement by adhesion will be defined in a specific administrative resolution.

2nd Paragraph – When making the request for adhesion, the interested party shall attach proof of meeting the requirements and conditions established in an administrative resolution.

3rd Paragraph – The administrative resolution will have general effects and will be applied to identical

cases, timely qualified by a request for adhesion, albeit to resolve only part of the controversy.

4th Paragraph – Adhesion will imply the interested party's waiving the right that underpins any lawsuit or appeal that may be pending, either administrative or judicial, with regard to the points encompassed by the subject of the administrative resolution.

5th Paragraph – If the interested party is party to a lawsuit opened through a class action, waiver of the right that underpins the lawsuit shall be express, by means of a petition addressed to the judge of the case.

6th Paragraph – Formalization of an administrative resolution destined to settlement by adhesion does not entail tacit waiver of the statute of limitations, nor its interruption or suspension.

Art. 33. In the case of disputes that involve a legal controversy between public-law entities or bodies that make up the Federal Public Administration, the Federal Attorney-General's Department shall effect the out-of-court settlement of the conflict, observing the procedures laid down in an act of the Federal Attorney-General.

1st Paragraph – In the hypothesis addressed in the main section, if there is no agreement on the legal controversy, it will fall to the Federal Attorney-General to settle it, based on the legislation.

2nd Paragraph – In cases in which resolution of the controversy implies recognition of the existence of credits of the Federal Union, its autarkies or foundations, against federal public-law legal entities, the Federal Attorney-General's Department will ask the Ministry of Planning, Budget and Management for a budget adaptation to settle the debts recognized as legitimate.

3rd Paragraph – Out-of-court settlement of the conflict does not rule out identifying responsibility

of the public agent who gave rise to the debt, whenever it is found that his/her action or omission constitutes, in theory, a disciplinary infringement.

4th Paragraph – In cases in which the matter addressed in the dispute is being discussed in an action of administrative malfeasance, or on which there is a decision from the Federal Court of Accounts, the conciliation addressed in the main section will depend on the express consent of the judge of the case or the reporting Justice.

Art. 34. The States, Federal District and Municipalities, their public foundations and autarkies, along with federal public companies and mixed-capital corporations, may submit their disputes with entities or bodies of the Federal Public Administration to the Federal Attorney-General's Department, for purposes of settling the conflict out of court.

Art. 35. In cases in which the legal controversy is related to taxes administrated by the Federal Revenue Secretariat of Brazil or to credits entered as Federal debts subject to execution:

I – the provisions of sub-items II and III of the main section of art. 30 do not apply;

II – public companies, mixed-capital corporations and their subsidiaries that exploit an economic activity of production or commercialization of goods or the provision of services, may not exercise the option addressed in art. 34;

III – when the parties referred to in the main section of art. 33 are parties:

a) submission of the conflict to out-of-court settlement by the Federal Attorney-General's Department implies waiving the right to appeal to the Administrative Council of Taxation Appeals;

b) reduction or cancellation of the credit will depend

on a joint statement from the Federal Attorney-General and the Minister of State for Finance.

Art. 36. Filing a lawsuit in which appear as plaintiffs or defendants Federal public-law entities or bodies, shall be authorized in advance by the Federal Attorney-General.

Sole Paragraph – The competency addressed in the main section may be delegated.

Art. 37. Public servants and employees who participate in the process of out-of-court settlement of the dispute may only be liable in the civil, administrative or criminal spheres when, through malice or fraud, they receive any undue financial advantage, allow or ease its reception by a third party, or contribute to this end.

Chapter III Final Provisions

Art. 38. The entities and bodies of the Public Administration may create chambers for the resolution of conflicts between private parties, which involve activities regulated or supervised by them.

Art. 39. Arts. 1 and 2 of Law No. 9,469, of July 10 1997, shall henceforth be in effect with the following wording:

“Art. 1. The Federal Attorney-General, directly or through delegation, and the highest-level directors of federal public companies, jointly with the statutory director of the area affected by the matter, may authorize reaching agreements in settlements to prevent or terminate a dispute, including judicial disputes.

1st Paragraph – Specialized chambers may be created, made up of public servants or effective public employees, with the aim of analyzing and formulating proposals for agreements or settlements.

2nd Paragraph – Regulations will address the form of composition of the chambers addressed in the 1st paragraph, which shall have as a member at least one full member of the Federal Attorney-General's Department, or, in the case of public companies, a legal assistant or occupant of an equivalent function.

3rd Paragraph – When the dispute involves amounts above those set in the regulations, the agreement or settlement, on pain of nullity, will require prior and express authorization from the Federal Attorney-General or the Minister of State or head of the Secretariat of the Presidency of the Republic and whose area of competency is pertinent to the matter; or also the Speaker of the House of Representatives, the Federal Senate, the President of the Federal Court of Accounts, of a Court or Council, or the Federal Chief Prosecutor, in the case of interests of the Legislative and Judiciary Branches, or of the Federal Public Prosecutor's Department, excluding non-dependent public companies, which will require only the prior and express authorization of the directors referred to in the main section.

4th Paragraph – In a settlement or agreement reached directly by the party or through the mediation of an attorney to extinguish or close a legal proceeding, or also in cases of administrative extension of payments pursued in court, the parties may define the responsibility of each one of them for the payment of the fees of their respective counsel.” [New Wording].

“Art. 2. The Federal Attorney General, the Federal Chief Prosecutor, the Attorney-General of the Central Bank of Brazil and the directors of the federal public companies mentioned in the main section of art. 1 may authorize, directly or through delegation, reaching agreements to prevent or terminate, in or out of court, a dispute that involves amounts below those set in the regulations.

1st Paragraph – In the case of federal public companies, delegation is restricted to a formally-

constituted joint board, consisting of at least one statutory officer.

2nd Paragraph – The agreements addressed in the main section may consist of payment of the debit in monthly and successive instalments, up to a maximum of 60 (sixty).

3rd Paragraph – The amount of each monthly instalment, at the time of payment, will undergo the addition of interest equivalent to the reference rate of the Special System of Clearing and Custody – SELIC for federal securities, accumulated monthly, calculated from the month following that of consolidation until the month preceding that of payment, and of 1% (one per cent) relative to the month in which the payment is being made.

4th Paragraph – In the event of default on any instalment, after thirty days, an execution proceeding will be opened or continued, for the balance.” [New Wording]

Art. 40. Decree No. 70,235, dated March 06 1972, shall henceforth be in effect with addition of the following provision:

“Art. 14-A. In the event of determination and requirement of Federal Union tax credits whose debtor is a public-law entity or body of the Federal Public Administration, submission of the dispute to out-of-court settlement by the Federal Attorney-General’s Department is considered a claim for the purposes of the provision of art. 151, III, of Law No. 5,172, of October 25 1966 – National Taxation Code.”

Art. 41. This Law applies, insofar as fitting, to other consensual forms of conflict resolution, such as community, school, criminal and labor mediations, and also those put into effect at out-of-court offices.

Art. 42. Mediation may be done on the internet or by any other means of communication that allows

remote transmission, provided that the parties are in agreement.

Sole Paragraph – A party domiciled abroad may participate in mediation according to the rules established in this Law.

Art. 43. This Law comes into effect one hundred and eighty days after its publication.

Art. 44. The 2nd paragraph of art. 6 of Law No. 9,469, of July 10 1997, is revoked.

Commission Office

Chairman

Reporter

This text, on reaching the House, will probably be attached to PL 94/02, which has now been under way for over fifteen years (former PL 4827/98), with no significant evolution. We imagine that a new Substitute will be presented which, once voted, will have to go back to the Senate.

4. OUTLOOK FOR BRAZILIAN LAW

Even though this paper has concentrated on the procedural issues pertaining to mediation, we hold the opinion that the best model is the one which urges the parties to seek a consensual resolution, making every effort before filing a lawsuit. A resolution extolling only a system of very well-equipped incidental mediation mechanisms after a lawsuit has already been initiated does not appear to be ideal, as the judicial machinery will already be in motion, when, in many cases, this could have been avoided¹⁰.

On the other hand, we do not agree with the idea of obligatory mediation or conciliation. The voluntary nature is the essence of such procedures. This feature can never be compromised, even with the argument that it is a form of educating the people and implementing a new form of public policy.

10 PINHO, Humberto Dalla Bernardina de. PAUMGARTTEN, Michele Pedrosa. *A experiência italo-brasileira no uso da mediação em resposta à crise do monopólio estatal de solução de conflitos e a garantia do acesso à justiça*, in Revista Eletrônica de Direito Processual, volume 8, available at <http://www.redp.com.br>.

However, we are forced to acknowledge that, in certain cases, mediation and conciliation must be regulatory stages of the procedure, to the extent that such tools prove to be the best suited to the outcome of that particular dispute..

Thinking of a prior and obligatory instance of conciliation, in cases in which only property issues are being discussed, or imposing sanctions for not accepting a reasonable settlement (such as payment of the costs of the proceeding or the attorneys' fees, even if the party is successful, when that amount is exactly what was decided by the judge in the decision), may be valid solutions. They are examples from English law¹¹ and U.S. law¹², which deserve to be studied.

But should never be applied in a mediation where there are profound emotional issues - quite often unconscious - that require time, maturity and mutual trust to be exposed and resolved¹³.

However, we are obliged to acknowledge that it is necessary to seek a resolution for cases in which mediation is the most suitable solution, yet rejected by the parties for no plausible reason.

The Judiciary cannot be allowed to be used, abused or manipulated at the whim of litigants who quite simply want to fight or push the dispute to new frontiers.

We reassert here our opinion that the parties should have the obligation to demonstrate to the Court that they have tried, in some way, to seek a consensual resolution for the dispute..

We support, as already stated¹⁴, expanding the procedural concept of interest to act, welcoming the idea of adaptation, within the binomial need-usefulness, as a way to rationalize the measure of jurisdiction and avoid unnecessary resort to the Judiciary Branch, or even abuse of the right of action.

This view may lead to a difficulty of harmony with the principle that jurisdiction may not be delegated; that the judge may not evade his

11 ANDREWS, Neil. *The Three Paths of Justice*. Cambridge: Springer, 2012, p. 197

12 As an example, we may mention Rule 68 of the F.R.C.P.: "*Federal Rules of Civil Procedure. Rule 68. OFFER OF JUDGMENT. (a) MAKING AN OFFER; JUDGMENT ON AN ACCEPTED OFFER. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment. (...)*". Text available at <http://www.uscourts.gov>, access on Sep. 12 2013.

13 PINHO, Humberto Dalla Bernardina de. PAUMGARTTEN, Michele Pedrosa. Os efeitos colaterais da crescente tendência à judicialização da mediação, in *Revista Eletrônica de Direito Processual*, volume 10, Jan-Jun. 2013.

14 PINHO, Humberto Dalla Bernardina de Pinho. *A Mediação e a necessidade de sua sistematização no processo civil brasileiro*, in REDP –YEAR 4 – 5th volume – January - June 2010, available at <http://www.redp.com.br>, p. 147.

function of judging, that is to say, if a citizen knocks at the door of the Judiciary, his access shall not be denied or hindered, pursuant to article 5, sub-item XXXV of the 1988 Constitution.

What must be clarified is the fact that a party under jurisdiction requesting measures from the state does not mean that the Judiciary must, always and necessarily, offer a response of imposition, doing no more than applying the law to the case in point¹⁵. It may be that the judge understands that those parties must be submitted to a conciliatory, pacifying stage, before any technical decision should be issued¹⁶.

This is made very clear in the legislative bill for the new CPC, to the extent that art. 139 grants the judge a whole series of powers, especially with regard to steering the proceeding, expressly mentioning adaptation and mitigated flexibility as tools for attaining effectiveness.

On this point, obviously the judge's paramount concern will be with the actual pacification of that dispute, rather than with merely rendering a judgment, as a form of technical-juridical answer at the urging of the party under jurisdiction.

If the new CPC requires from the judge absolute fidelity to the Constitutional Principles, converting him/her, beyond question, into an agent of preservation of the constitutional guarantees, on the other hand, it also grants him/her with instruments to acquire profound knowledge of the conflict, encompassing its reasons, albeit-meta-legal, so to as to effect its pacification.

In this regard, it is necessary to establish a system balanced between judicial and out-of-court mediation, so as to firmly guarantee access to justice and maintain a Judiciary that is agile, speedy and effective. Once a lawsuit has been filed, just as we have developed a system of filters for repetitive cases, we also have to think of a multi-door system that adapts to each type of dispute.

Another point that strikes me as vital is the construction of a collaborative network¹⁷, involving the entities of the Judiciary Branch and sectors of organized civil society possessing the structure necessary to offer this service under a regime of cooperation. I am referring to out-of-court registry offices, the public and private universities, professional associations, the Public Defenders and Prosecutors, and

15 MANCUSO, Rodolfo de Camargo. *A resolução dos conflitos e a função judicial no Contemporâneo Estado de Direito*. São Paulo: Revista dos Tribunais, 2009.

16 PINHO, Humberto Dalla Bernardina de. *Mediação: a redescoberta de um velho aliado na solução de conflitos*, in: *Acesso à Justiça: efetividade do processo* (org. Geraldo Prado). Rio de Janeiro: Lumen Juris, 2005, pp. 105/124.

17 SPENGLER, Fabiana Marion; SPENGLER NETO, Theobaldo. *Mediação enquanto política pública: a teoria, a prática e o projeto de lei*. Santa Cruz do Sul, Edunisc, 2010. <http://www.unisc.br/portal/pt/editora/e-books/95/mediacao-enquanto-politica-publica-a-teoria-a-pratica-e-o-projeto-de-lei-.html>.

Public Advocacy.

Thinking of judicial mediation alone will not resolve the problem of the overload of work that currently presses down on the judges' shoulders. On the contrary, it will most likely cause a new "boom" of cases, just as happened with enactment of the CDC (Consumer Defense Code) in 1990 and institution of the Civil Special Courts, in 1995.

Faced with this, we are obliged to recognize that, before enacting our future law of mediation, we have to build this network and prepare it for the volume of cases to come, in order to avoid the risk of compromising this institution before it even comes into effect.

5. REFERENCES

- ANDREWS, Neil. (trad. Teresa Alvim Arruda Wambier). *O Moderno Processo Civil: formas judiciais e alternativas de resolução de conflitos na Inglaterra*, São Paulo: Revista dos Tribunais, 2009.
- BESSO, Chiara. *La Mediazione Italiana: Definizioni e Tipologie*. Artigo disponível no vol. VI da Revista Eletrônica de Direito Processual, disponível no endereço <http://www.redp.com.br>, acesso em 10 de janeiro de 2011.
- COMOGLIO, Luigi Paolo. *Mezzi Alternativi de Tutela e Garanzie Costituzionali*, in Revista de Processo, vol 99, p. 249/293.
- FULLER, Lon. Mediation. Its Forms and Functions, *CAL. L. REV.* vol. 305, 1971.
- MANCUSO, Rodolfo de Camargo. *A resolução dos conflitos e a função judicial no Contemporâneo Estado de Direito*. São Paulo: Revista dos Tribunais, 2009.
- MIRIMANOFF Jean A., Une nouvelle culture : la gestion des conflits, in: APJ/PJA, février 2009, www.gemme.ch.
- MUÑOZ, Helena S.. La mediación: método de resolución alternativa de conflictos en el proceso español. Revista Eletrônica de Direito Processual Civil. vol. III, p. 66-88, jan-jun. 2009.
- NOLAN-HALEY, Jacqueline M. The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound. *Cardozo Journal of Dispute Resolution*, vol. 6, 2004.
- OWEN, Fiss. Alternative Dispute Resolutions Debated: Second-Hand Justice? *The Connecticut Law Tribune*. March 17, 1986.
- PELUSO, Antonio Cezar. RICHÁ, Morgana de Almeida [coordenadores]. *Conciliação e Mediação: estruturação da política judiciária nacional*, Rio de Janeiro: Forense, 2011.
- PINHO, Humberto Dalla Bernardina de [organizador]. *Teoria Geral da Mediação à luz do Projeto de Lei e do Direito Comparado*, Rio de Janeiro: Lumen Juris, 2008.
- PINHO, Humberto Dalla Bernardina de Pinho. *A Mediação e a*

necessidade de sua sistematização no processo civil brasileiro, in REDP - ANO 4 - 5º volume - Janeiro a Junho de 2010, disponível em <http://www.redp.com.br>.

PINHO, Humberto Dalla Bernardina de Pinho. DURCO, Karol. *A Mediação e a Solução dos Conflitos no Estado Democrático de Direito. O “Juiz Hermes” e a Nova Dimensão da Função Jurisdicional*, disponível em <http://www.humbertodalla.pro.br>.

PINHO, Humberto Dalla Bernardina de. *Mediação: a redescoberta de um velho aliado na solução de conflitos*, in: Acesso à Justiça: efetividade do processo (org. Geraldo Prado). Rio de Janeiro: Lumen Juris, 2005.

PINHO, Humberto Dalla Bernardina de. PAUMGARTTEN, Michele Pedrosa. *A experiência ítalo-brasileira no uso da mediação em resposta à crise do monopólio estatal de solução de conflitos e a garantia do acesso à justiça*, in Revista Eletrônica de Direito Processual, volume 8, disponível em <http://www.redp.com.br>.

PINHO, Humberto Dalla Bernardina de. PAUMGARTTEN, Michele Pedrosa. Os efeitos colaterais da crescente tendência à judicialização da mediação, in Revista Eletrônica de Direito Processual, volume 10, jan-jun 2013.

PINHO, Humberto Dalla Bernardina de. PAUMGARTTEN, Michele Pedrosa. *Mediación Obligatoria: una versión moderna del autoritarismo procesal*. Revista Eletrônica de Direito Processual. texto disponível em <http://www.redp.com.br>, vol.10, p.210 - 225, 2012

SPENGLER, Fabiana Marion; SPENGLER NETO, Theobaldo. *Mediação enquanto política pública: a teoria, a prática e o projeto de lei*. Santa Cruz do Sul, Edunisc, 2010. <http://www.unisc.br/portal/pt/editora/e-books/95/mediacao-enquanto-politica-publica-a-teoria-a-pratica-e-o-projeto-de-lei-.html>.

AN ATTEMPT FOR THE PROTECTION OF SEXUAL DIVERSITY IN BRAZILIAN LAW

Marcos Vinicius Torres Pereira

Professor at the Department of Civil Law of the Federal University of Rio de Janeiro, Brazil.

Abstract: This article intends to talk about a democratic initiative of the Brazilian Bar Association to promote human rights and sexual diversity in Brazil. Brazil is walking up the road to protect LGBTI citizens and to legally recognize same-sex couples. The country has guaranteed many rights to homosexual couples and their children, but the lack of a specific act to rule these matters is a problem in a country whose legal system is still very dependent to legal acts and positivism. This work tries to show the state of art of homosexual couples' rights in Brazil and how the proposal of a new statute to protect the rights of LGBTI people, in all aspects of their daily life could protect them and contribute for a democratic society.

Keywords: Prejudice - Sexual Diversity - Protection.

1. INTRODUCTION

Homosexuality has always existed, but only a few decades ago homosexuals started being considered as equal as other citizens in the majority of countries; and in the last years their relationships have been recognized as families in some countries. Brazil – as well as other Latin American countries - was not indifferent to this worldwide –or at least occidental - movement.

Many contradictions may blur the vision of Brazil as a paradise for sexual liberation. The country is known as a place where sex has no barriers, celebrations are everywhere all the time. Nevertheless, this utopic and at a certain point of view derogatory stigma does not correspond to daily life. Discrimination against women and homosexuals are frequent, sometimes with different approaches, but with a same root: a model of a sexist heterocentric society based on the figure of the heterosexual husband and father.

2. A LONG HISTORY OF CENTURIES OF DISCRIMINATION

The story of discrimination and persecution of homosexuals, and more precisely, those who dared choosing a different sexual orientation from the heterosexual model, may be focused in a view of them either as sinners, or criminals, or sick people.

The oldest and strongest cause for prejudice is surely religion. In the Middle Ages in Europe, homosexuals were persecuted as unnatural, because their attraction towards someone from the same sex was considered a deviation from the moral model preached by the Church¹. Homosexual relations would not match the dogma of sex for procreation, and therefore it would not contribute to ensure the continuity of the Church's power by enlarging the Christian population. Homosexuals were therefore considered sinners.

Historical records show that the Inquisition burned miles of homosexuals in Europe and in the Americas, during European Colonization. Inquisition was more severe in Portugal, Spain and their colonies in the 16th and 17th centuries, due to the Catholic Contra-Reform Movement on the Iberian peninsula. This way, the Portuguese heritage to Brazil did not include only the language, the religion and the cultural traditions, but also the society model, the sexism, and the prejudice and persecution against homosexuals.

The Catholic Church was powerful in Portugal and influenced its legal system. The Royal Ordinances considered sodomy a crime and its adepts could be prosecuted, condemned and killed, especially by Inquisition, which was very powerful during Brazilian Colonization.

From the Brazilian Empire on, our autochthonous laws did not criminalize man-to-man sexual intercourse itself, but some crimes were often used to persecute homosexuals, such as transvestism, obscene acts and vagabond behaviour.

The new Criminal Code from 1940 did not change this approach nor contribute to end prejudice against homosexuals. Following on the footsteps of European Theories from Criminology and Legal Medicine broadcasted from the end of the 19th Century on – the “homosexual” was first used by the German-Hungarian journalist Karl Maria Kertbeny in 1868 -, our authorities and intellectuals contributed to homophobia, because they disseminated the belief that homosexuality was caused by hormonal or psychiatric disturbs. The great development of psychology in the first half of the 20th century was not enough to avoid that some homosexuals were sent to clinics and submitted to medical treatment in an attempt to turn them into heterosexuals. Only in 1973, homosexuality was removed of the North-American list of psychiatric disorders, which

¹ See FORNE, Byrne. *Homophobia: a History*. New York, Metropolitan Books, 2011. p. 111-175.

was followed in Brazil only in the eighties. In a global scale, only in 1991 – by the end of the century –, it was officially removed from the list of diseases of the World Health Organisation.

Recently, some Christian Congregations, like the Contemporary Christian Church in big cities in Brazil, seem to be more tolerant towards homosexuality, what makes them popular for many members of the LGBTI community. They welcome gays and lesbians and sometimes celebrate religious weddings – which are not necessarily recognized – and welcome their children resulting from surrogacy motherhood, joint-adoption or stepchild-adoption. They thus encourage homosexuals to form a family, something that is criticized by some LGBTI activists, for it corresponds to a family based in a heterosexual model, but something that corresponds to what many activists are fighting for in many countries.

3. LIVING IN PARADISE IN BRAZIL?

3.1. DIFFERENT JURIDICAL STATUS FOR SAME-SEX COUPLES

If we focus on the status of homosexuals from the clash of human rights on, we can notice that from the 1960s on we can set out a phase of development of gay culture in many occidental big cities and of the beginning of the fight for gay rights, with the raid on the Stonewall Inn and the rebellion that followed it in New York in 1969, as an unforgettable landmark of the fight for gay rights. By this time, gay activist groups were starting to organize themselves in Europe and in North America, where we can single out the figure of Harvey Milk². In Brazil and in other Latin American countries, these movements were not so open, because of military governments that did not support minorities' rights at all.

The 1980s were marked by the phantom of AIDS, which was widespread in the gay community, but also witnessed a phase of victory for gay movements: the decriminalisation of homosexual relations in some major countries – a fight already started many years before – and the fact that Denmark was the first country to open its legislation to recognize homosexual unions in 1989, but excluding them from a religious ceremony and from adoption.

After some years of battle, other concrete victories on the human rights field were achieved from the 1990s on. Many local and national courts have judged favourably against discrimination and to ensure

² See MARCUS, Eric. *Making Gay History: the Half-Century Fight for Lesbian and Gay Equal Rights*. New York, Harper Collins, 2002.

some rights to homosexual couples. Some Scandinavian countries followed on the Danish footsteps. They had won an important battle: they could have their unions recognized, but they could not get married, as straight people could do. Besides, they did not have all the rights granted to heterosexual couples. France approved its PACS Act in 1999, and established a *sui generis* model of partnership contract which made no distinction among homosexual and heterosexual partners³.

In the 21st century, other countries in Europe legalized homosexual relationships. The recognition also arrived in Latin America⁴, South Africa, Australia and New Zealand, where homosexual marriage was approved for the first time in the area of Asia and the Pacific. It is remarkable that The Netherlands were the first country to allow homosexual marriage and joint adoption by homosexual parents in 2001⁵. Argentina, Belgium, Iceland, Spain, Sweden and Uruguay also legalized homosexual marriage. Portugal reformed its Civil Code to introduce homosexual marriage.

In the Americas, it is important to say that Canada began the legalization of homosexual relationships in the turn of the millennium, in its provinces, until marriage was legalized for the whole country in 2005 – the first country to allow homosexual marriages outside Europe. Marriage was spread over the country in Brazil and Mexico, through court decisions.

3.2. CURRENT LEVEL OF PROTECTION FOR SEXUAL DIVERSITY IN BRAZIL;

In Brazil, some State jurisdictions started recognizing same-sex partners the same status as heterosexual partners living in a civil union. The Court of Rio Grande do Sul first recognized it in 1999⁶. Then, other State Courts did the same and later also recognized the rights to succession and to joint adopt children for same-sex couples. However, the claims were usually risky, because a judge or a court could deny them, as our laws and codes said nothing about same-sex couples. The reference to marriage and civil unions as monogamical families composed by a man and a woman were referred to a specific

3 For a history of same-sex couples rights in Europe, see KESSLER, Guillaume. *Les partenariats enregistrés en droit international privé*. Paris, LGDJ, 2004.

4 See PIERCESON, Jason. PIATTI-CROCKER, Adriana. SCULENBERG, Shawn. *Same-sex marriage in the Americas: policy innovation for same-sex relationships*. New York, Lexington Books, 2010.

5 See BLAIR, Marianne. MALDONADO, Solangel. STARK, Barbara. WEINER, Merle H. *Family Law in the World Community: Cases, Materials, and Problems in Comparative and International Family Law*. 2 ed. Durham, Carolina Academic Press, 2009. p. 219-221.

6 BRASIL. TJRS, AC 598362655, 8ª Câm. Civ., rel. Des. José S. Trindade, j. 01.03.2000.

prohibition to same-sex couples.

In may 2011, the Supreme Federal Court – equivalent to a Constitutional Court - rendered a decision that recognized the same rights to homosexual couples living in a partnership as heterosexual couples living in a partnership have. The court did not list specific rights to be recognized, just indicated a general recognition, but it was a landmark for gay activists. The decision created a leading case, that should be followed by lower courts. From this decision on, no court in Brazil could ignore same-sex couples or limit their rights.

The 2011 Supreme Court decision⁷ did not talk about marriage, just about recognition as civil unions on the same basis as heterosexual couples. Nevertheless, as the Constitution and the Civil Code state that civil unions (partnerships) may be converted into marriage, some couples petitioned for it and some couples tried to get a direct permission to get married. Some couples did it directly to the notary, because they were asking an authorization to getting married. All couples do it for civil marriage, but it is never denied for straight couples. If a notary denies it, the parties may ask that a judge review it. A judge may review the decision or confirm it. If the parties are not satisfied with the judge's decision, they may appeal to the State Courts. A great variety of decisions were thus rendered in Brazil.

Some judges allowed the conversion, some not. Some also granted direct marriage, because they understood there could be no discrimination about marriage. The Higher Court of Justice – the Brazilian “Cour de Cassation” - rendered a decision recognizing the right of marriage for a lesbian couple, but it originated from an appeal on a case begun in the State of Rio Grande do Sul⁸. The decision was specific for this case but can be a reference for further cases. The Supreme Court has, nevertheless, never rendered a decision specific on gay marriage. She is expected to pronounce something favourable soon, because it is known that its Justices are pro same-sex marriage.

On the hope to end the battle of controversial decisions on same-sex couples' rights, in may 2013, the National Council of Justice – an organ that controls all the Courts in Brazil – enacted a resolution that benefited same-sex couples⁹. Brazil has 27 jurisdictions for the States and D.C. Family matters and successions are judged by these State jurisdictions, as well as notarial themes. Notaries in Brazil are always

7 BRASIL. Supremo Tribunal Federal. ADI 4277 e ADPF 133. Relator: Min. Ayres Britto. Tribunal Pleno, julgado em 05/05/2011, p. 656. Disponível em: <<http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=11872>>. Acesso em: 22/05/2014.

8 STJ. REsp. 1183378/RS. Rel Min Luis Felipe Salomão. j. 25/10/2011.

9 OLIVEIRA, Mariana. Decisão do CNJ obriga cartórios a fazer casamento homossexual. Publicada em: 14/05/2013 Disponível em: <<http://g1.globo.com/politica/noticia/2013/05/apos-uniao-estavel-gay-podera-casar-em-cartorio-decide-cnj.html>>. Acesso em: 30/05/2014.

public and are submitted to the High Court of the State Jurisdiction where they work. The National Council of Justice prohibited all notaries to discriminate same-sex couples who petition for marriage. As notaries are submitted and are part of State jurisdictions and tribunals, it was possible to reach them. This way, marriage was allowed to gay couples in Brazil. Even if a notary denies it, the parties may appeal and be sure that they will get married.

A conservative party is challenging the legality of this resolution before the Supreme Court. We expect it to be judged soon. Maybe we finally get something concrete soon. The party alleges that it was illegal, the same old story that marriage should be exclusive for a man and a woman. They also say that the Council exceeded its power, because they were ruling a theme that should be ruled by specific voted by the Parliament. Until now, there is no specific law or rule in the Civil Code or in the Federal Constitutional about marriage for homosexual couples. There are projects on the Congress for it, as well as we have projects against gay rights.

4. NEW HORIZONS FOR GAY RIGHTS IN BRAZIL?

The most significant initiative to guarantee gay rights recently as done by the Brazilian Bar Association. In 2011 a Special Commission of Specialists was indicated to prepare a draft for a new act on human rights and sexual diversity. The goal was to promote citizenship and to fight the discrimination based on sexual orientation and gender identity. The idea was elaborating a new act where all sorts of rights for gays, lesbians, bisexuals, intersex and transsexuals were guaranteed.

The draft was approved by the Brazilian Bar Association in the end of 2011. Since then, the Association is collecting signatures, to present it to the Congress through liberal deputies, with the support of voters. The project is expected to arrive soon to the Congress.

The draft for an act on sexual diversity would be very positive for Brazil and for human rights in general. Brazil would be the first country to include in the same document all rules related to the protection of LGBTI citizens, in all aspects of their daily life: not only family matters, but also protection from discrimination in different situations, the criminalization of homophobia and the introduction of affirmative measures to try to change society into an inclusive environment for all people.

This way, the draft of this project for a new Statute of Sexual Diversity is included herein as an appendix to this work, to publicize this important initiative.

5. REFERENCES

- BLAIR, Marianne. MALDONADO, Solangel. STARK, Barbara. WEINER, Merle H. *Family Law in the World Community: Cases, Materials, and Problems in Comparative and International Family Law*. 2 ed. Durham, Carolina Academic Press, 2009.
- FORNE, Byrne. *Homophobia: a history*. New York, Metropolitan Books, 2011.
- KESSLER, Guillaume. *Les partenariats enregistrés en droit international privé*. Paris, LGDJ, 2004.
- MARCUS, Eric. *Making Gay History: the Half-Century Fight for Lesbian and Gay Equal Rights*. New York, Harper Collins, 2002.
- PIERCESON, Jason. PIATTI-CROCKER, Adriana. SCULENBERG, Shawn. *Same-sex marriage in the Americas: policy innovation for same-sex relationships*. New York, Lexington Books, 2010.

APPENDIX

FOREPROJECT OF THE BRAZILIAN SEXUAL DIVERSITY ACT¹⁰

This Foreproject of the Brazilian Sexual Diversity Act is the result of the Work of the Special Sexual Diversity Commission of the Federal Brazilian Bar Association, which includes:

as its members:

President of the Commission - Maria Berenice Dias (**Rio Grande do Sul**)

Adriana Galvão Moura Abílio (**São Paulo**)

Paulo Marcos Freitas (**Distrito Federal**)

Marcos Vinícius Torres Pereira (**Rio de Janeiro**)

Paulo Tavares Mariante (**São Paulo**)

as its consultants:

Daniel Sarmiento (**Rio de Janeiro**)

Luis Roberto Barroso (**Rio de Janeiro**)

Rodrigo da Cunha Pereira (**Minas Gerais**)

Tereza Rodrigues Vieira (**São Paulo**)

EXPLANATORY MEMORANDUM

The Brazilian Federal Constitution establishes the dignity, the freedom and the equality of every person as fundamental principles. Besides prohibiting discrimination of any kind, it guarantees the full exercise of citizenship rights by everyone. Nonetheless, infra-constitutional laws shall give effectiveness to constitutional guidelines, principles and norms.

Therefore, congressmen cannot flee from the duty of voting infra-constitutional laws, otherwise the constitutional mandate consisting of the inclusion in the legal system of all rights that shall be protected, would not be achieved.

The lack of a certain act does not correspond to the nonexistence

¹⁰ The version in English of this material is used by the Brazilian Bar Association for cooperation activities with other foreign juridical institutions. The Original version in Portuguese available at the official website of the Brazilian Bar Association(OAB):http://www.oab.org.br/arquivos/pdf/Geral/ESTATUTO_DA_DIVERSIDADE_SEXUAL.pdf Last access: January 24th, 2012.

of this hypothetical corresponding right, neither can leave someone out of the scope of State protection. Democracy corresponds to guaranteeing rights for every person, not only the rights of the majority. Moreover, the minorities that are affected by prejudice and discrimination deserve a different and more careful protection in order to have their rights recognized.

State nonfeasance is historical regarding the rights of homosexual, lesbian, bisexual, transsexual, transvestite, transgendered and intersex persons. The oppression not only turns such persons into invisible beings, but also turns them vulnerable to homophobic acts, and thus socially vulnerable.

Not only sexual orientation and gender identity are neglected by the Legislative Authorities, but same-sex unions are also not legally recognized. The Federal Constitution considers family as the basis of society. Although it protects family in a special manner, the Constitution refers expressly only to marriage, heterosexual civil unions and single-parent families. In the same way, it only recommends the conversion of the heterosexual civil union into marriage. This, however, does not mean that same-sex unions are not family entities and that such special protection is not given to these types of unions.

Not neglecting this reality, judges have been recognizing the rights of homosexual, lesbian, bisexual, transsexual, transvestite, transgendered and intersex persons for over a decade, both in federal and State courts. The number of decisions has overpassed the one thousand mark. Since 2001, same-sex unions have been recognized within the scope of Family Law and Succession Law, which includes social security rights, death benefits and the right of including a partner as dependant in health insurance. Moreover, dozens of decisions have ensured the property's marriage portion to partners, the right to become a tenant of joint-residence after the death of a partner, inheritance rights and also those rights regarding the property listing of the deceased. In the same way, adoption and application to adopt have been assured to same-sex couples. Even the Supreme Federal Court has already welcomed more than 40 cases regarding such issues.

There are so many court decisions, that some rights are now granted by the administrative instance. This is what happened with the death and confinement pension allowances granted by the National Social Security Institute, the indemnities arising from the Mandatory Insurance for Personal Damages Caused by Land Motor Vehicles, or by its Load, to Transported People or Not, and the issuing of permanent visas to foreign partners, granted by the Ministry of Justice. Moreover, the inclusion of a partner as dependent in income tax filings is also possible.

Recently, a Supreme Court decision (ADI No. 4.277 and ADPF

No. 132, Rapporteur Minister Ayres Britto, judged on May 5th, 2011) unanimously recognized same-sex unions as family entities. Justices issued an accurate constitutional interpretation to Article 1,723 of the Civil Code, in order to exclude any interpretation that could prevent the recognition of a continuous, public and lasting same-sex union as a “family entity”, which shall be understood as a perfect synonym to “family”. Such recognition is supported by the same rules and has the same consequences of the heterosexual unions.

Such ruling became a historical milestone.

The Supreme Court did not trespass the National Congress’ functions - it did not legislate. It simply accomplished its duty, as set forth under the Constitution, of fulfilling legislative gaps. Justices also incited the legislators to comply with their duty.

As it was a definitive decision in a Direct Action of Unconstitutionality, it has binding effects over all courts and judges and over both direct and indirect public administration (Federal Constitution, Article 102, § 2). Thus, enforcement mechanisms regarding legal rights shall be created, homophobia shall be criminalized and public policies addressing the social inclusion of gay, lesbian, bisexual, transgender, transvestite, transgendered and intersex persons shall be adopted, under supervision of a legal system.

There is no doubt about the existence of a subjective right to the enjoyment of free sexual orientation and gender identity. As a result, there is a legal duty of recognizing and respecting such right. However, as it is a target segment of religious persecution, it is subject to marginalization and social exclusion. And, like every vulnerable social group, it deserves different protective rules.

The way modern States have found to ensure visibility and safety to those who are targeted by prejudice and discrimination is to establish legal microsystems that include the imposition of Affirmative Actions. Hence the Consumer’s Protection Code, the Children’s Act, the Elderly’s Statute and the Racial Equality Statute. The issuing of a special act for LGBT groups is not a transgression of the Principle of Equality. On the other hand, such actions consecrate such principle, as well as different treatment guarantees equality.

Besides listing some principles, the Sexual Diversity Act establishes family and criminal rules which set various prerogatives and rights to homosexual, lesbian, bisexual, transsexual, transvestite, transgendered and intersex persons. Furthermore, it legally recognizes same-sex unions and criminalizes homophobia, and also points out public policies that aim at the inclusion of such persons in society.

Whereas several rights are related to LGBT rights as a consequence of their recognition, the approval of the Sexual Diversity Act is not enough. Infra-constitutional rules shall be rectified, excluded

and amended. This way, this act also predicts the changes on many labour, private, social security, and criminal rules, in order to guarantee the recognition of citizenship to those who are still excluded from the brazilian legal system.

Many bills and constitutional amendments have been proposed and analyzed – some of them are still pending - in the National Congress. So far, no approval has been achieved yet. Therefore, many of such proposals have been incorporated into this Act.

It is time to end the legal invisibility of this segment of the population, which is targeted by vicious discrimination on the grounds of sexual orientation and gender identity.

Society shall change its paradigm. Every person shall learn to coexist with difference. Not only in the public sphere, but in the various segments of private enterprise. Nonfeasance, which contributes to social and moral harassment at school and at work, shall no longer exist. Likewise, we must end homophobia, criminalizing the discrimination, injure and kill.

Therefore, the Sexual Diversity Act shall be immediately approved, considering that it establishes a series of rights and privileges for those who are still not recognized as holders of rights: homosexual, lesbian, bisexual, transsexual, transvestite, transgendered and intersex persons. It is also important to insert homosexual ties within the field of Family Law, including its consequences and related rights.

Only the issuing of a set of rules shall impose not only the legal recognition, but also the social respect, to this part of the population, which is still targeted by prejudice and discrimination.

I. GENERAL PROVISIONS

Article One - This Sexual Diversity Act aims to promote the inclusion of all, to combat discrimination and intolerance on the grounds of sexual orientation or gender identity and criminalize homophobia, in order to ensure the promotion of equal opportunities and the protection of individual, collective and diffuse rights.

Article Two - It is recognized equal legal dignity to heterosexual, homosexual, lesbian, bisexual, transsexual, transvestite, transgendered and intersex persons as individuals and also in communion and social relationships, being respected the different ways through which they lead their lives according to their sexual orientation or gender identity.

Article Three - It is a duty both of the State and the Society to ensure the full exercise of citizenship, equal opportunities and the right to participate in community activities, especially in the political, economic, business, educational, cultural and sport activities.

II. FUNDAMENTAL PRINCIPLES

Article Four - Constitute fundamental principles for the interpretation and application of this Act:

Human dignity;
Equality and respect to the differences;
Right to free sexual orientation and gender identity;
Recognition of the personality according to gender identity;
Right to have a family and to community life;
Freedom to establish bonds of family and parenting;
Respect to intimacy, privacy and self-determination;
Fundamental right to happiness.

§ 1st - In addition to the constitutional rules which enshrine principles, guarantees and fundamental rights, this Act adopts as political and juridical guidelines the inclusion of victims of gender inequality and the respect to sexual diversity.

§ 2nd - The principles, rights and guarantees specified herein do not exclude others stemming from the constitutional and legal rules in force in the country and from international treaties and conventions to which Brazil is a signatory.

§ 3rd - For the purposes of this Act, the Yogyakarta Principles, approved in Indonesia on November 9th, 2006 shall be also observed.

III. RIGHT TO FREE SEXUAL ORIENTATION

Article Five - Freedom of sexual orientation and gender identity shall be deemed as fundamental rights.

§ 1st - State, family or society interference is undue when aiming to restrain someone from fulfilling his or her sexual and emotional relationships.

§ 2nd - Every person has the right to conduct his or her private life, not being admitted pressure to reveal, renounce or change sexual orientation or gender identity.

Article Six - No person shall suffer discrimination on the grounds of sexual orientation from any member of his or her family or community.

Article Seven - The freedom of conscience and belief is inviolable, being any practice that requires one to renounce or deny his or her sexual identity prohibited.

Article Eight - Hate speech or conducts that preach segregation on the grounds of sexual orientation or gender identity are forbidden.

IV. RIGHT TO EQUALITY AND NON-DISCRIMINATION

Article Nine - No one shall be discriminated against nor have rights denied on the grounds of his or her sexual orientation or gender identity in public, social, family, economic or cultural fields.

Article Ten - Discrimination shall be considered any act that:

Establishes distinction, exclusion, restriction or preference which has the aim of nullifying or limiting the rights and privileges granted to other citizens;

Prevents the recognition or exercise, on an equal basis, of human rights and fundamental freedoms in the social or family sphere;

Represents a violent, an embarrassing, an intimidating or a vexatious behavior.

Article Eleven - It is considered discriminatory on the grounds of sexual orientation or gender identity:

Prohibit the entrance or the presence of someone in a public or private property opened to the public;

Provide selective or differential treatment not provided by law;

Pretermite, charge a higher price or prohibit someone to be lodged in hotels, motels, inns or similar establishments;

Hinder or prevent the rental, purchase, leasing or loan of property or goods;

Prohibit public display of affection in public spaces, while demonstrations of the same kind are allowed to other citizens.

Article Twelve - The practice of any such acts or other discriminatory practices configures crime of homophobia, according to this Act, in addition as civil liability for material and moral damages.

V. RIGHT TO FAMILY LIFE

Article 13 - All persons have the right to constitute a family and are free to choose the family model they suit in, regardless of their sexual orientation or gender identity.

Article 14 - Same-sex unions shall be respected in their dignity and shall be especially protected by the State as family entities.

Article 15 - The same rights applicable to heterosexual unions are applicable to same-sex unions regarding Family Law and Succession Law, among such rights:

Right to marry;

Right to constitute a civil union and to convert it into a marriage;

Right to choose a model of property system to regulate their marriage or union;

Right to divorce;

Right to exercise parenthood, to adopt children and to use assisted reproduction technologies;

Right to be protected against domestic or family violence;

Inheritance rights, right to become a tenant of a joint-residence after the death of a partner and succession rights regarding partners.

Article 16 - All rights applicable to heterosexual unions are applicable to same-sex unions, such as those regarding social security, as well as fiscal and tax rights.

Article 17 - Foreign partners have the right to hold permanent visas in Brazil arising from the celebration of marriage or constitution of a civil union with Brazilian partners, as long as all legal requirements are fulfilled.

Article 18 - The law from the country where the same-sex family lives in determines the applicable Family Law rules.

Article 19 - Marriages, civil and stable unions celebrated or constituted in foreign countries shall be recognized in Brazil, as long as the formal proceedings required in the country of celebration or constitution have been observed.

VI. RIGHT TO PARENTHOOD, CUSTODY AND ADOPTION

Article 20 - The right to exercise parenthood, individually or within a civil union, regarding biological, adopted or social-affective children is hereby recognized, regardless of sexual orientation or gender identity.

Article 21 - The access to assisted reproductive technology is ensured through private healthcare or state-provided healthcare through the assistance of the Unified Healthcare System, individually or jointly.

Sole Paragraph - The use of the couple's genetic material for reproductive techniques is allowed.

Article 22 - Parenting rights cannot be limited or vanished due to sexual orientation or gender identity.

Article 23 - The right to individual or joint adoption of children and adolescents cannot be denied, under equal conditions, due to sexual orientation or gender identity of the applicants.

Article 24 - The custody and the single or joint adoption of child and adolescents cannot be denied due to the sexual orientation or gender identity of those who are able to adopt.

Article 25 - The parental leave of one hundred and eighty days is assured to any of the parents, with no harm to the job position and wage.

§ 1st - During fifteen days after the birth, adoption or custody concession for adoption, the birth leave is assured to both parents.

§ 2nd - The following remaining term of the parental leave may be enjoyed by any of the parents.

Article 26 - Upon the establishment of the social-affective bound, it is assured the right of parenting, even if the couple is divorced

or separated.

Article 27 - Whether the separation or divorce occurs, shared custody shall be applied, regardless of the existence of biological bounds between the child and the parent.

Article 28 - The single custody shall only be deferred when proven to be the best way to protect the development of the child, being granted to the parent that has the best connection and affection level with the child.

Article 29 - The right of family companionship is guaranteed to parents and relatives.

Article 30 - The duty of financial support and education is a duty of both parents, even after the termination of the family companionship period.

Article 31 - Children cannot suffer family discrimination when revealing his or her sexual orientation or gender identity.

Sole Paragraph - The home expulsion of an underage person generates liability for material abandonment and the indemnity financial maintenance to the parents or legal guardians.

Article 32 - Birth certificates and all others identity documents, such as identity card, voter's register, passport, driver's license, shall not have any mention to the words 'father' or 'mother', having such words to be replaced by 'parents'.

VII. RIGHT TO GENDER IDENTITY

Article 33 – Transsexual, transvestite, transgendered and intersexual persons have the right to freely express their gender identity.

Article 34 –The qualification of human resources of health professionals is indispensable in order to support transsexual, transvestite, transgendered and intersexual persons in their needs and specificities.

Article 35 – It is assured the access to medical, surgical and psychological procedures for the adaptation of the morphological sex to the gender identity.

Sole Paragraph - It is guaranteed the rendering of the procedures of hormonal therapy and sexual reassignment surgery in the private system or Unified Health System.

Article 36 – Having no risk to their own life, it is forbidden the rendering of any medical or surgical intervention of irreversible nature for the determination of the gender of newborns and children diagnosed as intersexual.

Article 37 – Having therapeutic indication from medical or multidisciplinary team for hormonal therapy and non-surgical complementary procedures, the adaptation to gender identity can begin

from the age of 14 (fourteen).

Article 38 – Sexual reassignment surgeries can only be performed from the age of 18 (eighteen).

Article 39 – It is recognized the right to name and sexual identity rectification to transsexual, transvestite and intersexual persons so that they can adapt to their psychic and social identity, regardless of the realization of a sexual reassignment surgery.

Article 40 – Court orders determining name and gender change of transsexual, transvestite and intersexual persons shall be registered at the Civil Registry of Natural Persons Book.

Sole Paragraph – Certificates cannot contain any reference to the rectification, except if required by the party or due to a court order.

Article 41 – When one's name or gender is changed due to a court order, the rectification is assured in all others certificates and documents, without any mention to the reason of the modification

Article 42 – The military recruitment of transsexual, transvestite and intersexual persons shall be performed on a special date and in a private manner, by issuing of a simple requirement before the Military Service Center.

Article 43 – The Certificate of Military Recruitment shall be issued or cancelled upon the presentation of the rectification mandate delivered to the Civil Registry.

Article 44 – It is guaranteed to transsexual, transvestite and intersexual persons, which have a gender identity distinct of their morphological sex, the right to hold a social name, by which they are recognized and identified in their community:

In all government offices of direct and indirect administration, in federal, state and municipal spheres;

In registry forms, forms, prompt-books, among others documents of government service in general;

In academic certificates of elementary schools, high schools and universities.

Article 45 – In all public spaces and spaces opened to the public, one shall use the facilities and accommodations which correspond to his or her gender identity.

VIII. HEALTH RIGHTS

Article 46 - It is forbidden for health professionals to use means and techniques that create, maintain or reinforce prejudice, stigmas or discriminatory stereotypes regarding one's sexual orientation or gender identity.

Article 47 – Any discrimination on the grounds of sexual orientation or gender identity in hospitals, clinics, health centers and

medical offices is prohibited.

Article 48 - The inclusion of the items ‘sexual orientation’ and ‘gender identity’ in forms and prompt-books of public and private hospital systems is mandatory.

Article 49 – The access to universal and egalitarian services of Unified Healthcare System is guaranteed, regardless of sexual orientation or gender identity.

Article 50 – The sexual orientation and/or gender identity cannot be used as criteria for the selection of blood donors.

Sole Paragraph – The collecting entities cannot ask the sexual orientation of those who voluntarily submit themselves as donors.

Article 51 – Hospital wards have to respect and preserve the gender identity of the patients.

Article 52 – Physicians, psychologists and other health professionals cannot exercise any action that consider homosexual behaviors or practices as pathologies, neither take enforcement actions tending to guide homosexuals, lesbian, bisexual, transsexual, transvestite, transgendered or intersexual persons to unrequested treatments.

Article 53 – It is forbidden to offer sexual orientation or gender identity reversal treatments, as well as making healing promises.

IX. SOCIAL SECURITY RIGHTS

Article 54 – Equal social security rights are guaranteed to all people, regardless of their sexual orientation or gender identity.

Article 55 – It is forbidden for insurance or social security institutions, state-owned or private, to deny any kind of benefit based on the beneficiary’s homosexual, lesbian, bisexual, transsexual, transvestite, transgendered or intersexual condition.

Article 56 – Private healthcare companies cannot deny or restrict the inscription of the same-sex spouse or partner of the beneficiary as a dependent in health insurance plans.

Article 57 – The same-sex spouse or partner has the right to a death pension, a confinement allowance and to all others rights as a beneficiary before the National Social Security Institute.

Article 58 – The spouse or partner in a same-sex union has the right, as a preferential dependent, to receive a death indemnity as a beneficiary of the Mandatory Insurance for Personal Damages Caused by Land Motor Vehicles, or by its Load, to Transported People or not - DPVAT insurance.

X. RIGHT TO EDUCATION

Article 59 - Schools must curb in the school environment

situations that aim to intimidate, threaten, embarrass, offend, punish, submit, ridicule, defame, slander, or expose students to physical or moral embarrassment due to their sexual orientation or gender identity.

Article 60 - Education professionals have the duty to address the issues of gender and sexuality from the perspective of sexual diversity, aiming to overcome all forms of discrimination, making use of teaching materials and methodologies which propose the elimination of homophobia and prejudice.

Article 61 - Schools must adopt materials that do not reinforce discrimination based on sexual orientation or gender identity.

Article 62 - When scheduling activities related to school holidays or celebrations, schools must observe the various family models in order to avoid any embarrassment of students who have homosexual parents.

Article 63 - Teachers, principals, supervisors, psychologists, psychoeducators and all those working in schools have a duty to avoid any bigotry or discrimination against students from families with homosexual parents.

Article 64 - The government shall promote the training of teachers for inclusive education, as well as actions that aim increasing school enrollment of gay, lesbian, bisexual, transgender, transvestite, transsexual and intersex persons, in order to prevent school dropout.

Article 65 - In elementary, secondary and higher education, it is allowed to transsexuals, transvestites, transgender and intersex persons, upon registration, the use of their social name, which shall be used in all academic records.

XI. RIGHT TO WORK

Article 66 - Access to the job market is guaranteed to all persons, regardless of sexual orientation or gender identity.

Article 67 - It is prohibited to inhibit the entry, the hiring or the promotion in the private or public service, on the grounds of sexual orientation or gender identity.

Article 68 - When selecting candidates, there cannot be any distinction or exclusion on the grounds of sexual orientation or gender identity.

Article 69 - It is a discriminatory practice to establish or maintain differences in wages between employees who work in the same functions as a result of their sexual orientation or gender identity.

Article 70 - It is a discriminatory practice to dismiss an employee based, directly or indirectly, on his or her sexual orientation or gender identity.

Article 71 - The government shall establish training programs for professional qualification, employment and income generation

aimed at homosexuals, lesbians, bisexuals, transsexuals, transvestites, transsexuals and intersex, to ensure equal opportunities for them to have access to the job market.

Article 72 - It is guaranteed to transsexuals, transvestites, transgendered and intersex persons, the registration of their social names in the Labor and Social Security ID Card and all functional settlements, having those persons to be identified with such names in the workplace.

Article 73 - The government shall ensure equal opportunities for the employment of transvestites and transsexuals, transgender and intersex, observing the principle of proportionality.

Sole Paragraph - Mechanisms to encourage the adoption of similar measures in companies and private organizations shall be established.

Article 74 - The government and the private sector shall promote campaigns aimed at raising the qualification of transvestites, transsexuals, transgender and intersex.

Article 75 - Any restrictions to the acquisition or lease of property due to the sexual orientation or gender identity of the purchaser or lessee are prohibited.

Article 76 - Public or private financial agents must ensure access to home ownership to same-sex families.

Sole Paragraph - The combined income of a couple for the granting of housing financing is ensured.

Article 77 - The administration of the private property or condominium must inhibit any behavior that constitutes discriminatory practice under this act, otherwise liability on the grounds of civil damages may be applied.

Article 78 - Programs, projects and other governmental actions in the scope of the National System of Social Interest Housing must consider the social and economic characteristics resulting from sexual orientation and gender identity.

Article 79 - States, the Federal District and Municipalities shall stimulate and facilitate the participation of organizations and social movements in the composition of boards constituted for the purpose of application of the National Fund for Social Housing.

XIII. RIGHT TO HAVE ACCESS TO THE JUDICIARY, SAFETY AND SECURITY RIGHTS

Article 80 - Lawsuits in which sexual orientation or gender identity rights are disputed shall be deemed as classified information.

Article 81 - Lawsuits in which sexual orientation or gender identity are disputed shall be identified in order to statistics to be

compiled.

Article 82 - Non-criminal lawsuits shall be judged by Family Courts and appeals shall be judged by Chambers Specialized in Family Law within the State Courts, if existent.

Article 83 - States, the Federal District and Municipalities shall establish support centers in order to provide support to homosexual, lesbian, bisexual, transsexual, transvestite and intersexual persons that suffer from situations of violence so that their physical, psychic, social and juridical integrity can be guaranteed.

Article 84 - Police stations specialized in receiving accusations regarding prejudice on the grounds of sex, sexual orientation or gender identity shall be established.

Article 85 - Conjugal visits in prisons shall be authorized, regardless of the prisoner's sexual orientation or gender identity.

Article 86 - The incarceration within the prison system shall consider the prisoner's sexual identity, having the prisoner to be jailed in a separate cell if there is risk to the prisoner's physical or psychic integrity.

Article 87 - Victims of discrimination shall be supported by the State in order to be sheltered, oriented, directed to the competent authority and for the investigation of criminal practices.

Article 88 - The State shall implement public policies in order to qualify civil and military policemen, as well as penitentiary officers, so that discrimination on the grounds of sexual orientation or gender identity is avoided.

Article 89 - The State shall adopt measures for the repression of police violence against homosexual, lesbian, bisexual, transsexual, transvestite, transgendered and intersexual persons.

Article 90 - The State shall implement resocialization and protective actions aimed at the youngsters in conflict with the law and socially excluded due to his or her sexual orientation or gender identity.

Article 91 - The administration shall create reference centers in Public Security Bureaus in order to provide shelter, orientation, support, direction to the competent authority and investigation of crimes motivated by discrimination on the grounds of sexual orientation or gender identity.

XIV. MEANS OF COMMUNICATION

Article 92 - Homosexual, lesbian, bisexual, transsexual, transvestite, transgendered and intersexual persons shall be respected in all means of communication, such as radio, television, advertising, the Internet and social networks, so that the physical and psychic integrity of such persons are protected.

Article 93 - The means of communication shall restrain themselves from making any prejudiced reference regarding one's sexual orientation or gender identity.

Article 94 – It's a discriminatory practice to publish, exhibit or show any sign, symbol or badge that stimulate intolerance or violence.

XV. CONSUMER RELATIONS

Article 95 - Every consumer has the right to be well treated, regardless of his or her sexual orientation or gender identity.

Article 96 - It shall be considered a discriminatory practice to deny the supply of goods or the rendering of services to a consumer due to his or her sexual orientation or gender identity.

Article 97 - No consumer shall be treated differently from other costumers for being homosexual, lesbian, bisexual, transsexual, transgendered or intersexual.

Article 98 - No public or opened to the public establishment shall retain someone from entering its facilities or establish restrictions on the grounds of sexual orientation or gender identity.

Article 99 - Public and private services shall qualify their staff so that they can serve costumers correctly, avoiding any prejudiced or discriminatory behavior on the grounds of sexual orientation or gender identity.

XVI. CRIMES

Crime of homophobia

Article 100 - To practice any discriminatory or prejudiced behavior as foreseen in this Act due to sexual orientation or gender identity:

Penalty – Reclusion from 2 (two) to 5 (five) years

Sole Paragraph - Any kind of behavior that stimulates hate or preaches that someone is inferior due to his/her sexual orientation or gender identity is liable on the same penalty.

Incitation of violence

Article 101 - To incite someone to practice a violence act in any way motivated by prejudice on the grounds of sex, sexual orientation or gender identity:

Penalty – Reclusion from 1 (one) to 3 (three) years, besides the penalty applied to the violence.

Discrimination in the job market

Article 102 - Not to hire someone, or make his or her hiring difficult, when the skills required for the job or function are fulfilled, motivated by prejudice regarding sex, sexual orientation or gender

identity:

Penalty - Reclusion from 1 (one) to 3 (three) years.

§ **1st** - The Penalty shall be raised in one third if the discrimination happens in the application for government jobs, functions and contracts.

§ **2nd** - Whoever discriminates someone during the existence of the labor contract or job relation on the grounds of sex, sexual orientation or gender identity is liable on the same penalty.

Discrimination within consumer relations

Article 103 - To refuse or deny access to someone in a commercial establishment of any kind or deny treatment, motivated by prejudice on the grounds of sex, sexual orientation or gender identity:

Penalty - Reclusion from 1 (one) to 3 (three) years.

Article 104 - In any offense that a homophobic motivation is configured, the penalty shall be raised in one third.

XVII. PUBLIC POLICIES

Article 105 - The Union, the States, the Federal District and the Municipalities must adopt public policies that aim to create awareness of the society regarding the equal dignity of heterosexual, homosexual, lesbian, bisexual, transsexual, transvestite, transgendered and intersexual persons.

Article 106 - Participation under equal conditions of opportunity, in the economic, social, political and cultural lives of the Country shall be promoted mostly by the:

Inclusion in the public policies of economic and social development;

Modification of the institutional structures of the State for the proper combat and overcoming of inequalities arising from prejudice and discrimination on the grounds of sexual orientation or gender identity;

Promotion of normative adjustments in order to improve the fight against discrimination and inequalities within individual, institutional and structural manifestations;

Elimination of historical, social, cultural and institutional obstacles that deadlock the representation of sexual diversity in both public and private environments;

Stimulation, support and fortification of the initiatives arising from the civil society aimed to the promotion of equal opportunities and fighting of inequalities, also through the implementation of incentives and conditioning and priority criteria for the access to public resources;

Implementation of affirmative action programs in order to combat inequalities regarding education, culture, sports and leisure, health, security and safety, work, housing, means of mass communication,

public financing, access to land ownership, access to the Judiciary, among other fields of life.

Article 107 - Upon the implementation of programs and actions in the Pluriannual Plans and in the Annual Budgets of the Union, the States, the Federal District and the Municipalities, public policies that aim to promote equal opportunities for and social inclusion of heterosexual, homosexual, lesbian, bisexual, transsexual, transvestite, transgendered and intersexual persons shall be observed, especially those related to the:

Promotion of the equal opportunities for the access to health care, education, employment and housing;

Stimulation for the creation of programs and means of communication aimed to combat prejudice, discrimination and homophobia;

Support of programs and projects of the Federal, State, District and Municipal governments and civil society entities aimed to the promotion of social inclusion and equal opportunities.

XVIII. FINAL AND TRANSITORY PROVISIONS

Article 108 - The actions set by this Act do not exclude others in benefit of homosexual, lesbian, bisexual, transsexual, transvestite, transgendered and intersexual persons that have been or may come to be adopted in the Union, States, Federal District or Municipalities.

Article 109 - The Executive branch shall create instruments to verify the social effectiveness of the actions established in this Act and shall monitor it constantly, with the issuing and propagation of periodic reports, also available through the World Wide Web.

Article 110 - (List the legal provisions of Brazilian Law in an Annex, including all rules that shall be modified, amended or excluded)

Article 111 - This Act enters into force on the date of its publication.

PARENTAL ALIENATION WITHIN THE CONTEXT OF THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: *THE BRAZILIAN PERSPECTIVE*

Bruno Rodrigues de Almeida

Adjunct Professor of Civil and Private International Law
at Universidade Federal Rural do Rio de Janeiro, PhD in
International Law by Universidade do Estado do Rio de Janeiro,
LLM in International Law by Universidade do Estado do Rio
de Janeiro, Member of ASADIP, Attorney at Law.

Gisela Vieira Dalfeor Vidal

Law Degree by Universidade Federal Rural do Rio de Janeiro.

ABSTRACT: The number of cases of relocation of children and adolescents to Brazil has increased significantly in the last years. One must consider that abducting or wrongfully retaining children from the places of their habitual residence prevents them from enjoying fundamental rights such as those to historical, social and cultural identities and even the right to enjoy full family life with both sides of their families. This article shows that unilateral relocation of children to Brazil (as well as their wrongful retention in Brazilian territory) in violation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, is actually one form of Parental Alienation practiced in cross border circumstances, pursuant to Federal Law nº 12.318, from August 26, 2010 (Brazilian Parental Alienation Act). On that sense, Brazilian administrative and judicial authorities must not only engender public policies and strategies to enhance acknowledgement about rules of the Convention among Brazilian communities living abroad, they must also encourage extrajudicial agreements between interested parties to increase the rates of voluntary return of abducted or retained children. In cases brought to courts, since Parental Alienation is a form of emotional abuse of the child, magistrates must count on the opinion of interdisciplinary advisors before considering opinion of the

abducted children in the ruling of the return order. In sum, the search for international cooperation with other Contracting States of the 1980 Hague Convention and the respect of the best interest of the child must be in permanent harmony.

KEYWORDS: 1980 Hague Convention on the Civil Aspects of International Child Abduction – Brazilian Parental Alienation Act of 2010 – best interest of the Child – international cooperation.

1. INTRODUCTION

Parental Alienation Syndrome (PAS) is a term coined in 1985 by child psychiatrist Richard Garner to address the recurrent problem in child custody disputes where one of the parents deliberately (or even unconsciously), and without justification, promotes brainwashing and manipulation of the child's own perception focusing in the disparagement of the targeted parent¹.

Although there are dissenting opinions on the subject, many specialists have concluded that PAS is indeed a method of emotional abuse of the child, since alienating parents are often worried about punishing the former spouse by leading their child into hating the targeted parent. Although there are many different possibilities and degrees for the alienating parent to launch this denigrating campaign, the myriad of venues usually aims at the emotional detachment of the child from the targeted parent (and his/her side of family such as grandparents, uncles and other relatives)².

Within such context, the 1980 Hague Convention on the Civil Aspects of International Child Abduction is an international cooperation treaty concerned with the swift return of the child to the place of habitual residence when any person (usually one of the parents) wrongfully removes the child from there, or illegally retains the children in the territory of a contracting State³.

Brazil, as a Member of this treaty, is internationally committed to its goals and participates in the Post-Convention works, regularly organized by The Permanent Conference of Private International Law

1 GARDNER, Richard. Parental Alienation Syndrome (PAS): Sixteen years later. *Academy Forum*, v. 45, issue 1, 2001, p. 10-12.

2 BERNET, William. Parental Alienation Disorder and DSM-V. *The American Journal of Family Therapy* v. 36, Issue 5, 2008, 349-366. For dissenting opinion on the matter see HOULT, Jennifer. The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy (2006). *Children's Legal Rights Journal*, vol. 26, n° 1, 2006. Available at < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=910267

3 BEAUMONT, Paul R.; McELEVAY, Peter E. *The Hague Convention on International Child Abduction*. Oxford: Oxford University Press, 1999, pp. 86 e 87.

in order to discuss more efficient of enforcement among Member-states.

Considering the current trend of intensification of cross border relationships – promoted by facilitation of transport and instant communication methods⁴ – many families around the world can actually overcome political and juridical frontiers, with branches settled in different countries.

The current work intends to analyze the connections between International Child Abduction and Parental Alienation through the perspective of Brazilian enforcement of the 1980 Hague Convention. For such goals, it will study different strategies and approaches to cases of children abducted to/ illegally retained in Brazilian territory in order to address this recurring practice as a form of Parental Alienation.

2. THE IMPACT OF THE ENFORCEMENT OF 1980 HAGUE CONVENTION BY BRAZILIAN AUTHORITIES.

The 1980 Convention on Civil Aspects of International Child Abduction is the most successful – in terms of number of ratifications – document celebrated under The Hague Permanent Convention of Private International Law, an intergovernmental entity that has been working since 1893⁵.

This treaty, which was approved in the city of The Hague on October 25, 1980 and later enforced into Brazilian legal order through enactment of Presidential Decree number 3.413 (from April 14, 2000), actually inaugurated a new era for international cooperation in Brazil⁶.

Recent studies about the enforcement of the 1980 Hague Convention in Brazil indicate that there has been a significant increase on the number of children/adolescent unilaterally brought or retained in national territory. However, Brazilian judicial and administrative authorities' awareness about impact of the 1980 Hague Convention in our legal scenario has equally improved in the last years, given the increasing number of cases of children being abducted to/ retained in Brazilian territory⁷.

One of the greatest changes brought by developing enforcement

4 JAYME, Erik. O Direito Internacional Privado do novo milênio: a proteção da pessoa humana face à globalização. In: ARAUJO, Nadia de; MARQUES, Cláudia Lima (organizadoras). *O novo Direito Internacional – estudos em homenagem a Erik Jayme*. Rio de Janeiro: Renovar, 2005, p.5.

5 http://www.hcch.net/index_en.php.

6 DOLINGER, Jacob. *A criança no Direito Internacional*. Rio de Janeiro: Renovar, 2003. p. 248-249, note 37. See also: ARAUJO, Nadia de. *Direito Internacional Privado – Teoria e prática brasileira*. 4. ed. Rio de Janeiro: Renovar, 2008. p. 520-521.

7 TIBURCIO, Carmen; CALMON, Guilherme. *Sequestro Internacional de Crianças*. Comentários à Convenção da Haia de 1980. Rio de Janeiro: Atlas, 2014, p. 1-5.

of this treaty into Brazilian legal scenario is the acknowledgment of Federal Justice to judge cases of international child abduction falling under the 1980 Hague Convention, which, until the enactment of the Convention, has been previously dealt by State judges. In fact, this particular breakthrough has even drawn attention from US President Barack Obama in the year of 2009⁸.

However, unlike foreign practitioners must have imagined back then, the competence of Brazilian Federal Justice in child abduction cases falling under the 1980 Hague Convention does not arise from a potential lack of impartiality of State Courts when Brazilians and foreigners figure as opposed parts in a lawsuit.

It actually arises from the juridical effects of the treaty itself.

Article 1 of the 1980 Hague Convention on Civil Aspects of International Child Abduction sets the main goals of this Convention which are: “ (a) to secure the prompt return of children wrongfully removed to or illegally retained in the territory of a contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States”.

In order to reach such goals, Article 7 establishes the specific obligation of cooperation that each contracting State will comply via designated Central Authorities:

Article 7. Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures -

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

⁸ <http://brasil.estadao.com.br/noticias/geral,obama-agradece-analise-da-justica-federal-no-caso-sean,338926>.

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

For such reasons, some scholars classify the 1980 Hague Convention as an example of contractual treaty (*tratados-contrato*) – as opposed to law-treaty (*tratados-lei*)⁹.

When States sign up to law-treaties, they manifest the same volition (coincident or parallel) to establish general rules of law, thus creating *norma agendi*¹⁰. However, upon celebrating contractual treaties their wills are not only different, they actually converge towards a same goal, which establishes specific rights and obligations to each of the Member States (*facultas agendi*)¹¹.

Since Brazilian Federative Republic has indeed assumed specific and international obligations to fully cooperate with other Contracting States in cases of international child abduction under the 1980 Hague Convention, it must comply with the measures described in Article 7.

9 TIBURCIO, Carmen; BARROSO, Luís Roberto. *Temas de Direito Constitucional Internacional*. Rio de Janeiro: Renovar, 2013, p. 225-241.

10 REZEK, José Francisco. *Direito dos Tratados*. Rio de Janeiro: Renovar, 1984, p. 130.

11 MELLO, Celso D. de Albuquerque. *Curso de Direito Internacional Público*, v. I, 1997, p. 219.

The Special Secretariat for Human Rights (*Secretaria Especial de Direitos Humanos da Presidência da República*) – which functions as the Central Authority for this particular convention (*Autoridade Central da Área Federal – ACAF*) – is responsible authority for conducting extrajudicial measures (including mediation between interested parties).

However, if judicial measures become necessary, members of the General-Advocacy of the Union will have to function in the case, which, according to Article 109, I of Brazilian Federal Constitution of 1988¹², will automatically trigger the competence of Federal Justice for cases of international Child abduction within the scope of the 1980 Hague Convention¹³.

Another meaningful and worthy of note impact is the recent jurisprudence of the High Court of Justice (*Superior Tribunal de Justiça*) concerning the competence of Federal Justice to analyze matters concerning custody rights about children who have been abducted or retained into Brazilian territory, changing a former trend of firming State Courts jurisdiction through the issuing of provisory custody orders¹⁴.

In fact, whenever facing cases that potentially fall under the 1980 Hague Convention, state judges must, according to Article 265, IV¹⁵ of Brazilian Code of Civil Procedure, notify local Central Authority (SEDH/ACAF) to assess if there's interest in the particular case. In case of affirmative response, all proceedings in State Justice will be

12 Article 109. The federal judges have the competence to institute legal proceeding and trial of: I – cases in which the Union, an autonomous government agency or a federal public company have an interest as plaintiffs, defendants, privies or interveners, with the exception of cases of bankruptcy, of job-related accidents, and of those subject to the Electoral and Labour Courts;

13 GASPAR, Renata Alvarez; AMARAL, Guilherme. Sequestro internacional de menores: os tribunais brasileiros têm oferecido proteção suficiente ao interesse superior do menor? *Meritum*, v. 1, n. 8, 2013, p. 351-387.

14 BRAZIL, Superior Tribunal de Justiça (STJ). Conflito de Competência nº 64.012. Rapporteur: Carlos Alberto Menezes Direito, Published in *Diário de Justiça da União* in 11/9/2006; Conflito de Competência nº 64.120. Rapporteur: Castro Filho. Published in *Diário de Justiça da União* in 10/25/2006.

15 (*Free translation*) Article 265. The suit shall be suspended : I - In case of the death or loss of procedural capacity of any of the parties, their legal representatives or attorneys; II - by agreement of the parties; (According to Federal Law nº 11. 481 of May 31, 2007) III - upon a motion for dismissing the case on the grounds of incompetence of the judge or the court, as well as their personal suspicion or legal impediment; IV - when the judgment on the merits of the case:a) depends on the judgment of another cause, or declaration of the existence or nonexistence of legal relationship that constitutes the main subject of another pending case; b) can not be given until another court recognizes the occurrence of a certain fact or produces certain evidence; c) requires previously judgement which has been request as incidental matter ; V - by force majeure; VI - in other cases, regulated under this Code.

suspended, awaiting for decision in Federal Justice¹⁶.

More recently, STJ has also decided that even suits concerning custody rights from the recognition of socio-affective paternity, should be judged by Federal Courts if arising from cases of international child abduction falling under the 1980 Hague Convention¹⁷.

The Brazilian High Court of Justice decided that, because of the common object, both suits should be reunited and judged in Federal courts. In a deeper analysis, the interest of the Federal Union (article 109, I of 1988 Constitution) and the obligations to Federative Republic of Brazil arising from international treaties (article 109, III of 1988 Constitution)¹⁸ attract suits that originally fall under State Courts jurisdiction (*via atrativa*).

It must be also pointed out that Brazil has recently instituted the Permanent Commission on International Child Abduction, an organ composed by representatives of authorities of different branches of Brazilian government such as: The Special Secretariat for Human Rights, The Ministry of Justice, The General-Advocate of the Union, The Special Secretariat for Women Policies, The Federal Union's Public Defender and the Federal Police¹⁹.

The Permanent Commission, following the directives analyzed in post-convention works organized and celebrated by The Hague Permanent Conference on Private International Law, has established specific goals towards locally improvement of the effectiveness of the 1980 Hague Convention such as:

I - studying new measures to prevent international abduct or retention of children and teenagers;

II - divulgation of the structure and functioning of The 1980 Hague Convention on the Civil Aspects of International Child Abduction and provide for the

16 MIGUEL FILHO, Theophilo Antônio. *Questões constitucionais e legais da Convenção de Haia sobre os aspectos civis do Sequestro Internacional de Crianças*. PhD thesis. Orientated by: Nadia de Araujo. Rio de Janeiro: Pontificia Universidade Católica do Rio de Janeiro, 2010. p.98.

17 BRAZIL, Superior Tribunal de Justiça (STJ). Conflito de Competência nº 100.345/RJ. Raporteur: Luis Felipe Salomão. Published in *Diário de Justiça da União* in 03/25/2009.

18 TIBURCIO, Carmen; BARROSO, Luís Roberto. *Temas de Direito Constitucional Internacional*. Rio de Janeiro: Renovar, 2013, p. 234. ARAUJO, Nadia de. *A Convenção da Haia sobre os aspectos civis do sequestro de menores: algumas notas recentes*. Available at <http://www.sdh.gov.br/assuntos/adocao-e-sequestro-internacional/legislacao-e-publicacoes/a-convencao-de-haia-algumas-notas-recentes-nadia-de-araujo>. Last access: September 13th, 2014.

19 The Permanent Commission was established by Portaria SEDH/PR nº 34, published in *Diário Oficial da União* in January, 24, 2014.

capacitation of Brazilian civil servants involved in the cooperation processes;

III - adoption of conjoint procedures to deal with special circumstances such as the occurrence of domestic violence against the mother or the child/teenager;

IV - establishing uniform procedures to be adopted in the 1980 Hague Convention and the 1989 Inter-American Convention on the International Return of Children (internalized by Decree n° 1.212, from December 3, 1994.)

V - developing strategies and public policies to improve the implementation of the above mentioned conventions.

According to the President of the Permanent Commission, although factors such as the worldwide economic and financial crisis and the growing divorce rates can contribute to such phenomenon, one of the main reasons for the afore mentioned increase could actually be the lack of information available about the rules on the previous legal measures to avoid problems regarding international abduction or retention of children (or adolescents)²⁰.

That happens because, unbeknownst to most of Brazilian parents living abroad, pursuant to Article 3 of The 1980 Hague Convention, any decision regarding custody rights or access to children or adolescents (especially concerning their international relocation) must be taken in accordance with the law of the Contracting State in which the child/adolescent has his/her habitual residence, whether by parental agreements or judicial decisions performed in that territory²¹.

20 LIMA, Georges. *Retorno Legal: prevenir a subtração internacional de crianças*. Available at <http://www.sdh.gov.br/assuntos/adocao-e-sequestro-internacional/legislacao-e-publicacoes/retorno-legal-prevenir-a-subtracao-internacional-de-criancas>. Last accessed in September 13th, 2014, p. 1.

21 Article 3 The removal or the retention of a child is to be considered wrongful where - a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph a) above, may arise

Brazilian Central Authority (*Special Secretariat for Human Rights*) believes that many cases of abduction/retention occur because the rules of the 1980 Hague Convention have not, insofar, sufficient divulgation throughout the community of Brazilian people living abroad. Hence, the conclusion of the Permanent Commission is that prevention should become a priority on its agenda.

For such reasons, SEDH currently develops multimedia public policies towards the prevention of cases of international abduction/illegal retention of children related with Brazil. This campaign consists on the development of material (virtual folders, booklets and alike) focusing on social network media, and the establishment of multi-leveled cooperative network reaching Brazilian government authorities (such as diplomatic and consulate agents), entities of civil society such as community leaders and Non-Governmental Organizations and other international institutions dedicated to the protection of Women²².

Although the 1980 Hague Convention provides for judicial measures to enforce the return of the abducted or retained child/adolescent, one cannot deny the increasing relevance that alternative dispute resolutions (ADR's) such as mediation have gained within the context of International Child Abduction. In fact, the Guide to Good Practice of the 1980 Hague Convention of 2012 beseeches Contracting States to promote conciliation between interested parties through interdisciplinary mediation committees, whose work should be supervised and advised by the Central Authorities²³.

On that note, Central Authorities, following the provisions of Article 10 of the 1980 Hague Convention, should also pursue the goal of voluntary solution of the case, taking necessary measures to secure the prompt and swifter return of the child/adolescent to his/her place of habitual residence²⁴.

Carmen Tiburcio and Guilherme Calmon present the following statistics concerning the number of extrajudicial agreements promoted by Brazilian Central Authority (SEDH) on the matter of international child abduction/retention within the period between 2002 and 2012²⁵:

in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

22 LIMA, Georges. *Retorno Legal*: prevenir a subtração internacional de crianças. Available at <http://www.sdh.gov.br/assuntos/adocao-e-sequestro-internacional/legislacao-e-publicacoes/retorno-legal-prevenir-a-subtracao-internacional-de-criancas> . Last accessed in September 13th, 2014, p. 3.

23 Available at. http://www.hcch.net/upload/guide28mediation_en.pdf . Last access on 9/13/2014.

24 Article 10. The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

25 TIBURCIO, Carmen; CALMON, Guilherme (in collaboration with Patrícia Lamego).

CASES CLOSED BY AGREEMENT (Passive cooperation) – 2002-2012:

Year	Private/Lawyer/ Others	ACAF/SEDH	Judicial (State/Federal)	TOTAL
2002	1			1
2003	2			2
2004		3	2	5
2005	2	5		7
2006	3	5	1	9
2007	3	1	1	5
2008	2		4	6
2009	7	2	5	14
2010	3	11	6	20
2011	7	8	13	28
2012	6	2	4	12
TOTAL	39	35	35	109

RESULTS OF CLOSING AGREEMENTS 2002-2012

Year	Return to habitual residence	Remaining in Brazil	Access/visitation rights	TOTAL
2002	1			1
2003	2			2
2004		4	1	5
2005	4	1	2	7
2006	7	2		9
2007	5			5
2008	3	1	2	6
2009	10	1	3	14
2010	13	5	2	20
2011	15	12	1	28
2012	10	2		12
TOTAL	69	26	11	109

Sequestro Internacional de Crianças. Comentários à Convenção da Haia de 1980. Rio de Janeiro: Atlas, 2014, p. 194-195.

YEARLY PERCENTAGE OF CASES CLOSED BY ARRANGEMENT – 2004-2014

Year	TOTAL CLOSED	CLOSED BY AGREEMENT	%
2004	15	5	33%
2005	34	8	23,5%
2006	31	9	29%
2007	22	5	23%
2008	33	6	18%
2009	37	14	27%
2010	40	20	50%
2011	64	25	39%
2012	31	13	42%
TOTAL	308	105	34 %

From such data, it is possible to conclude that Brazilian Central Authority (SEDH/ACAF) is increasingly becoming an important agent in the promotion of extrajudicial agreements between interested parties. It also had a high rate of success on concluding cases through extrajudicial agreements between the abductor and the left behind parent.

Actually, in most of cases closed by extrajudicial agreements (almost two in each three cases), the child was voluntarily returned to the State of habitual residence, which actually attends the best interest of the child, as defined by the 1980 Hague Convention.

For such reasons, besides the adoption of public policies to educate people in order to prevent cases of International Child Abduction, SEDH/ACAF (as the Brazilian Central Authority for the 1980 Hague Convention) should also work set mediation as its primary goal. Through the encouragement of self-reconciliation between interested parties, not only the voluntary return of the child is more often achievable, but also the reestablishment of institutional dialogue within transnational families.

3. THE CONFLUENCE OF THE BEST INTEREST OF CHILD IN THE 1980 HAGUE CONVENTION AND THE BRAZILIAN PARENTAL ALIENATION ACT OF 2010.

The best (or superior) interest of children is a value that deserves special attention of several documents on Brazilian legal order such

as: the Federal Constitution of 1988 (article 227²⁶), The Children and Teenagers Act of 1989 Articles 3 (1), ²⁷ and 9 (1) and (3)²⁸ of The UN Convention on The Rights of the Children (Decree n° 99.710, November, 21, 1990), among others.

In the meantime, Brazilian legal order has also addressed the problem of Parental Alienation Syndrome by enacting Federal Law n° 12.318, from August 26 2010, also known as the Parental Alienation Syndrome Act.

According to Article 2, Parental Alienation consists of any method capable of *“causing interference with the psychological upbringing of a child or adolescent, promoted or inducted by one parent, grandparent or the person entitled of his/her custody, authority or surveillance in order to make the child or adolescent to disown his/her parent, or causing hindrances in the establishment or maintenance of emotional bonds with the targeted parent”*²⁹.

Psychological studies on children who have been victims of Parental Alienation Syndrome report that they are more likely to develop psychological disorders such as chronical depression, social phobias, identity and self-image distortions. These patients also might develop traits like desperation, hostile behavior, and tendency for self-isolation. In more extreme cases, these children might become adults tormented by guilty, more susceptible to drug addiction and suicidal

26 Article 227. It is the duty of the family, the society and the State to ensure children and adolescents, with absolute priority, the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom and family and community life, as well as to guard them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression.

27 Article 3 (1). In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

28 Article 9 (1). States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's p (3). States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests lace of residence.

29 Art. 2º. *Considera-se ato de alienação parental a interferência na formação psicológica da criança ou do adolescente promovida ou induzida por um dos genitores, pelos avós ou pelos que tenham a criança ou adolescente sob a sua autoridade, guarda ou vigilância para que repudie genitor ou que cause prejuízo ao estabelecimento ou à manutenção de vínculos com este.*

tendências³⁰.

The sole paragraph of the afore mentioned article establishes an open list (*numerus apertus*) of the typical conducts of Parental Alienation Syndrome, without prejudice of other behaviors noticed by magistrates by themselves or with the help of specialists. On that note, Parental Alienation occurs when one of the parents³¹:

I – promotes disqualification campaign against the targeted parent;

II - hampers the exercise of parental authority;

III – raises difficulties on the access of the child by the other parent;

IV – creates obstacles to rights of visitation and family life with the other parent;

V – deliberately hides relevant informations about the child or teenager such as educational, medical or address changes;

VI – presents false accusations against the other parent, grandparents and other relatives in order to jeopardize their relationship with the child or teenager;

VII – unilaterally and without justification changes the domicile of the child or teenager in order to prevent access of the left-behind parent, grandparents and other relatives.

30 SILVA, Denise Maria Perissini da. *Psicologia Jurídica no Processo Civil Brasileiro*. São Paulo: Casa do Psicólogo, 2003. p. 86.

31 *Parágrafo único. São formas exemplificativas de alienação parental, além dos atos assim declarados pelo juiz ou constatados por perícia, praticados diretamente ou com auxílio de terceiros: I - realizar campanha de desqualificação da conduta do genitor no exercício da paternidade ou maternidade; II - dificultar o exercício da autoridade parental; III - dificultar contato de criança ou adolescente com genitor; IV - dificultar o exercício do direito regulamentado de convivência familiar; V - omitir deliberadamente a genitor informações pessoais relevantes sobre a criança ou adolescente, inclusive escolares, médicas e alterações de endereço; VI - apresentar falsa denúncia contra genitor, contra familiares deste ou contra avós, para obstar ou dificultar a convivência deles com a criança ou adolescente; VII - mudar o domicílio para local distante, sem justificativa, visando a dificultar a convivência da criança ou adolescente com o outro genitor, com familiares deste ou com avós.*

There are Brazilian legal scholars defending that one of the gravest forms of Parental Alienation is the wrongful and unjustified removal of the child from the State of his/her habitual residence, which not only severely hinders the access to the left-behind parent, but due to physical distance, also increases the possibility of manipulating the child's emotions and thoughts³².

In fact, upon the enactment of Federal Law 12.318/2010, if one parent is entitled to full custody over progeny, it does not mean he/she can overlook fundamental rights of the child such as the right to family life. Even parents that only have visitation rights are capable of vetoing the relocation of the child, if proved that such change has the main objective of hampering his/her access to the child³³.

As a matter of fact, Article 8 of Brazilian Parental Alienation Syndrome Act of 2010 establishes that jurisdiction over the custody rights of a child/teenager will not change because of wrongful relocation, which actually restates the very spirit of the 1980 Hague Convention³⁴.

Thus, according to Articles 3 and 5³⁵ of The 1980 Hague Convention, any parent (whether having full or shared custody or visitation rights) who unilaterally relocates (or retains) children up to 16 year olds to (or in) Brazil in infringement the law of their habitual residence is committing an act of Parental Alienation, pursuant to Article 2, Sole Paragraph of Federal Law 12.318/2010.

Pursuant to Article 13, b, authorities of the Contracting States might refuse to enforce the return of the abducted or retained child to the State of habitual residence if:

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

32 DIAS, Maria Berenice (coordenadora). *Incesto e Alienação Parental*. São Paulo: Editora Revista dos Tribunais, 2013, p. 15-19.

33 TIBURCIO, Carmen; CALMON, Guilherme. *Sequestro Internacional de Crianças*. Comentários à Convenção da Haia de 1980. Rio de Janeiro: Atlas, 2014, p. 128.

34 Article 8 (Free translation). Eventual relocation on the domicile of the child or adolescent will not affect the original jurisdiction over claims regarding right to family life, unless such change results from parental agreement or judicial order.

35 Article 5 For the purposes of this Convention – a) “rights of custody” shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence; b) “rights of access” shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Statistic surveys realized under request of The Hague Permanent Conference of Private International Law reveal that allegations of physical and/or emotional abuse committed against the child or teenager by the left behind parent (grandparents or other relatives) are the most frequently invoked arguments by Contracting States authorities to refuse the issuing of returning order, thus keeping the abducted or retained child in the State of refuge³⁶.

In fact, regular post-convention works held in The Hague have dealt with the interpretation, meaning and scope of this rule. In the Overall Conclusions of the First Special Commission of October 1989 on the Operation of The Hague Convention of 25 October 1980, deputies have concluded that in many reported cases of this international treaty, abducting or retaining parents repeatedly invoke the exception of Article 13, b to keep the child in the State of refuge³⁷.

Thus, subsequent Special Commissions for Reviewing the

36 2011 Hague Global Statistical Analysis, p. 30. Available at www.hcch.net/upload/abduct2011pd08ae.pdf. Last access 09/14/2014.

37 Overall Conclusions of the Special Commission of October 1989 on the Operation of The Hague Convention of 25 October 1980 on The Civil Aspects of International Child Abduction, 1989, item 26. Available at <http://www.hcch.net/upload/abdrpt89e.pdf>. Last access 09/16/2014.

Operation of the 1980 Hague Convention, held in 1993 (Second)³⁸, 1997(Third)³⁹, 2006 (Fifth)⁴⁰ have reinstated that to attend the best interest of child, Article 13, b must remain only as an exception. That is to keep the very meaning of the Convention, which estates that in order to guarantee respect to family and social backgrounds, decisions regarding any custody or visitation rights regarding children and teenagers up to 16 years old should be preferably taken by authorities of the State of their habitual residence.

Specialized studies report that in many PAS cases, the alienator deliberately accused the targeted parent of child abuse in order to hamper his/her access on the child. Additionally, Parental Alienation is also a recognized form of emotional abuse of the child, since one parent might indeed manipulate the child's emotions and thoughts about the targeted parent in such manner that he or she will fully support the alienator and refuse any contact with the targeted parent⁴¹.

Contracting States are deeply concerned with allegations of abuse and violent behavior in familiar relationships. For that matter, the 2012 (Sixth) Special Commission has even suggested the installation of specialized works regarding the uniform interpretation of Article 1.3, b of the 1980 Hague Convention to address specific circumstances such as domestic violence against the mother⁴².

However, there is no logical reason in acknowledging the enforcement of an exceptional clause as a regular rule for international child abduction cases. Scholars agree that the scope of this Convention is not to primarily deal with custody/visitation matters over abducted/retained children, because their best interest requires that authorities of the State of their habitual residence are able to decide such issues and

38 *Report of The Second Special Commission to Review the Operation of the Hague on the Civil Aspects of International Child Abduction Held* (18-21 January 1993), 1993, item 23. Available at: <http://www.hcch.net/upload/abdrpt93e.pdf>

39 *Report of The Third Special Commission to Review the Operation of the Hague on the Civil Aspects of International Child Abduction Held* (17-21 March 1997), 1997, item 54. Available at: <http://www.hcch.net/upload/abdrpt97e.pdf>

40 *Report of The Fifth Special Commission to Review the Operation of the Hague on the Civil Aspects of International Child Abduction and the Practical Implementation of The Hague Convention of October 19, 1996 on Jurisdiction, Applicable Law, Recognition Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the protection of Children* (30 October-9 November 2006), item 164, 2006. Available at: http://www.hcch.net/upload/wop/abd_2006_rpt-e.pdf.

41 LOTUFO, Renan; NANNI, Giovanni Ettore; MARTINS, Fernando Rodrigues (coordenadores). *Temas relevantes do Direito Civil contemporâneo: reflexões sobre os 10 anos do Código Civil*. São Paulo: Atlas, 2012. p. 799-800.

42 *Special Commission on the practical operation of the 1980 and the 1996 Hague Conventions* (25-31 January 2012), 2012, item 81. Available at www.hcch.net/upload/wop/concl28-34sc6_en.pdf

to enforce their decisions⁴³.

Before considering the opinion of the child that refuses to be returned to his/her State of habitual residence, judicial and administrative authorities must take necessary cautions⁴⁴, such as hearing the opinion of interdisciplinary specialists, in order to attest not only the level of maturity, but, especially, to verify if he/she is not being victim of emotional abuse or manipulation. It should also be pointed that children cannot be accounted for such crucial decisions when they are so deeply and emotionally immersed in the matter, which makes them even more susceptible to emotional abuse⁴⁵.

For such matters, analyzing the elements and evidences presented on suits requesting return of abducted/retained children in Brazil, federal magistrates might conclude by themselves (or with the help of expertized survey) that some children or teenagers are actually being victims of Parental Alienation such as established in Article 5⁴⁶ Federal Law 12.318/2010⁴⁷.

This procedure, which is also regulated in Articles 145 through 147 of the Brazilian Code of Civil Procedures (Federal Law nº 5.869, January 10, 1973), allows interested parties to indicate assistant experts, in order to attest impartiality throughout the survey. It is important to highlight that, although magistrates are not bound to the opinion of experts, they often rely on their professional experience and technical knowledge one assessing these particular subjects⁴⁸.

43 BEAUMONT, Paul R.; McELEVAY, Peter E. *The Hague Convention on International Child Abduction*. Oxford: Oxford University Press, 1999, p. 115.

44 SHAPIRA, Amos. *Private International Law: aspects of child custody and child kidnapping cases*. *Recueil des Cours*, v. 214, 1989, p. 196.

45 BODENHEIMER, B.M. *The Hague Convention on International Child Abduction*. *Family Law Quarterly*, v. 14, 1980, p.110.

46 Article 5 (Free transaltnion). If a magistrate suspects of parental alienation, he/she will take necessary measures, whether in autonomous or incidental suits, and will, if necessary, determine bio psychosocial or psychological survey. § 1 The expert report will be based on extensive psychological evaluation or bio psychosocial background, as appropriate for each case, and might comprise personal interview with the parties, examination of documents, historical of the couple's relationship and separation, chronology of incidents, personality assessment of the involved persons, and the examination of the level of concernment the child displays about possible charges against that parent. § 2 The survey will be performed by a multidisciplinary team of professionals, whose proof of experterise can be attested by professional or academic documents on experience of diagnosing acts of parental alienation . § 3 The expert or a multidisciplinary team of professionals appointed to assess the occurrence of parental alienation will within 90 (ninety) days to submit the report, renewable only by judicial authorization based on detailed justification.

47 TIBURCIO, Carmen; CALMON, Guilherme. *Sequestro Internacional de Crianças*. Comentários à Convenção da Haia de 1980. Rio de Janeiro: Atlas, 2014, p.128.

48 FREITAS, Douglas Phillips. *Alienação Parental – Comentários à Lei 12.318/2010*. 2nd

Brazilian federal judges, upon attesting Parental Alienation behaviors against abducted (or retained) children in Brazil, might as well enforce available legal tools to protect them, until the issuing of return order. Article 6 of Federal Law nº 12.318/2010 describes some possible measures:

Art. 6. Characterized typical acts of parental alienation or any conduct that hampers the coexistence of child or adolescent with parent in autonomous lawsuit or incidentally, the judge may enforce, separately or cumulatively, without prejudice of civil or criminal liabilities, and the general procedural instruments to inhibit or mitigate such effects, according to the severity of the case:

I - warn the alienating parent about the occurrence of parental alienation;

II - expand access to child in favor of the alienated parent;

III - apply a fine to the alienator;

IV - require psychological and / or bio psychosocial monitoring;

V - change the system of custody rights to joint custody or unilateral custody;

VI - prohibit changes on the domicile of the child or adolescent;

VII - suspend rights arising of parental authority of the alienator parent.

Sole paragraph. Characterized abusive change of address, impracticability or obstruction to family life, the court may also reverse the obligation to take or remove the child or adolescent from the residence of each parent throughout alternated periods of time.

At the same time, pursuant to Article 13, b of The Hague Convention they might also not take in consideration objections made by involved children/teenagers if, despite of maturity level, there are strong elements to conclude on the practice of Parental Alienation by abductor or alienator parent.

Carmen Tiburcio and Guilherme Calmon emphasize, with reference to Elisa Péres-Vera Explanatory Report of the 1980 Hague Convention, that in order to keep the scope of the Convention, exceptions must be fully proved and not simply alleged. Thus, the burden of proof falls over claiming parties. Nonetheless, there must be grave physical or emotional risks (but not necessarily actual damages to the child/teenager) to justify the refusal of return⁴⁹.

The same authors consider that the expression “*intolerable situation*” refers to circumstances exterior to the children but with strong impact in their condition, such as outbreaks, natural disasters but also acts of domestic violence committed against the mother, when she has performed the abduction/retention⁵⁰.

In sum, Brazilian Parental Alienation Act of 2010 must serve as an important tool in judicial claims of returning abducted children within the scope of The 1980 Hague Convention which shall be brought forward federal magistrates, according to Article 109, I and III of 1988 Federal Constitution.

In such cases, when abducting parents argue that returning the child will imply on physical and/or emotional harm to the child, or when the involved child/teenager in question objects the return to the State of habitual residence, Brazilian Federal magistrates must attest (by themselves or relying the opinion of professional experts) that there are no signs of practice of Parental Alienation before refusing to return the child on the grounds of the exception of Article 13, b of the 1980 Hague Convention.

4. OTHER SELECTED CASES.

In order to illustrate that the link between of The 1980 Hague Convention on The Civil Aspects of International Child Abduction and The Parental Alienation Syndrome Act of 2010 is actually based on the best interest of the child, it is now important to look at a few selected cases.

Pursuant to Article 155, II of Brazilian Code of Civil Procedure, any lawsuit regarding marriage, divorce, legal separation, filiation or

49 TIBURCIO, Carmen; CALMON, Guilherme. *Sequestro Internacional de Crianças*. Comentários à Convenção da Haia de 1980. Rio de Janeiro: Atlas, 2014, p. 289.

50 TIBURCIO, Carmen; CALMON, Guilherme. *Sequestro Internacional de Crianças*. Comentários à Convenção da Haia de 1980. Rio de Janeiro: Atlas, 2014, p. 290.

child custody and maintenance obligations are under judicial secrecy. Therefore, all names, and possible identification items were dully removed to preserve legal secrecy.

4.1. Case nº 2005.51.01.009792-9 (16th Federal Civil Court of Rio de Janeiro)⁵¹

Facts: In June, 2004, the boy L.B.L, who was 5 years old then, was taken from Quebec by his mother, I.L.B., to Rio de Janeiro, without permission of the father, who was under the impression that they had traveled to the US. The mother later informed to the former companion that she and their son would not return to Canada. The Father reported the case to Canadian Central Authority, which soon contacted the Brazilian Central Authority (SEDH/ACAF) to function in case, but attempts of voluntary return of the child were unsuccessful, and General Advocacy of Union triggered to present the proper lawsuit requiring judicial order for the return of the child (*ação de busca e apreensão de menor*). In her defense, the mother invoked, among other arguments, that her son would be exposed to serious risk of physical and/or emotional harm if returned to live with his father because of his alleged alcoholism and violent behavior.

Decision: Realizing the illegal relocation of the child from his place of habitual residence (which already configures Parental Alienation behavior) the Federal Judge granted the request of the Union, issuing the judicial order to return the boy L.B.L to Canada, rejecting the arguments of the abducting parent, on the grounds that mere allegations cannot justify the exceptional clause of Article 13, b of The Hague Convention. The same magistrate also determined the notification of that Sate Courts (which have issued orders granting temporary custody rights to the mother).

4.2. Case nº 2003.51.01.06976-2 (14th Federal Civil Court of Rio de Janeiro)⁵²

Facts: The girl, born in Israel, daughter of Brazilian mother and Israeli father, was brought to Brazil by her mother in December 2002, without permission of the father, who then filed a judicial lawsuit, claiming the return of the child.

Decision: After analyzing the elements brought to the case, the

51 16ª Vara Federal do Rio de Janeiro. Ação de Busca e Apreensão de Criança nº 2005.51.01.009792-9. Published in March 19, 2007.

52 14ª Vara Federal da Seção Judiciária do Rio de Janeiro, Ação de Rito Ordinário nº 2003.51.01006976-2. Federal Judge Claudia Maria Pereira Bastos Neiva, date of ruling May 14th 2007.

Federal judge concluded that relocation of the girl to Brazil was indeed contrary to custody rights conferred to father by the law of habitual residence, because his obligatory military service did not suspend such rights. However, given extensive proof regarding moral and physical aggression practiced against the mother in the presence of the child, eviction notices due to lack of rental payment, food deprivation to the child, and violent behavior of the father, the Judge concluded that the exceptional clause of Article 13, b was enforceable, thus refusing to issue the order of the return.

4.3. Case n° 2012.00577779-5 (Brazilian High Court of Justice)⁵³

Facts: a Brazilian woman married a Norwegian man in Norway back in 1999, habitually residing in that country where she two children, born in the years of 200 and 2002 respectively. In 2003, upon divorce of the couple, a Norwegian court granted joint custody rights to the couple over their oldest child and unilateral custody to the mother over the youngest with visitation rights granted to the father. The decision also ruled that the mother could spend up to one month per year with her children in Brazil, granted that she would inform the father about the dates of departure and arrival with one month of advance.

In July 2004, however, after bringing the children with her to Brazil, the mother reported to the father that they would not return to Norway, thus violating custody rights granted in that country. The father flew in to Brazil, where the parents discussed the possibility to change family residence to Rio de Janeiro, a trial that only lasted from August through December 2004, period during which they verbally agreed that the father could bring the children back to Norway with him if that attempt failed. In fact, in December 2004, the Norwegian father flew back to his home country bringing the children along, without permission of the mother, who flew back to Norway in May 2005 where she requested revision of custody rights over her children to local courts.

In 6/27/2006, Norwegian judicial authorities rendered their decision conferring full custody rights to the father and limited visitation rights to the mother, who would not be able to remove the children from that country without express permission of the father. However, on October 2006, she brought her children back with her to Brazil with the help of false passports. The father reported these facts to Norwegian Central Authority, which then contacted Brazilian Central Authority to trigger proceedings under the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

⁵³ BRASIL STJ, REsp 1315342/RJ. Rapporteur: Napoleão Nunes Maia Filho. Ruled in 11/27/2012, published in 04/12/2012.

Decision: The 17th Federal Civil Court of Rio de Janeiro considered that Norway was the place of habitual residence of these children, pursuant to Article 4⁵⁴ of the 1980 Hague Convention. They only were in Brazil originally because their mother illegally retained them in the country. Therefore, Norwegian authorities has jurisdiction over any parental agreement or claims about changing the habitual residence of these children.

Despite the ruling for immediate return of the children to Norway, the mother kept them in the country, by use of judicial methods such as *writs of mandamus* filed in State Courts of Rio de Janeiro. These decisions, which clearly overlooked the Article 16 of the 1980 Hague Convention⁵⁵, granted custody rights to the mother to keep their children in Brazil until decision by Federal Court of Justice.

Meanwhile, she appealed on the merits of this decision to Federal Court of Appeals (Tribunal Regional da 2^a Região) invoking the exceptional clause of Article 13, b of the Hague Convention. The Federal Court of Appeals initially reversed the decision on returning the children by majority of votes, but in the end it revised this ruling to recognize that the father, back in 2004, did not breach custody rights conferred by Norwegian authorities, unlike the mother in 2006, thus deciding that the children should return to Norway.

Notwithstanding, the mother appealed to the ultimate organs of Brazilian Judiciary Power. The appeal to the High Court of Justice (*Recurso Especial*) was on the grounds of breaching of the 1980 Hague Convention (article 13, b of Decree nº 3.413/2000) requesting precautionary order to keep the children in Brazil until the ruling on the issue. She also filed for an appeal to the Supreme Court (*Recurso Extraordinario*) alleging disrespect of constitutionally granted rights (right to family life and best interest of the child).

Nonetheless, both High Court of Justice and Supreme Court rejected to reverse the ruling of return the Children to Norway, which finally took place in the year of 2013.

In fact, the leading vote on STJ restated that The 1980 Hague Convention preconizes the right of children to enjoy life in close and

54 Article 4. The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

55 Article 16. After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

intimate coexistence with both parents, and for such reasons it equally protects custody and visitation rights, pursuant to Articles 1, 2 and 21⁵⁶.

For such matters, the High Court of Justice recognized that it is the best interest of child to enjoy full family life, and thus, to avoid the menace of Parental Alienation, which greatly hinders their right to a normal social, psychological, and emotional development. Thus, Contracting States must ensure that any decision regarding custody or visitation rights (such as the change of habitual residence) must be taken by the authorities of the Contracting State of habitual residence, and for such reason it rejected the appeal of the mother.

Henceforward, it also relied on the expert opinion that the children were not under threat of physical or emotional harm with the possible return to Norway. In fact, both of them enjoyed Brazil, but freely displayed desire to return to their homeland to live with their father. This survey proved to magistrates that none of the exceptional clauses of Article 13, b happened in the case⁵⁷.

At the same time, Brazilian Supreme Court rejected the appeal because it concluded that such claim implied in reexamination of factual matters, which pursuant to Brazilian procedural law can only take place in lower stances. In addition, Justice Gilmar Mendes concluded that the ruling of Federal Court of Appeals also respected infra constitutional legislation⁵⁸.

56 Article 21. An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child. The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

57 “Com efeito, é por demais alardeado pelos estudos de Psicologia e Assistência Social, cujos profissionais mais gabaritados tem insistentemente alertado para os malefícios do que se convencionou chamar alienação parental, a importância para o desenvolvimento psicossocial, emocional e psicológico das crianças ao partilhar da convivência com ambos os pais. Essa constatação é uma realidade sentida por todos os cidadãos, tenham eles filhos ou não, sentimento este encampado pelo Estado Democrático de Direito quando elegeu a proteção da família e das crianças com um dos seus maiores objetivos.” See full text in ww2.stj.jus.br/revistaelectronica/ita.asp?registro=201200577795&dt_publicacao=04/12/2012. Access on 9/20/2014.

58 “Verifico que o Tribunal a quo decidiu a causa com fundamento na legislação infraconstitucional. Assim, eventual ofensa à Constituição Federal, caso existente, dar-se-ia de maneira indireta ou reflexa, o que inviabiliza o processamento do recurso extraordinário. Demais disso, ressalto que a tese desenvolvida no recurso extraordinário demanda a reanálise

5. CONCLUSIONS

The selected cases, along with other precedents reported throughout the current work, and the highlighted scholarly opinions justify the conclusion around the necessary convergence of the best interest of the child in Brazilian Constitutional and infra constitutional legislation.

It is necessary to conclude that wrongful international relocation of children and/or teenagers in Brazilian territory in breach of the 1980 Hague Convention (by either abduction or retention) is recognizably a form of Parental Alienation. Such conclusion is pursuant to Federal Law nº 12.318/2010 Article 2, Sole Paragraph, item VII, since it represents unjustified change of the child's domicile in order to prevent access to the child.

Consequently, Article 13, b of the Hague Convention requires certain precautions prior to its enforcement. Hence, authorities of the requested Contracting State can only refuse return of abducted children to the States of habitual residence under strict circumstance, since it represents exceptional clauses that require substantial proof of physical or psychological harm (or risk of harm) for the children. Mere allegations shall not be considered, especially if magistrates conclude, especially with the help of experts, that the abductor or retaining parent is actually practicing any form of Parental Alienation.

For the same matter, the eventual objection of related children or teenager is only considerable if attested that the abductor/retaining parent is not manipulating the opinion of his child in any form.

Hence, the scopes of the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the Federal Law nº 12.318/2010 must converge to prevent that unilateral and illegal behavior of parents to interfere with the best interest of children in transnational context. This fundamental right consists in the right to family life with both parents according to the decisions enacted according the law of the contracting State of habitual residence.

6. REFERENCES

ARAÚJO, Nadia de. *Direito internacional privado*. Teoria e prática brasileira. 5th edition. Rio de Janeiro: Renovar, 2010.

da instrução probatória, entretanto o apelo extremo não se presta à revisão dos fatos e provas já analisados pelas instâncias ordinárias. Incide, portanto, o Enunciado 279 da Súmula desta Corte, segundo a qual não cabe recurso extraordinário para simples reexame de prova. Desse modo, não assiste razão à recorrente. Ante o exposto, nego seguimento ao recurso (arts. 21, §1º, do RISTF e 557 do CPC). Publique-se". BRASIL, Supremo Tribunal Federal, RE 784838, Raporteur: Justice Gilmar Mendes, ruled in 02/06/2014, published in 12/02/2014.

- BEAUMONT, Paul R.; McELEAVY, Peter E. *The Hague Convention on International Child Abduction*. Oxford: Oxford University Press, 1999.
- BERNET, William. Parental Alienation Disorder and DSM-V. *The American Journal of Family Therapy* v. 36, Issue 5, 2008, 349-366.
- BRASIL, Superior Tribunal de Justiça. Conflito de Competência nº 100.345/RJ. Raporteur: Luis Felipe Salomão. Published in Diário de Justiça da União in 03/25/2009
- BRASIL, Supremo Tribunal Federal, Recurso Extraordinário 784838, Raporteur: Justice Gilmar Mendes, ruled in 02/06/2014, published in 12/02/2014.
- BRASIL. 14ª Vara Federal da Seção Judiciária do Rio de Janeiro, Ação de Rito Ordinário nº 2003.51.01006976-2. Federal Judge Claudia Maria Pereira Bastos Neiva, ruled on May 14th 2007.
- BRASIL. 16ª Vara Federal do Rio de Janeiro. Ação de Busca e Apreensão de Criança nº 2005.51.01.009792-9. Published in March 19, 2007.
- BRASIL. Superior Tribunal de Justiça, Recurso Especial 1315342/RJ. Raporteur: Napoleão Nunes Maia Filho. Ruled in 11/27/2012, published in 04/12/2012.
- BODENHEIMER, B.M. The Hague Convention on International Child Abduction. *Family Law Quarterly*, v. 14, 1980, p. 90-132.
- DIAS, Maria Berenice (coordenadora). *Incesto e Alienação Parental*. São Paulo: Editora Revista dos Tribunais, 2013.
- DOLINGER, Jacob. *A criança no Direito Internacional*. Rio de Janeiro: Renovar, 2003.
- FREITAS, Douglas Phillips. *Alienação Parental – Comentários à Lei 12.318/2010*. 2nd edition. Rio de Janeiro: Forense, 2012.
- GARDNER, Richard. Parental Alienation Syndrome (PAS): Sixteen years later. *Academy Forum*, v. 45, issue 1, 2001, p. 10-12.
- GASPAR, Renata Alvarez; AMARAL, Guilherme. Sequestro internacional de menores: os tribunais brasileiros têm oferecido proteção suficiente ao interesse superior do menor? *Meritum*, v. 1, n. 8, 2013, p. 351-387.
- LIMA, Georges. *Retorno Legal: prevenir a subtração internacional de crianças*. Available at <http://www.sdh.gov.br/assuntos/adocao-e-sequestro-internacional/legislacao-e-publicacoes/retorno-legal-prevenir-a-subtracao-internacional-de-criancas> . Last accessed in September 13th, 2014.
- LOTUFO, Renan; NANNI, Giovanni Ettore; MARTINS, Fernando Rodrigues (coordenadores). *Temas relevantes do Direito Civil contemporâneo: reflexões sobre os 10 anos do Código Civil*. São Paulo: Atlas, 2012.
- MIGUEL FILHO, Theophilo Antônio. *Questões constitucionais e legais da Convenção de Haia sobre os aspectos civis do Sequestro*

Internacional de Crianças. PhD thesis. Orientated by: Nadia de Araujo. Rio de Janeiro: Pontificia Universidade Católica do Rio de Janeiro, 2010.

SHAPIRA, Amos. Private International Law: aspects of child custody and child kidnapping cases. *Recueil des Cours*, v. 214, p. 127-250, 1989.

SILVA, Denise Maria Perissini da. *Psicologia Jurídica no Processo Civil Brasileiro*. São Paulo: Casa do Psicólogo, 2003.

TIBURCIO, Carmen; BARROSO, Luís Roberto. *Temas de Direito Constitucional Internacional*. Rio de Janeiro: Renovar, 2013.

TIBURCIO, Carmen; CALMON, Guilherme. *Sequestro Internacional de Crianças*. Comentários à Convenção da Haia de 1980. Rio de Janeiro: Atlas, 2014.

GUN JUMPING IN BRAZILIAN ANTITRUST LAW: A CASE STUDY IN THE OIL INDUSTRY

Clarissa Brandão

Federal Fluminense University, Brazil.

Aline Teodoro de Moura

State University of Rio de Janeiro, Brazil.

Abstract: This article presents some of the main changes introduced in the Brazilian antitrust system with the publication of Law no. 12.529, 2011, which introduced important changes in the control of acts of economic concentration - mergers, acquisitions, formation of joint ventures – which now began to be performed by the competent authority prior to the act of concentration, avoiding the consummation of transactions without the consent of CADE and analyzes the concept of Gun Jumping. The legislative change imposes a challenge for the Brazilian antitrust system: to define the boundaries between a lawful process of economic concentration and a Gun Jumping practice. In particular, a study was conducted on these impacts on the national oil industry in order to evaluate the performance of CADE in the implementation of the legislation.

Keywords: Antitrust - Gun Jumping - Oil Industry.

1. THE DEFENSE OF COMPETITION IN BRAZIL: BACKGROUND

The country's competitive experience began in the 90s, with the 'Brasil New Plan', which introduced deregulation, trade liberalization, privatization of enterprises and economic stability.

Before this period, companies installed in Brazil were bundled under the protective mantle of the government, free from competition and not concerned with the quality and prices of the products offered. Therefore, the liberalization of the market became an important factor in the industrial and economic development of the country, while domestic companies began to seek better prices and quality in their production.

In this new dynamic scenario, investments ceased to be merely speculative and began to be directed to production, therefore generating better income distribution, employment opportunities and wages, contributing to the country's development.

The concept of competition, borrowed from the economic sciences, provides the Law with the necessary parameters for the fulfillment of the constitutional guarantees listed in Articles 170 to 192 of the Constitution, in particular free enterprise and free competition. Free enterprise is enshrined in art. 170, sole paragraph, where we have:

It is ensured to all the right to engage in any economic activity, regardless of authorization from government agencies, except in cases provided by law.

Free enterprise involves the freedom of business and the freedom to hire. This means that the exploration of any economic activity is free, as long as the constitutional limits imposed upon it are respected, as the protection of competition is also in the Federal Constitution, in its Article 173:

§ 4th. The law will repress the abuse of economic power aiming at the domination of markets, the elimination of competition and the arbitrary increase of profits.

§5th. The law, without prejudice to the individual responsibility of the directors of the legal entity, shall establish the responsibility of the latter, subjecting it to the punishments compatible with its nature, in the acts performed against the economic and financial order and against the popular economy.

Competition, therefore, can refer to the market of factors as well as to the market of products. This is the “dispute for the acquisition of resources usable in production” (PINHO & VASCONCELLOS. 2004, p. 15) and the “dispute for the purchase and sale of the final product” (PINHO & VASCONCELLOS. 2004, p. 15). Therefore, the antitrust legislation seeks to ensure free and fair competition in the market, without having to limit free enterprise.

All business relationships are shrouded by the risk of trade. Carrying out a commercial activity implies taking on the risk of the business being or not successful. The defense of competition seeks to protect not the elimination of risks, but rather a fair dispute for the

market and the opportunity for any agent to enter and remain in it, or leave it whenever he/she so desires, because he/she is driven by his/her own initiative.

Moreover, the commercial nature of competitive relationships is essential to enable the discussion of acts that violate the economic order. If there is no economic activity, no organization of productive factors for the obtainment of profit, there is no reason to speak of the right to competition. Competition Law governs the market and the relationships between its participants and consumers. The interests of the consumer and of the collectivity are also objects of Competition Law, which are, in the end, the legal assets protected by the Brazilian antitrust law, according to the lesson of Fábio Ulhôa Coelho,

“by watching over the fundamental structures of the free market economic system , competition law ends up reflecting not only the interests of entrepreneurs victimized by practices harmful to the economic constitution, but also of consumers, workers and, through the generation of wealth and increased taxes, the interests of society in general.”
(COELHO, Fábio: 1995, p. 5).

Competition is not longer limited to the issue of price. Several other factors comprise it, such as, for example, technology, high productivity, investments in research. Its legal importance certainly derives from the fact of it being closely related to economic life and consumption relations.

There are two essential factors to understand the dynamics of competition: the characterization of its agents or subjects and identification of the product's relevant market.

We already know that the economic agents that integrate a competitive relationship will always be commercial entities, that is, companies and business people, companies or group of companies. There are, however, different markets, different activities and different clienteles. This is also the view of author Sérgio Bruna, since, according to him “not all goods compete against each other. Obviously, on the supply side, a producer of tractors does not compete with a drug manufacturer, which is why changes in the supply of tractors will have little or no influence in the amount of drugs produced” (BRUNA Sérgio: 1997, p. 67). Complementing this reasoning, in his vote, the CADE rapporteur, Leônidas R. Xausa, defines that “competition establishes itself between equal business categories or between industries of the same sector or between dealers, but not between an industry and a dealer” (FRANCESCHINI: 1998, p. 291).

So, to characterize a situation of competition we need the following elements: economic agents that contend for the same clientele through the production of a same or similar consumable good or through the provision of a same or similar service.

The concept of relevant market, for Sérgio Bruna, is the “economic space in which economic agents interact in order to determine the level of competition and the amount of economic power enjoyed by them” (BRUNA, Sérgio: 1997, p.76). This is also the position of CADE’s jurisprudence, as can be seen in the following decision:

One may define the relevant market as the territory in which interested companies are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and in which the conditions of competition are substantially different from those prevailing in neighboring territories (...) the product’s relevant market is represented by the sum of products that can be reasonably substituted when used for the purposes for which they are produced, without failing to consider the quantity, purpose and, particularly, the price. (FRANCESCHINI: 1998, p. 531).

One may conclude that the concept of relevant market is quite technical because it is an economic concept used in the legal field to characterize situations of competition, or still to characterize the abuse of economic power.

For the analysis of antitrust issues, according to Sérgio Bruna, “the characterization of economic power, for purposes of the repression of its abuse, will depend in advance on the definition of the relevant market in which it is manifested” (BRUNA, Sérgio: 1997, p. 43). This then means that the concept of relevant market, in addition to being extremely technical and complex, is instrumental to the extent that it is required to instruct the analysis of the occurrence or not of violations of the economic order, or abuse of economic power, according to the understanding of Sérgio Bruna. Therefore, for him, “the concept of relevant market is instrumental in nature: it serves the purpose of identifying, subsequently, the existence of economic power” (BRUNA, Sérgio: 1977, p.89).

Also for Fábio Ulhôa Coelho, the characterization of the abuse of economic power only occurs after the relevant market of the business relationship in question is determined. According to him, “the notion of dominant position is relative and only has meaning with the

specific geographical and material definition of the market in which this dominance is revealed” (COELHO: 1995, p. 58).

Therefore, it is understood that the relevant market is the geographical and material definition that limits the performance of the economic power of a particular agent. For example, we cannot assess whether or not a market suffered any damage as a result of the abuse of economic power, if this market is not technically defined, because, otherwise, the assessment of the extent of the result will not be reliable.

Therefore, it is not enough to just analyze that a particular economic agent has lowered its prices and in doing so incurred in a violation of the economic order¹. It is necessary for the relevant market to have been affected. Otherwise, there is no basis to speak of the abuse of economic power, as nobody economically dominates the entire economy of a country no matter how much economic power he/she possesses.

Technically, the definition of relevant market is made in two aspects: geographical and material. The geographical aspect includes the geographical area of operation of the economic agent. And the material aspect is what determines the issues related to the consumer, that is, if he/she would have, in that market, substitutes for the product manufactured by the agent in question.

One of the best real examples found in this study to definitively understand what relevant market is, is the work of Sergio Bruna, where he mentions the Du Pont case, the cellophane company from the United States. This is a case decided by the U.S. Supreme Court, in which Du Pont claimed that it did not detain the dominant position in the cellophane market because cellophane did not constitute a market in itself but participated in the “flexible packaging materials” market, in which it accounted for only 20% of the total consumed materials; and therefore it had no “economic power” over the market, and could not be punished for abuse of economic power (BRUNA, Sérgio:1997, p. 77-79).

Sérgio Bruna also highlights in his work the understanding of the U.S. Supreme Court regarding relevant market: *“That market is composed of products that have reasonable interchangeability for the purpose for which they are produced – price, use and qualities considered².”* This understanding should also include the analysis of

1 Art. 36 of Law No. 12,529, 2011 provides: “Art. 36. *Actions of whatever kind, regardless of blame, which have as their object or may have the following effects, even if they are not met, constitute violations of the economic order. I - to limit, restrain or in any way impair open competition or free enterprise; II - to control a relevant market of goods or services; III - to increase profits arbitrarily; and IV – abusively exercise a dominant position.*”

2 It is the rule of reasonable substitutability of one product by another considering their price, quality and use, according to Benjamin Shieber in Abuse of Economic Power, p. 43-49.

the consumers' reaction. That is to say, it is not sufficient for the product to be technically interchangeable if the consumers reject it. It is called *substitutability at consumers eyes*.

Thus, Sérgio Bruna joins the current of American professor Hovenkamp and also Areeda & Kaplow, whose understandings as to the configuration or not of the abuse of economic power are similar. All agree that the application of one or other rule in analyzing the behavior of an economic agent is not sufficient to evaluate a possible economic offense is insufficient, but rather an extensive analysis involving the largest possible number of parameters. For instance, it is not enough to identify the relevant market, or the simple technique of replacing a product by another for such conduct to be characterized; rather the deepest and most complete analysis possible, gathering all available techniques.

Without a doubt, this is the best indication for the analysis of antitrust issues, but it implies the full understanding by the judges of the legal and economic doctrine that involves such issues, which does not occur so often in our legal system, leading many to commit errors, as for example, Preliminary Investigation 56/75, cited by Franceschini & Franceschini, in Sérgio Bruna's book, which discussed the relevant market for configuring the abuse of economic power by a milk plant, in which CADE understood that there was no typical behavior by the plant in having cut the supply of milk to a distributor in Vila Galvão-SP because domain of the domestic market by the company was not characterized. However, one can immediately identify that the issue did not involve the domestic market but rather the relevant market of Vila Galvão, which was simply disregarded.

Another no less important element for competition is the identification of economic power. Its relevance is in knowing that, if there is no economic power by a specific economic agent, one cannot speak of abuse of economic power or infraction of the economic order. According to this same understanding, Sérgio Bruna states that

"The investigation into the existence of economic power, on a legally relevant level, is always indispensable since, in the absence of economic power, there is no possibility of performance of the State's antitrust activity, because if there is no power there will be no abuse to curb" (BRUNA, Sérgio: 1997, p. 125).

Economic power is the ability of an agent to have influence over the market in which it participates. For Sérgio Bruna, "the notion of economic power brings with it the antithesis of the model of perfect

competition, where none of the economic agents is capable of influencing, with their individual attitudes, the behavior of the market as a whole” (BRUNA, Sérgio:1997, p. 103). Complementing, he continues stating that “economic power is the ability to determine third-party economic behaviors under conditions different from those that would result from the market system, if it functioned in a pure competitive system” (BRUNA, Sérgio: 1997, p. 105) and, further, “it may occur that the economic power enjoyed by a particular agent, although existing, does not possess the magnitude required to become the object of antitrust activity by the State” (BRUNA, Sérgio: 1997, p. 105).

The previous law - Law 8.884/94 - expressly took a position in art. 20, that, for the infraction to be characterized, the abuse of a dominant power is required. The new Antitrust Law followed the same orientation. The dominant power exercised due to a leadership position in the market is not an anti-competitive practice. Without dissonance, this is also the understanding of the doctrine, according to author Sergio Bruna, who explains that, in other words, market domination due to non-abusive conduct does not characterize illegal market domination. The concept of abuse of dominant position does not intrinsically offer better parameters for this situation to be clearly identified. In the words of Sérgio Bruna,

“one can say that the dominant position is one that confers its holder with a substantial amount of economic or market power, to the point that it can exercise decisive influence over the competition, especially with regards to the price formation process, either by attenuating the volume of supply or demand and that provides a high degree of independence in relation to the other economic agents in the relevant market” (BRUNA, Sérgio: 1997, p.115).

Sergio Bruna focuses the discussion on the issue of prices assuming it will not be possible to influence issues of competition without the agent having substantial control over prices. For him, abuse will only occur if it is shown that the agent practiced abusive prices, above or below the acceptable level, and produced real effects on the market through said practice. Without a doubt, pricing is important in the matter of competition, but it is not the only requirement for the practice of antitrust violations; we can provide an extreme example from the very work of Sergio Bruna, where he mentions, quoting Hovencamp, that to eliminate competition by exploding the competitors’ factories, one only needs a saboteur and a match.

Sergio Bruna understands that economic power can also be sized by elements other than market share. For him, the residual demand, price discrimination, the existence of excessive profits are also part of the antitrust analysis. He concludes in his teachings that all these elements are mere attempts to forecast the practice of anti-competitive actions in the marketplace, because according to Hovencamp, “predicting the competitive impact of a merger is not part of an exact science” (BRUNA, Sérgio: 1997, p.127)

It can be said that the definition of the situation of competition between different economic agents is complex, but essential for the characterization or not of economic offenses determined by the antitrust laws. Both the analysis of the relevant market, as well as the definition of the existence or not of economic power, are indispensable for the application of the antitrust laws that we will discuss in the next section.

2. THE NEW BRAZILIAN ANTITRUST LAW

The new antitrust law, Law no. 12.529/11 was published based on Bill 3.937/2004, resulting from an intense legislative debate that lasted seven years, justified by the major changes introduced to the Brazilian Competition Defense System (SBDC) - which is formed by the Administrative Council for Economic Defense (CADE) and the Secretariat for Economic Monitoring (SAE)³ -, to ensure the promotion of a competitive economy by means of the prevention and enforcement of actions that may limit or impair healthy competition for a relevant market.

Current legislation has brought innovation by organizationally restructuring the duties of the agencies involved in the Defense of Competition and assigning effectiveness and coercivity to CADE's decisions - which do not involve review by the Executive power⁴ - with the introduction of the system of prior control of acts of concentration, with the establishment of penalties for any breach of the Law.

From the organizational point of view, Law 12.529/2011, details the attributions and functioning of the entities responsible for

3 Art. 3 of Law 12.529/11 provides in article 3 that “*The SBDC is formed by the Administrative Council for Economic Defense - CADE and the Secretariat for Economic Monitoring of the Ministry of Finance with the obligations provided for in this Law.*” Already when the SBDC is regulated by Law No. 8.884/94, it was composed by three bodies: the Administrative Council for Economic Defense (CADE), the Secretariat of Economic Law (SDE) of the Ministry of Justice and the Secretariat for Economic Monitoring (SEAE) of the Ministry of Finance.

4 Attention is drawn to the principle of guaranteed access to the jurisdiction under which states art. 5, XXXV, CF/88, “*the law does not exclude from review by the Judiciary injury or threat of injury to the right.*”

implementing the norms of Defense of Competition in Brazil, through the legal structuring of the so-called Brazilian Competition Defense System, a nomenclature which, even of general use, lacked legal provision until the enactment of the new law.

The main changes can be summarized based on the attributions of two bodies: a) CADE, which consists of (i) General Superintendence, responsible for the investigation and analysis of acts of concentration and anticompetitive practices; (ii) the Department of Economic Studies, responsible for the preparation of studies and reports; and (iii) the Administrative Court for Economic Defense, responsible for the judgment of cases, and b) the Secretariat for Economic Monitoring of the Ministry of Finance (SAE) ⁵, which will be responsible for the advocacy of competition before government agencies and the general public.

We can point to the role of the SBDC in three basic areas: (i) the control of market structures, through the appraisal of acts of concentration; (ii) the repression of anticompetitive conduct; and (iii) the promotion of a culture of competition (FIGUEIREDO: 2013, p.234).

In this sense, an important change promoted by the new law was the change in the control of the market structures. Law no. 12.529/2011⁶

⁵ SAE's duties are described in article 19 of Law no. 12.529/11.

⁶ Innovation of prior control brought by article 88: "*Article 88. Acts of economic concentration that will be submitted to CADE by the parties involved in the transaction in which, cumulatively: I - at least one of the groups involved in the operation have been registered in the last balance sheet, gross annual revenue or total turnover in the country in the year preceding the operation, equivalent to or greater than R\$ 400,000,000.00 (four hundred million reais); and II - at least one other group involved in the operation has been registered in the last balance sheet, gross annual sales or total turnover in the country in the year prior to the operation, equivalent to or greater than R\$ 30,000,000.00 (thirty million reais). § 1 The values mentioned in items I and II of this article may be adequate, simultaneously or independently, by appointment of the Plenary of the Cade, by ministerial decree of the Ministers of Finance and Justice. § 2 The control of mergers in the caput of this Article shall be made in advance and no more than 240 (two hundred and forty) days from the application protocol or its amendment. § 3 Those acts that are submitted to the provisions in this article may not be consummated before being analyzed under this article and the procedure laid down in Chapter II of Title VI of this Act, under penalty of nullity, being also imposed a pecuniary penalty of not less than R\$ 60,000.00 (sixty thousand reais) or more than R\$ 60,000,000.00 (sixty million reais), to be applied under the regulations, without prejudice to the prosecution of the administrative process, pursuant to art. 69 of this Law. § 4 Until the final decision on the transaction, the conditions of competition between the companies involved should be preserved, under penalty of the application of the sanctions provided in § 3 of this article. § 5 The merger involving elimination of competition in a substantial part of the relevant market, which may create or strengthen a dominant position or which may result in the domination of the relevant market of goods or services, except as provided in § 6 of this article will be banned.*" We emphasize that the article was modified by Ministerial Decree no. 994, of May 30, 2012.

is express in determining which merger, acquisition or joint venture operations should be necessarily considered in advance by the SBDC and analyzed a maximum of 240 days from the date of filing of the petition or its amendment, the consummation of which, without authorization by CADE, subjects those concerned to the imposition of a penalty and nullification; therefore, until the final decision on the transaction, the conditions of competition between the companies involved should be preserved.

Certain changes were also made to the illustrative list of behaviors that may constitute violations of the economic order, such as those listed in § 3 of art. 36 of the Law, however, the list is simply, as stated, exemplary, as transcribed:

§ 3 The following acts, among others, to the extent that they constitute a hypothesis provided in the caput of this article and its items, characterize a violation of the economic order:

I – to agree, arrange, manipulate or adjust with a competitor in any form:

a) the prices of goods or services offered individually;

b) the production or commercialization of a restricted or limited amount of goods or the provision of a restricted or limited number, volume or frequency of services;

c) the division of parts or segments of an actual or potential market for goods or services by means, among others, of the distribution of customers, suppliers, regions or periods;

d) prices, conditions, privileges or abstaining in public bidding processes;

II – to promote, obtain or influence the adoption of uniform or concerted business practices among competitors;

III – to limit or prevent access of new companies to the market;

IV – to create difficulties for the establishment,

operation or development of a competitor or vendor, purchaser or financier of goods or services;

V – to prevent access of competitors to sources of inputs, raw materials, equipment or technology, as well as distribution channels;

VI – to require or grant exclusivity for the dissemination of advertising in mass media;

VII – to use misleading means to cause third party price oscillations;

VIII – to regulate markets for goods or services, establishing agreements to limit or control research and technological development, the production of goods or services, or to hinder investment in the production of goods or services or their distribution;

IX – to impose, in the trade in goods or services, upon distributors, retailers and representatives resale prices, discounts, payment terms, minimum or maximum amounts, profit margins, or any other sales conditions related to their transactions with third parties;

X – to discriminate purchasers or suppliers of goods or services through differentiated pricing, or by establishing operational conditions for the sale or provision of services;

XI – to refuse the sale of goods or the provision of services within normal business payment conditions;

XII – to hinder or disrupt the continuity or development of commercial relations for an indefinite period due to the refusal by the other party to abide by business terms and conditions that are unreasonable or anticompetitive;

XIII – to destroy, disable or take possession of raw materials, intermediate or finished products, as well as to destroy, disable or impair the operation of equipment to produce them, distribute them or

transport them;

XIV – to take possession of or prevent the exploitation of the rights of industrial or intellectual property or technology;

XV – to sell goods or services unreasonably below the cost price;

XVI – to retain production or consumer goods, except to ensure coverage of production costs;

XVII – to partially or fully discontinue the activities of the company without proven cause;

XVIII – to subordinate the sale of a good to the purchase of another good or to the use a service, or subordinate the provision of a service to the use of another or to the acquisition of a good; and

XIX – to exercise or abusively exploit industrial property rights, intellectual, technology or brand.

With regards to the penalties provided in the Law, one should point out the reduction of the parameters for the calculation of fines to be imposed on companies and their directors in the case of a conviction for the violation of the economic order, as provided in art. 37 of Law 12.529/12. Under the aegis of the previous law (Law no. 8.884/94), the penalty applicable to companies ranged from 1% to 30% of the economic group's gross revenue in Brazil, during its last financial year. The current Law establishes, for the company, a fine from 0.1% to 20% of the company's, group's or conglomerate's gross revenues obtained during the last financial year prior to the opening of the administrative process in the field of business activity in which the infraction occurred, whenever possible to estimate⁷.

7 Art. 37 provides: The practice of violation of the economic order subjects those responsible to the following penalties: I - for now, a fine of 0.1% (one tenth of one percent) to 20% (twenty percent) of the gross revenues of the company, group or conglomerate obtained, the last before the introduction of the administrative process in the field of business activity in which the infraction occurred, which will never be less than the benefit received, whenever possible in your estimation; II - in the case of other individuals or legal entities of public or private law, as well as any entities or associations of persons constituted in fact or in law, even temporarily, with or without legal personality, which do not carry out a business activity, it is not possible using the criterion of the value of gross revenue, the fine will be between R\$ 50,000.00 (fifty

For administrators, the fine to be imposed on companies and managers is now calculated based on the percentage incidence on revenues of the economic group in the field of business activity in which the violation occurred - and no longer on the revenue of the entire group - whenever possible to estimate.

3. THE CHARACTERIZATION OF GUN JUMPING

The theme of Gun Jumping is recent in the Brazilian legislative scenario; it is understood as the theory that lends itself to the analysis of alleged anticompetitive conduct practiced with the intent of controlling structures, arising mainly from the improper exchange of information and/or premature integration of companies in the process of economic concentration (MARTINS: 2012, p. 58).

In this sense, it is worth understanding the extent to which agreements, inherent in the process of economic concentration, may violate the rules of antitrust law, which is our proposal. The identification of the unlawfulness of Gun Jumping is related to the analysis of the competitive position of the parties, market conditions, the purpose of the operation and the nature of the due diligence and conduct prior to the consummation of the transaction.

As stated earlier, Gun Jumping is considered “jumping the gun.” This expression can be easily understood if analyzed from the aspect of activities involving competition in which, whether sportive or economic, the starting conditions can define a good result. Therefore, transposing the idea to a process of economic concentration, a good start or a fast start can ensure the efficiency of the negotiation between the parties, as well as the planning and implementation of the operation.

However, it is noteworthy that the early implementation of the operation may cause a “false start” and therefore conflict with the rules of antitrust legislation, thus characterizing the practice of Gun Jumping.

Law 12.529/11 completely changed the system used to control acts of economic concentration in Brazil. It innovated by introducing the preventative control of acts of concentration⁸. According to art. 88, §§ 2 and 3 of the Law, the control of the acts became prior to the

thousand reais) and R\$ 2,000,000,000.00 (two billion reais); III - in the case of the administrator, directly or indirectly responsible for the infraction when negligence or willful misconduct is proven, a penalty of 1% (one percent) to 20% (twenty percent) of that applied to the company, as provided in subsection I of this article, or to companies or entities, as provided in section II of this article.

⁸ The subsequent analysis, as provided for the Law 8884/94 was largely ineffective and made the anticompetitive review extremely difficult for the proper agencies. With the change made by the new law, Brazil is aligned with countries that have the best antitrust laws.

transactions and the transactions may not be consummated prior to their consideration by CADE, under penalty of sanctions to be imposed with the characterization of Gun Jumping:

Art. 88. Acts of economic concentration will be submitted to CADE by the parties involved in the transaction in which, cumulatively: [...] § 2 The control of the acts of concentration addressed by the caput of this article shall be made in advance and, at most, within 240 (two hundred and forty) days from the protocol of the petition or its amendment. § 3 The acts that are subsumed to the provisions in the caput of this article may not be consummated before being analyzed, under the terms of this article and under the procedure laid down in Chapter II of Title VI of this Law, under penalty of nullity, being further imposed a pecuniary penalty of not less than R\$ 60,000.00 (sixty thousand reais) nor more than R\$ 60,000,000.00 (sixty million reais), to be applied in accordance to the regulations, without prejudice to the filing of administrative proceedings pursuant to art. 69 of this Law.

Regulation of this control can also be observed in art. 108, § 1 of the Internal Rules of the Administrative Council for Economic Defense (RiCade) which establishes:

Art. 108. The application for approval of acts of economic concentration referred to in art. 88 of Law No. 12,529, 2011, will be made in advance. § 1 The notifications of acts of concentration must be filed, preferably after the signing of the formal instrument which binds the parties and before consummating any act relating to the transaction.

Previously, under the terms of Law 8.884/94, there was a subsequent control of structures, in which the companies submitted the legal matter to the analysis of the competitive authority only after its consummation.

Under the procedural aspect, Gun Jumping occurs when the parties of an act of concentration do not observe the requirement to notify the antitrust authority in advance or wait for the waiting period for analysis of the act.

As important as the procedural aspect is the observance of the

material characterization of Gun Jumping: the improper exchange of information and/or premature integration between companies in the economic concentration process. We point out that when the competing parties coordinate their activities before the actual consummation of the transaction, there occurs a limitation of the functional independence of one of the parties – prior to the approval of the transaction by the antitrust authority –, which violates the prior control of the newly introduced Brazilian Competition Defense System, which excels in maintaining the conditions of competition in the market without restricting competition.

Therefore, the parties are not allowed to coordinate activities consisting in the exchange of commercially sensitive information that ensure to the defendant a competitive advantage in the market (as long as said information restricts or limits effectively or potentially the individuality of one of the companies that plan the integration) before closing the transaction - Jumping the Gun - and, if identified, will be characterized as anticompetitive conduct undertaken by companies in the process of economic concentration, since they must operate as independent competitors and thereby preserve their respective competitiveness until the final decision of the antitrust authority, CADE.

Nevertheless, the coordination of certain activities between the parties, even if understood as necessary, may be questioned by the antitrust authority. Note the need to establish minimum parameters for the occurrence of this prior coordination between the companies participating in a process of economic concentration (MARTINS: 2012, p. 73), thus avoiding the characterization of Gun Jumping; however, given the gap in the Brazilian legislation on the determination of these parameters, the analysis is performed on a case by case basis, as clarifies Leonor Cordovil,

“It is essential that CADE clarify to the companies which acts would have the capacity to consummate the legal transaction. In practical terms, it is expected that CADE clarify: (i) which steps the parties to an act of concentration may adopt before CADE’s approval, (ii) what information can be shared between the parties during the course of due diligence and up until CADE’s final decision; (iii) how and to what extent, if any, may the parties integrate assets and or the management of the companies (especially related to business management and marketing issues); and (iv) how to characterize and identify the unification of the exercise of power within companies before the approval of the act by CADE.” (CORDOVIL: 2011,

p. 213)

It is important to establish that in order to avoid the characterization of an illicit act of concentration and legitimize the conduct adopted by the parties, one must initially establish the moment of notification to CADE, before the beginning of its execution. It is worth noting that under Law 8.884/94, the parties signed contracts that included the suspension of the contractual effects depending on the CADE decision, being allowed to initiate the integration, as long as the irreversible business conditions were preserved.

As from the enactment of Law No. 12.529/11, the parties may not practice any action of integration representing the execution of the signed contract. According to the lesson of Gaban and Domingues,

“Brazil, in the first moment of the application of the NLAB, will face a process (possibly painful) of maturing and of cultural change in which the risk of gun jumping is likely to be many times greater than the risk of the merit itself. For this reason, it is advisable that economic agents adopt, whenever possible, more conservative measures with respect to practices of the act of consummation in operations that have been notified to the SBDC” (GABAN & DOMINGUES: 2012, p. 118)

4. THE CASES IN THE OIL INDUSTRY.

The changes in the new Brazilian antitrust law have an impact on several sectors of the economy, including the oil industry. In the upstream segment, certain operations and business transactions such as contracts for the sale of exploration rights (farm-in/farm-out) began to undergo a double analysis: by ANP and by CADE. The fines that may be imposed by CADE may reach 60 million reais in conjunction with the cancellation of the deal, in addition to inconveniently exposing businesses and the business of the sector.

Certainly antitrust analyses should and must be made relative to the oil exploration and production sector in Brazil, especially when considering the scenario of the pre-salt exploration and the fact that there was only one offer for the production sharing contract system. Even in relation to the post-salt and concession contracts, despite all the regulatory apparatus and the realization of public bidding processes aimed to elect the best concessionaires, the result of the bidding rounds is quite predictable, as shown in the table below:

Graph I – Data of Bidding Rounds

	Bid 1	Bid 2	Bid 3	Bid 4	Bid 5	Bid 6	Bid 7	Bid 8	Bid 9	Bid 10	Bid 11
Blocks for bidding	27	23	53	54	908	913	1134	284	271	130	289
Blocks transferred	12	21	34	21	101	154	251	38	117	54	142
Participation of PETROBRAS	5	8	15	8	88	107	96	21	27	27	34

Source: Compiled from data obtained from the National Petroleum, Natural Gas and Biofuels Agency site

Obs.: BID – Auction

Since the opening of the sector in 1997, and, notwithstanding the flexibilization of the monopoly situation, today, in Brazil, the participation of PETROBRAS in the exploration of oil blocks in the onshore and offshore concession contract system is approximately 46%, not taking into account the blocks referring to round zero and the rights obtained through farm-in farm-out operations in which the company participated.

Within this scenario, it should be emphasized that the new regulatory framework for the pre-salt, in addition to ensuring the participation of PETROBRAS as an operator in all blocks, did not regulate the manner in which the company will act as bidder. There is, therefore, a normative void that leaves in the hands of a highly asymmetric market the possibilities of association between PETROBRAS and other companies. As reported in the newspapers and trade journals, this “relationship” between the companies and PETROBRAS will not be governed by any bidding procedure that can guarantee the equality of conditions among all those interested in the pre-salt round. The economic power of PETROBRAS in the upstream sector is robust.

Within the scope of the concession agreements, the fines imposed by CADE on said operations significantly affect commercial negotiations of the national upstream segment. This is due to two reasons: a) change in the Brazilian competition system which now requires prior approval of acts of concentration, without any action having been carried out before this assessment (prior control); and b) the understanding by CADE and the ANP that the assignment of rights and obligations arising from the concession contract correspond to intangible assets of the companies and therefore are subject to the control of acts of concentration.

Even though the new law has been in force since May 2012, it was from this year on that the National Petroleum, Natural Gas and Biofuels Agency - ANP declared mandatory the declaration of approval of the transaction by CADE to then analyze the concession process, through Circular Letter No. 003/2013/SEP.

According to the new Law and Ministerial Decree no. 994/2012, the concession transactions involving parties that cumulatively have an annual gross revenue (year prior to that of the operation) or total business volume in the country equivalent or superior to R\$ 750,000,000.00 (seven hundred and fifty million reais) and the other party having an annual gross revenue (year prior to that of the operation) or total business volume in the country equivalent or superior to R\$ 75,000,000.00 (seventy five million reais) must be submitted to CADE's analysis prior to its implementation

Each analysis of concession of rights implies in the opening of individualized administrative proceedings, whose costs correspond currently to a value of R\$ 45,000.00 (forty-five thousand reais) to be collected via GRU (Federal Government payment docket), pursuant to art. 23 of Law 12.529/12.

Pursuant to art. 8, item III, the assignment of rights of concession contracts, especially when the operation is in the exploratory phase, tend to be analyzed via summary proceedings, with a duration of up to 240 (two hundred and forty) days unless CADE does not understand that it is a complex act. The current average time for consideration of acts of concentration by CADE has been 18 days.

The fine for non-submission to CADE of the acts of concentration vary between R\$ 60,000.00 (sixty thousand reais) to R\$ 60,000,000.00 (sixty million reais), in addition to cancellation of the transaction.

Regarding CADE, the following transactions involving the transfer of rights have been submitted and approved:

- *BP / Devon (AC No. 08012.003431/2010-81 approved without restrictions on 5/19/2005);*
- *Mersk / SK (AC No. 08012.000097/2011-94 approved without restrictions on 3/2/2011);*
- *TNK / Petra (AC No. 08012.008374/2011-15 approved without restrictions on 9/14/2011);*
- *Petrobras / BG (AC No. 08012.008348/2011-89 approved without restrictions on 9/28/2011);*
- *TNT / HRT (AC No. 08012.010312/2011-65*

approved without restrictions on 3/14/2012); and

- Vale/Statoil, (AC n° 08700.000374/2013-72, approved without restrictions on 1/25/2013)⁹.

The strengthening of CADE with the new law and the changes in the competitive system came in good time. But there must be caution with a possible indiscriminate action over the economic agents involved, which merit a careful review on the functioning of the industry and its specific characteristics. In addition to, of course, a coordinated action between CADE and the ANP for the perfect handling of the matter in face of a notoriously troubled market.

REFERENCES

- BRASIL. Lei n 12.529/11, de 30 de novembro de 2011. Planalto. Available at <http://www.planalto.gov.br/CCIVIL_03/_Ato2011-2014/2011/Lei/L12529.htm>. Accessed on Feb. 19, 2014.
- _____. Lei n 8.884/94, de 11 de junho de 2004. Planalto. Available at <http://www.planalto.gov.br/ccivil_03/Leis/L8884.htm>. Accessed on Feb. 19, 2014.
- _____. Portaria Interministerial n.º 994, de 30 de maio de 2012. CADE. Available at <http://www.cade.gov.br/upload/Portaria%20994.pdf>. Accessed on Feb. 19, 2014.
- BRUNA, Sérgio Varella. *O poder Econômico e a conceituação do abuso em seu exercício*. São Paulo: Editora RT, 1997.
- COELHO, Fábio Ulhôa. *Direito Antitruste Brasileiro: comentários à lei nº 8.884/94*. São Paulo: Ed. Saraiva, 1995.
- FIGUEIREDO, Leonardo Viseu. *Lições de Direito Econômico*. 6th ed. Rio de Janeiro: Forense, 2013.
- FRANCESCHINI, José Inácio Gonzaga & FRANCESCHINI, José Luiz Vicente de Azevedo. *Poder Econômico: exercício e abuso – direito antitruste brasileiro*. São Paulo: Ed. Revista dos Tribunais, 1985.
- MARTINS, Amanda A. L. *Gun Jumping, Controle Prévio de Estruturas e o Cade*. Revista do IBRAC, RIBRAC, 2012.
- SILVA, José Afonso da. *Curso de Direito Constitucional Positivo*. São Paulo: Ed. Malheiros, 1998.
- SHIEBER, Benjamin M. *Abusos do Poder Econômico (Direito e Experiência Antitruste no Brasil e nos EUA.)*. São Paulo: Ed. Revista dos Tribunais, 1966.
- FRANCESCHINNI, José Inácio Gonzaga. *Lei da Concorrência conforme interpretada pelo CADE*. São Paulo: Editora Singular, 1998.

⁹ Information available on the site www.cade.gov.br

GABAN, Eduardo Molan e DOMINGUES, Juliana Oliveira. *Direito Antitruste*. SP: Saraiva, 2012.

TAUFICK, Roberto Domingos. *Nova Lei Antitruste Brasileira*. Rio de Janeiro: Forense, 2012.

CORDOVIL, Leonor *et al.* *Nova Lei de Defesa da Concorrência Comentada*. São Paulo: Editora RT, 2011.

INTERNATIONAL REACH OF SECURITIES REGULATION: A COMPARATIVE VIEW ON BRAZILIAN AND U.S. LAW

Gabriel Valente dos Reis

Professor of Law at the Federal Rural Rio de Janeiro University (Universidade Federal Rural do Rio de Janeiro - UFRRJ). Ph.D. candidate in International Law at the University of São Paulo (USP) Law School. Ph.D. candidate in International Law at the State University of Rio de Janeiro (UERJ) Law School. Master of Laws (USP, *summa cum laude*). Attorney.

Abstract: This paper examines the international reach of securities regulation, focusing on the Brazilian and U.S. experiences in this field. The aim is to provide the reader with a view on how the issue first developed in the U.S. (and how the U.S. Supreme Court has recently changed, in part, the U.S. solution) and on how Brazilian Law, on its part, addresses regulation of transnational securities markets – mentioning particularly a landmark Administrative Enforcement Proceeding judged by the Brazilian regulatory authority (CVM).

Keywords: Securities regulation - Transnational markets – Brazil - Conduct and effects test - CVM.

1. INTRODUCTION

The scope of this paper is to examine the international reach of securities regulation, in a comparative perspective between developments in the subject in the United States (U.S.) and Brazil.

In part 2, the challenges of regulating capital markets in a world characterized by increasingly interconnected markets are described. In part 3, the evolution of theories concerning the international reach of anti-fraud regulation in the United States is addressed. Part 4 focuses upon how the issue is treated under current Brazilian law, instead with a slightly different focus, on how the *Comissão de Valores Mobiliários* – CVM (Brazilian securities authority) has dealt with the problem of its international jurisdiction to investigate and punish frauds. In part 5, the importance of sound characterization is highlighted, and final remarks are made in part 6.

2. CAPITAL MARKETS REGULATION AND THE CHALLENGE OF TRANSNATIONALIZATION

Regulation first appeared as a tool to correct market failures, so as to assure the adequate functioning of markets, protecting the interests of society. The need of public regulation in the capital markets became evident, in the U.S., after the 1929 New York stock exchange collapse and the Great Depression that followed in subsequent years¹. From thereof, regulatory structures emerged in many countries.

In Brazil, however, such move occurred much later, with the enactment of Law n° 4.729/1965 and, after more than one decade, of Law n° 6.385/1976 (both still in force, though with some amendments). The latter created the *Comissão de Valores Mobiliários* (CVM), which has played a crucial role in the enactment of rules and enforcement in the Brazilian securities market.

Nonetheless, this system based on regulation by each National State of its own market faces big challenges nowadays. With the exponential transnationalization of markets seen in the last decades, cases simultaneously connected to different legal orders became common.

Much is due to technology, which eliminates the meaning of national borders for investors, adding to the fact that organized markets (and notably stock exchanges) have shifted into truly transnational entities through consolidation processes².

One must notice that, notwithstanding regulatory disparities, market participants have took advantage from internationalization: many companies resort to different markets in order to finance their businesses, being listed in more than one financial center. Global diversification, moreover, reduces portfolio risk³.

Until not so long ago, U.S. securities markets were so much stronger than other markets that the U.S. were able to impose, to a large extent, through the *Securities and Exchange Commission* (SEC), its own rules and requirements to issuers and intermediaries of other countries, who resorted mainly to that market – yet, this is not the case anymore, within the context of a more diversified global economy⁴.

Eric C. Chaffee⁵ makes an interesting comparison: the current

1 See Rachel Sztajn, *Regulação e o mercado de valores mobiliários*, *Revista de Direito Mercantil*, vol. 53, n° 135, 2004, p. 139.

2 Eric C. Chaffee, *A moment of opportunity: reimagining international securities regulation in the shadow of financial crisis*, *Nexus: Chapman's Journal of Law & Policy*, n. 15, p. 29.

3 Onnig H Dombalagian. *Choice of law and capital markets regulation*, *Tulane Law Review*, n. 82, 2008, pp. 1920-1929.

4 Roberta S.Karmel; Claire R. Kelly, *The hardening of soft law in securities regulation*, *Brooklin Journal of International Law*, vol. 34, 2009, p. 886.

5 Eric C. Chaffee, *op. cit.*, pp. 30-31.

state of global capital markets is similar to the situation of U.S. markets before the *Securities Act* of 1933, whose enactment was prompted by the 1929 crisis. Up to that moment, there were dozens of different regulatory structures in the U.S., one for each federal state. The *Securities Act* came to set forth some important uniform standards.

According to the author, we now face the same challenge in the global sphere – a variety of national rules is used in trying to regulate securities markets that transcend national borders. In particular, the financial crisis which started in 2008 might be a catalyzer for the development of international securities regulation⁶. In such scenario, one needs to consider two opposing risks: sub-optimal regulation and overregulation⁷. An adequate balance must be reached, assuring reasonable regulation.

Notwithstanding the merits of truly international instruments, like treaties⁸ and *soft law*⁹, in the current stage attention must be given to the issue of the applicable national laws, inasmuch as, at least for the moment, domestic sources largely prevail in the field of securities regulation.

Moreover, many differences between regulatory systems might be legitimate consequences of identity or cultural differences¹⁰. Social and political aspects also influence corporate governance structures prevailing in a given society¹¹, which impacts regulation, so that large-scale uniformity is very unlikely in the short term.

Indeed, there is strong resistance against international uniformity, as Bebchuk and Roe point out when addressing the convergence of corporate governance standards, building their “path dependence theory”¹². The same argument can be made as to capital markets regulation.

Thus, once differences still prevail, delimitating the reach of each national regulatory system remains necessary. Andreas Lowenfeld

⁶ Eric C. Chaffee, *op. cit.*, p. 34.

⁷ Herbert Kronke, Capital Markets and Conflicts of Laws, *Recueil des Cours*, vol. 286, 2000, p. 362.

⁸ See, for example, the UNIDROIT Geneva Convention on Substantive Rules for Intermediated Securities of 2009.

⁹ Notice that many soft law rules were prepared by entities such as IOSCO (International Organization of Securities Commissions), OECD and IASB (International Accounting Standards Board).

¹⁰ Amir Lichtet *al*, Culture, law, and corporate governance, *International Review of Law & Economics*, n. 25, 2005, , pp. 229-236.

¹¹ See Mark Roe, *Political Determinants of Corporate Governance*. Oxford: Oxford University Press, 2003.

¹² Lucian Bebchuk; Mark Roe, *A Theory of Path Dependence in Corporate Governance and Ownership*, Working Paper n° 131, Columbia Law School, The Center for Law and Economic Studies, 1999.

observed already in 1979 that governments increasingly intervened in the economy, while more and more activities were developed beyond national borders. Adding to this the blurring of the classic division between public and private law; Professor Lowenfeld rightly concluded that public law, just like private, can and must be carefully assessed when traveling overseas¹³.

3. INTERNATIONAL REACH OF SECURITIES REGULATION – THE U.S. APPROACH

3.1. The conduct and effects test

In the U.S., the issue of the international reach of anti-fraud regulation issued by SEC in pursuance of 10 (b) of the *Securities Exchange Act* of 1934 has been discussed for decades. After many judgments, the majority of U.S. courts came to adopt the *conduct and effects test*, developed by Judge Friendly at the *Court of Appeals for the Second Circuit*¹⁴, located in the financial center of the country.

The conduct and effects test implies making the following questions: (i) has the conduct happened in the U.S. territory?; and (ii) has the conduct caused substantial effects in the U.S. territory or to U.S. citizens? The combined answers to both questions shall lead to a conclusion as to the reasonableness of applying or not U.S. regulation¹⁵. Such test is also provided for in *Section 416* of the *Restatement Third of Foreign Relations Law* (1986).

3.2. The U.S. Supreme Court Opinion in *Morrison* and the presumption against extraterritoriality

More recently, the conduct and effects doctrine was abandoned (at least in part) in the case *Morrison et al. v. National Australia Bank Ltd. et al* (2010)¹⁶, in which the U.S. Supreme Court addressed the issue for the first time.

The defendant *National Australia Bank Ltd.* (NAB), an Australian bank whose ordinary shares were not traded in any U.S. stock exchange (there were, however, *American Depositary Receipts*

¹³ *Id.*, pp. 326-329.

¹⁴ See *Schoenbaum v. Firstbrook* (1968); *Leasco Data Processing Equip. Corp. v. Maxwell* (1972); *Bersch v. Drexel Firestone, Inc.* (1975); *IIT v. Vencap Ltd.* (1975); e *IIT v. Cornfeld* (1980).

¹⁵ In *Itoba Ltd. v. LepGroup PLC* (1995), it became clear that a combination of both tests was the best way to proceed.

¹⁶ U.S. Supreme Court, *Morrison et al v. National Australia Bank Ltd. et al.*, Certiorari to the United States Court of Appeals for the Second Circuit, 24.06.2010.

of the bank negotiated in the New York Stock Exchange) had acquired co-defendant *Home Side Lending*, a company headquartered in Florida, U.S., with activities in the mortgage business.

The acquisition resulted in big losses and plaintiffs, who had bought *NAB* securities before the write-off of such losses, decided to sue the two companies and their managers for alleged manipulation of financial models, which would have led, according to them, to an undue overvaluation of *Home Side Lending*.

In *Morrison*, the U.S. Supreme Court abandoned the traditional conduct and effects test, opting instead to adopt the theory of *presumption against extraterritoriality* to interpret statutes. Arguing that the traditional tests were complex and unpredictable, the Court took the view that *Section 10 (b)*, in the absence of express mention to extraterritorial application, was applicable only to (i) transactions involving securities listed in the U.S.; or (ii) transactions concluded in the U.S. involving other securities¹⁷.

The other line of argument made by plaintiffs was also rejected: plaintiffs had argued that, in reality, there was no extraterritoriality issue at all, for the illegal conducts (financial manipulation and illegal declarations) had occurred in Florida. Instead, the Supreme Court was of the view that the relevant factor was where the transaction of securities took place – and not the place of origin of the purported fraud¹⁸.

3.3. The Dissenting Opinion and the Congress reaction

In *Morrison*, there was a strong Dissenting Opinion by Justice Stevens, who was joined by Justice Ginsburg. Notwithstanding the fact that such judges concurred with the final result, *i.e.*, the non-applicability of U.S. law to the case¹⁹, they entirely disagreed with the justification given by the majority.

The Justices noted that U.S. courts had been interpreting *Section 10(b)* in a way totally different from the view of the *Morrison* majority. For about four decades, the inferior courts had been resorting to the test of conduct and effects developed by the Second Circuit and adopted in *Section 416* of the *Restatement Third* - and never had the Congress or SEC, during all this time, raised against the rule.

The dissenting Justices noticed that the *Second Circuit* had been refining its test for decades, judging dozens of cases and benefitting from the concurrence of other Circuits and the acquiescence of

¹⁷ *Morrison et al v. National Australia Bank Ltd. et al.*, Opinion of the Court, pp. 11-16.

¹⁸ *Morrison et al v. National Australia Bank Ltd. et al.*, Opinion of the Court, p. 17 e p. 24.

¹⁹ The reason for concurring with the final result was that share holders were not successful in proving that the “heart” of the fraud took place in the U.S. or that there were detrimental effects to U.S. investors or U.S. markets. Cf. *Morrison et al v. National Australia Bank Ltd. et al.*, J. Stevens, p. 13.

Congress and SEC. Therefore, there was no usurpation of Congress powers involved in the test, inasmuch as Congress itself left margin for judicial discretion²⁰. In the dissidence view, the Supreme Court was simply ignoring the wisdom and experience accumulated for decades by inferior courts²¹.

In any case, they posited that the presumption against extraterritoriality is not a clear rule, but instead a flexible one, nor is it incompatible with the conduct and effects test – the real issue is the sufficient contacts needed for the incidence of *Section 10(b)*, there being no easy answer to this problem²².

The Dissenting Opinion remarked that, in its interpretation, the new rule then established by the Supreme Court affected only private rights of action, and not in any manner whatsoever actions intended by SEC²³.

Notice that shortly after the *Morrison* judgment, the U.S. Congress passed, in response to the 2008 financial crisis, the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (published in July, 21st, 2010), which expressly stated in *Section 929P* that, in the case of actions brought by SEC or by the Federal Government, the conduct and effects test shall apply. In such actions specifically, given the position taken by the Congress, there should be no more room for applying the presumption against territoriality, at least in the version envisaged by the *Morrison* Court²⁴.

4. THE CURRENT STATE OF BRAZILIAN LAW – THE CVM’S INTERNATIONAL JURISDICTION

Notice that, as already mentioned, Brazilian securities regulation is much younger than U.S.’s. With this in mind, taking inspiration from the U.S. experience, the conduct and effects test was adopted in Brazil specifically to define the international reach of CVM’s administrative jurisdiction to investigate and punish fraudulent conducts in the market. This was made through Presidential Decree n. 3.995/2001, which added §6º to Article 9th of Law n. 6.385/1976:

“§6º The Commission shall be competent to investigate and punish fraudulent conducts in the securities market whenever: I – its effects cause

20 *Morrison et al v. National Australia Bank Ltd. et al.*, J. Stevens, pp. 1-5.

21 *Morrison et al v. National Australia Bank Ltd. et al.*, J. Stevens, p. 14.

22 *Morrison et al v. National Australia Bank Ltd. et al.*, J. Stevens, pp. 7-9.

23 *Morrison et al v. National Australia Bank Ltd. et al.*, J. Stevens, p. 11, esp. footnote n. 12.

24 As to possible different views on the issue, see Linda J. Silberman, *Morrison v. National Australia Bank: implications for global securities class actions*, *Yearbook of Private International Law*, vol. 12, 2010, p. 126.

damages to persons resident in the national territory, without regard to the place where they occurred; and II – the relevant acts or omissions took place within the national territory.”²⁵

There is uncertainty regarding such provision, for a Presidential Decree, due to the separation of powers principle, was not the proper means of amending a statute enacted by Congress. Accordingly, the Decree’s unconstitutionality is being argued in an lawsuit brought by the Federal Council of the Brazilian Bar (*Conselho Federal da Ordem dos Advogados do Brasil*) before the Supreme Court (*Supremo Tribunal Federal - STF*) - ADI n. 2601-1/600 – DF, which is still waiting for decision.

However, even if the STF considers in the future the Decree unconstitutional, we believe that the conduct and effects test can well keep being applied in the field of securities (be it with regard to administrative jurisdiction or to applicability of the law), for analogy reasons, for Brazilian Antitrust Law expressly provides for the test in Article 2nd of Law n. 12.529/2011²⁶:

“Art. 2nd. This Law shall apply, without prejudice to conventions and treaties to which Brazil is a signatory, to practices wholly or partly undertaken in the national territory or which produce or might produce effects in it”.

Comparative Law (especially U.S. Law, as seen above) should also help to justify the resort to the test of conduct and effects in Brazil, even if §6 of Article 9th of Law n. 6.385/1976 comes to be deemed unconstitutional and, as a result, is invalidated by judicial review. Of course, a new legislative provision should be enacted (addressing not only administrative jurisdiction, but also applicable law), in order to provide market agents and authorities more legal certainty.

It is noteworthy that jurisdiction and applicable law are entirely autonomous matters in the International Conflict of Laws theory. Nonetheless, in the field of Brazilian securities regulation enforcement,

25 Non-official translation by this author. Original: “§ 6^ºA Comissão será competente para apurar e punir condutas fraudulentas no mercado de valores mobiliários sempre que: I - seus efeitos ocasionem danos a pessoas residentes no território nacional, independentemente do local em que tenham ocorrido; e II - os atos ou omissões relevantes tenham sido praticados em território nacional.”

26 Non-official translation by this author. Original: “Art. 2^º. Aplica-se esta Lei, sem prejuízo de convenções e tratados de que seja signatário o Brasil, às práticas cometidas no todo ou em parte no território nacional ou que nele produzam ou possam produzir efeitos.”

there are cases where these issues are closely linked, as we shall see below.

In the Administrative Enforcement Proceeding n. SP2007/0117²⁷, ruled in February, 26th 2008 (*Processo Administrativo Sancionador – PAS*), the CVM Board (*Colegiado da CVM*) condemned the defendant to an administrative penalty of impediment to be manager or member of the Fiscal Council of publicly-held companies (*companhias abertas*), for 5 (five) years, due to insider trading.

The accused was a member of the Board of Directors of *Sadia S/A* (a Brazilian large food company) who traded ADRs of its competitor *Perdigão S/A* (which was about to receive an take over bid from *Sadia*) in the New York Stock Exchange.

CVM's Reporting Administrative Judge (*Diretor-Relator*) Eli Loria, noticing that “*extraterritoriality is not something alien to national law, being provided for in Articles 7th of the Criminal Code and Article 7th of the Military Criminal Code*”, concluded that the text of the above mentioned Article 9th, §6, of Law n. 6.385/76 leaves no doubts as to CVM's jurisdiction to investigate the conduct at stake.

Loria mentioned also Article 10 of Law n. 6.385/76²⁸, which provides for international cooperation to investigate “*violations of rules concerning the securities markets which occurred within the country or overseas*”.

Another Administrative Judge, Marcos Barbosa Pinto, stressed that the notion of “fraudulent conduct” of Article 9th, §6, of Law n. 6.385/76 shall be interpreted as any fraud in the general meaning, not being restricted to those fraudulent transactions provided for in CVM Instruction n. 08/1979.

However, Barbosa Pinto accepted the defense's argument that the violation of the duty of loyalty (*dever de lealdade*) for which the accused was being charged should not be considered, in the technical meaning, a fraud for purposes of §6.

But Barbosa Pinto was of the view that CVM's jurisdiction set forth in §6 was not exhaustive, so that the Brazilian authority was allowed to act in other occasions, such as in the presence of violation of the Brazilian Corporations Law (*Lei das Sociedades por Ações* – Law n. 6.404/1976), as provided for in Article 11 of Law n. 6.385/1976²⁹.

27 Available at: http://www.cvm.gov.br/port/inqueritos/2008/rordinario/inqueritos/02_26_SP2007-0117.asp, accessed on 15.10.2013.

28 “Art. 10. A Comissão de Valores Mobiliários poderá celebrar convênios com órgãos similares de outros países, ou com entidades internacionais, para assistência e cooperação na condução de investigações para apurar transgressões às normas atinentes ao mercado de valores mobiliários ocorridas no País e no exterior.”

29 “Art. 11. A Comissão de Valores Mobiliários poderá impor aos infratores das normas desta Lei, da lei de sociedades por ações, das suas resoluções, bem como de outras normas legais cujo cumprimento lhe incumba fiscalizar, as seguintes penalidades: [...]”

Considering that *Sadia S.A.* was a company incorporated in accordance with Brazilian Law and that it had its headquarters in the Brazilian territory, the Brazilian Corporations Law was applicable in pursuance of Article 60 of Decree-Law n. 2.627/1940³⁰ and Article 11 of Decree-Law n. 4.657/1942 (Introductory Law to the Brazilian Rules - *Lei de Introdução às Normas do Direito Brasileiro*)³¹.

Barbosa Pinto remarked that this was no confusion between international jurisdiction and applicable law issues, “*but, on the contrary, it was a case where the reach of jurisdiction is given by the applicability of the law*”. Indeed, the competence set forth in Article 11 of Law n. 6.385/1976 is a direct consequence of the Brazilian Corporations Law applicability.

Administrative Judge Sergio Weguelin agreed with the punishment imposed and with the final remarks made by Barbosa Pinto, adding yet another line of argument:

*“the relationship between manager and corporation, both Brazilians, took place in Brazil, with the features and duties provided for in the country’s legislation. Therefore, I understand that the duty of loyalty, as set forth in art. 155 of Law n. 6.404/76, was ‘located’ in Brazil. And its violation, consequently, also occurred in Brazil, though through a transaction overseas. In other words, in my view, the place of negotiation is not a determinant. The purchase could have occurred anywhere. Or otherwise there could be another way of violating the duty of loyalty, not necessarily through a purchase of securities”*³².

30 “Art. 60. São nacionais as sociedades organizadas na conformidade da lei brasileira e que têm no país a sede de sua administração. Parágrafo único. Quando a lei exigir que todos os acionistas ou certo número deles sejam brasileiros, as ações da companhia ou sociedade anônima revestirão a forma nominativa. Na sede da sociedade ficará arquivada uma cópia autêntica do documento comprobatório da nacionalidade.”

31 “Art. 11. As organizações destinadas a fins de interesse coletivo, como as sociedades e as fundações, obedecem à lei do Estado em que se constituírem. §1º Não poderão, entretanto ter no Brasil filiais, agências ou estabelecimentos antes de serem os atos constitutivos aprovados pelo Governo brasileiro, ficando sujeitas à lei brasileira. §2º Os Governos estrangeiros, bem como as organizações de qualquer natureza, que eles tenham constituído, dirijam ou hajam investido de funções públicas, não poderão adquirir no Brasil bens imóveis ou susceptíveis de desapropriação. §3º Os Governos estrangeiros podem adquirir a propriedade dos prédios necessários à sede dos representantes diplomáticos ou dos agentes consulares.”

32 Non-official translation by the author of this paper. Original: “o relacionamento entre o administrador e a companhia, ambos brasileiros, desenvolvia-se no Brasil, revestido pelos atributos e deveres previstos na legislação do país. Assim, entendo que o dever de lealdade, conforme estabelecido no art. 155 da Lei 6.404/74, ‘estava’ no Brasil. E sua quebra, portanto, também ocorreu no Brasil, ainda que por meio de uma operação no exterior. Em outras

The other two Administrative Judges (Durval Soledade and Maria Helena Santana) concurred with the opinion of the Reporting Judge, however with the reservations made by Barbosa Pinto and Weguelin.

5. THE IMPORTANCE OF SOUND CHARACTERIZATION

Transnational capital markets are very complex: the same conduct might be subject to rules of private law, administrative regulation, self-regulation, criminal law etc in different countries.

This situation makes the issue of *characterization* a crucial one in order to define the law applicable to the case. Characterization (*qualificação*) is a traditional subject of International Conflict of Laws theory. When facing cross-border cases, one needs to previously characterize the matter at stake, so that the proper choice of law rule can be found and applied, thus leading to a given legal order whose substantive rules shall resolve the case³³.

Therefore, while corporate issues shall be resolved by the *lex societatis* (law applicable to legal persons), regulation of frauds in securities markets follows different standards – as we have seen, the test of conducts and effects has been an important technique to define the international reach of public regulation in this sphere.

The dissent among Brazilian CVM Administrative Judges concerning the characterization of *insider trading* in PAS n. SP2007/0117 as something related to fraudulent conduct or otherwise as a violation of the corporate duty of loyalty, and the diverse connection factors depending on the chosen characterization (conduct and effects test in the former case; *lex societatis* in the latter), testify to the importance of sound characterization when dealing with transnational securities markets.

6. FINAL REMARKS

The unprecedented transnationalization of markets which took place during the last decades is a big challenge for legal thought, there being need to avoid two opposing risks: sub-optimal regulation and overregulation. In this context, the issue of international reach of national regulations is crucial, notwithstanding the usefulness of truly international instruments such as treaties and soft law.

palavras, no meu entender, o ambiente de negociação não é determinante. A compra poderia ocorrer em qualquer lugar. Ou, ainda, poderia ser uma hipótese em que o dever de lealdade fosse descumprido por um outro modo, que não a compra de um valor mobiliário”.

33 See Gabriel Valente dos Reis, O Direito Internacional Privado e a teoria das qualificações: uma revisão do método conflitual a partir do princípio da proximidade, *Revista de Direito do Estado*, n. 13, 2009, pp. 293-325.

In the U.S., the conduct and effects test was developed to define the reach of U.S. anti-fraud rules. The test was abandoned in part by the Supreme Court in *Morrison* (2010), specifically when addressing private rights of action – in such case, the Morrison Court preferred instead to apply the so-called presumption against extraterritoriality. However, the U.S. Congress made it clear, through the approval of the *Dodd-Frank Act*, that the conduct and effects test is still pertinent in actions intended by SEC or by the Federal Government.

In Brazil, the conduct and effects test is set forth as criteria do define the international jurisdiction of CVM to investigate and punish frauds, as provided for in Article 9th, §6, of Law n. 6.385/1976, as amended by Decree n. 3.995/2001, being the constitutionality of this decree currently object of a lawsuit in the STF (Brazilian Supreme Court).

In PAS n° SP2007/0117 proceedings, the CVM Board punished a Brazilian *insider* who had traded ADRs of *Perdigão S/A* in the New York Exchange. The Reporting Administrative Judge made use of the conduct and effects test to attest CVM's jurisdiction in the case, while the remaining Administrative Judges deemed the issue to be a corporate law one, noticing the jurisdiction of CVM to investigate and punish violations of Brazil's Corporations Law (applicable in the case as the *lex societatis*), as set forth by Article 11 of Law n. 6.385/76. The proper characterization was an important issue.

At the end of his course at The Hague Academy of International Law, Herbert Kronke pointed to the need of improvement in the communication channels between international lawyers and capital markets lawyers, for the fast internationalization of markets increases the need of linking both fields of knowledge – accordingly, no one should try to “invent the wheel”³⁴.

This paper amounts to an effort of dialogue between Private International Law and Capital Markets Law, focusing particularly on the Brazilian and U.S. experiences, being aware that the healthy development of the global economy is increasingly dependent on improvements in regulation of transnational securities markets.

7. REFERENCES

BEBCHUK, Lucian; ROE, Mark. *A Theory of Path Dependence in Corporate Governance and Ownership*, Working Paper n. 131, Columbia Law School, The Center for Law and Economic Studies, 1999.
CHAFFEE, Eric C. A moment of opportunity: reimagining international securities regulation in the shadow of financial crisis, *Nexus*: Chapman's

34 Herbert Kronke, *Capital Markets and Conflicts of Laws*, *Recueil des Cours*, vol. 286, 2000, p. 380.

Journal of Law & Policy, n. 15.

DOMBALAGIAN, Onnig H. Choice of law and capital markets regulation, *Tulane Law Review*, n. 82, 2008.

KARMEL, Roberta S.; KELLY, Claire R. The hardening of soft law in securities regulation, *Brooklyn Journal of International Law*, vol. 34, 2009.

KRONKE, Herbert. Capital Markets and Conflicts of Laws, *Recueil des Cours*, vol. 286, 2000, p. 362.

LICHT, Amir, et al. Culture, law, and corporate governance, *International Review of Law & Economics*, n. 25, 2005, pp. 229-236.

LOWENFELD, Andreas. Public law in the international arena: conflict of laws, international law, and some suggestions for their interaction, *Recueil des Cours*, v. 163, 1979.

ROE, Mark. *Political Determinants of Corporate Governance*. Oxford: Oxford University Press, 2003.

SILBERMAN, Linda J. Morrison v. National Australia Bank: implications for global securities class actions, *Yearbook of Private International Law*, vol. 12, 2010.

SZTAJN, Rachel. Regulação e o mercado de valores mobiliários, *Revista de Direito Mercantil*, vol. 53, n. 135, 2004.

VALENTE DOS REIS, Gabriel. O Direito Internacional Privado e a teoria das qualificações: uma revisão do método conflitual a partir do princípio da proximidade, *Revista de Direito do Estado*, n. 13, 2009, pp. 293-325.

CAMPAIGN FINANCE IN COMPARATIVE PERSPECTIVE: A NESTED ANALYSIS APPROACH

Dalson Britto Figueredo Filho

Professor at the Federal University of Parnambuco, Brazil.

Ranulfo Paranhos

Professor at the Federal University of Alagoas, Brazil.

Enivaldo Carvalho da Rocha

Professor at the Federal University of Parnambuco, Brazil.

José Alexandre da Silva Júnior

Professor at the Federal University of Alagoas, Brazil.

*Dinheiro compra tudo,
até amor verdadeiro.
Nelson Rodrigues*

Abstract: This paper analyzes campaign finance in a comparative perspective, giving special attention to Brazil and the United States. The focus regards the level of regulation on the sources of campaign contributions. Methodologically, the research design adopts a nested approach, combining descriptive and multivariate statistics with deep case studies and documental analysis. Additionally, we replicate data from the Institute for Democracy and Electoral Assistance (IDEA) to estimate a standardized measure of regulation. The results suggest that most countries show low levels of control over the sources of campaign contributions. However, both Brazil and the United States display high levels of regulation on campaign finance, despite their widely different institutional designs.

Keywords: Campaign contributions - Regulation - Comparative law.

1. INTRODUCTION

Imagine the following situations: (1) an election where candidates provide both food and beverages (including alcoholic) for voters just before they cast their votes; (2) a public service system where jobs are assigned by political criteria and 3) an incumbent candidate is charged of receiving campaign contributions in exchange for making favors for state contractors. These cases are not about Latin American countries that are well known by lack of law enforcement. These cases are not about African nations that are worldwide acknowledged by high levels of corruption. These cases represent both the U.S. (cases 1 and 2) and Canada (case 3) before regulating their campaign finance¹.

Theoretically, campaign finance regulation aims to achieve two objectives: the promotion of political equality, and the prevention of corruption (SMITH, 2001)². Arguments that favor increasing regulation are based on four assumptions: a) too much money is spent on political activity³; b) campaigns funded with large contributions are not representative of public opinion but biased toward big donors; c) a candidate's spending largely determines electoral results and d) money exerts a powerful corrupting influence on the legislature.

How does campaign finance regulation varies across countries? The main purpose of paper is to analyze campaign finance regulation in a comparative perspective, giving special attention to Brazil and the United States. The focus regards the level of regulation on the sources of campaign contributions. Methodologically, the research design adopts nested analysis technique, combining descriptive and multivariate statistics with deep case studies and documental analysis (legislation and jurisprudence). In addition, we replicate data from the Institute for Democracy and Electoral Assistance (IDEA) to estimate a standardized measure of regulation. The results suggest that most countries show limited levels of campaign finance regulation. Nevertheless, both Brazil

1 According to Smith (2001), in 1757, George Washington spent £39 to buy food and rum for his voters.

2 According to Ansolabehere (2007), the primary objective of campaign finance regulations is to prevent political corruption. Limits on contributions and expenditures aim to restrict both the supply and demand for political donations, thereby reducing or perhaps eliminating altogether the influence of donors and the private interests that they represent over publicly elected officials (ANSOLABEHERE, 2007: 163).

3 Respecting the increasing costs of elections, Ansolabehere, Gerber and Snyder (2001) point out that total expenditures in the average contested House election were \$318,000 in 1972, \$735,000 in 1992, and \$973,000 in 2000 (all figures in 1990 dollars). Similarly, Jensen and Beyle (2003) argue that the costs of gubernatorial campaigns have been rising since 1968. Abrams and Settle (1976) demonstrate that the costs of presidential elections also follow this same pattern.

and the United States display high levels of control over the sources of campaign contributions, despite their widely different institutional designs.

The remainder of the paper is divided as follows. Next section reviews the literature on campaign spending and election outcomes. Section 3 describes data and methods. Section 4 presents the empirical results. Section 5 examines the historical development of campaign finance legislation in Brazil and in the United States. Section 6 summarizes the main conclusions.

2. BRIEF LITERATURE REVIEW⁴

The relationship between campaign spending and electoral outcomes is a canonical issue in Political Science (PALDA, 1973, 1975; WELCH, 1974, 1980; JACOBSON, 1976, 1978, 1985, 1990, 2001; SHEPARD, 1977; GLANTZ, ABROMOWITZ and BURKHART, 1976; ABROMOWITZ, 1988, 1991; GREEN and KRASNO, 1988, 1990; GERBER, 1998, 2004; BARDWELL, 2005). The typical research design regarding the effects of money on votes has three main characteristics: (1) it estimates a regression of a candidate's vote share on some function of the candidate's spending levels after controlling for additional variables; (2) it uses ordinary least squares functional form⁵; (3) the unit of analysis is the United States House of Representatives. According to Gerber (2004), the basic model to analyze the relationship between money and votes is the following:

$$\text{Votes}_{\text{inc}} = \alpha + \beta_1 f(\text{spending}_{\text{inc}}) + \beta_2 f(\text{spending}_{\text{chal}}) + \beta_3(X) + \varepsilon$$

where $\text{Votes}_{\text{inc}}$ is the incumbent's share of the two-party vote, $\text{spending}_{\text{inc}}$ is the total incumbent campaign spending, $\text{spending}_{\text{chal}}$ is the total challenger campaign spending, and X represents a set of variables other than campaign spending that are thought to influence candidate election outcomes, such as challenger quality or constituency partisanship (GERBER, 2004).

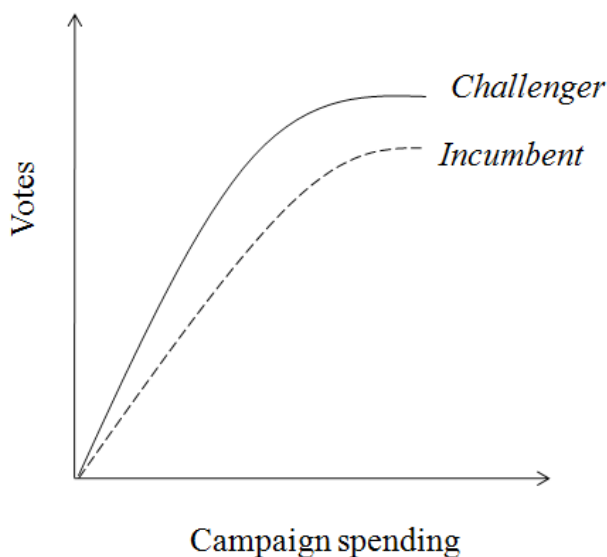
Some scholars examine municipal elections (FLEISCHMANN and STEIN, 1998), subnational legislative (OWENS and OLSON, 1977; GILES and PRITCHARD, 1985; TUCKER and WEBER, 1987; JEWELL and BREAUX, 1988; HUDSON, 2006; BROWN, 2009), state primaries (BREAUX and GIERZYNSKI, 1991; HOGAN, 1999),

4 Jacobson (1985) reviews the empirical literature produced during the mid-1980s.

5 Regarding functional form, Welch (1974), Jacobson (1976) and Shepard (1977) employed linear models. Welch (1976) used a semi-log model, Lott e Warner (1974) used a log-log model and Silberman and Yochum (1978) employed a quadratic model.

the Senate elections (GRIER, 1989; GERBER, 1998), gubernatorial races (PATTERSON, 1982; PARTIN, 2002; BARDWELL, 2005) and presidential nomination campaigns (HAYNES, GURIAN and NICHOLS, 1997). On methodological grounds, some pundits employ two-stage least squares (GREEN and KRASNO, 1988), logarithmic transformations (JACOBSON, 1978), computational experiments (HOUSER and STRATMANN, 2008), field experiments (Gerber and Green, 2000; Gerber, 2004) and natural experiments (MILYO, 1998) trying to properly identify the mechanisms that link spending and votes. On theoretical grounds, Gary Jacobson has produced the seminal work on campaign-spending literature⁶. Figure 1 illustrates the Jacobson's effect.

Figure 1 - The Jacobson's effect



Both challengers' and incumbents' spending exert a positive effect on their share of votes and suffer from diminishing returns. However, each extra dollar spent by challengers has a higher impact

⁶ According to Gerber (2004), "a common critique of Jacobson's findings was that incumbents raise their spending levels in response to strong threats. If the control variables do not fully account for the threat level, candidate spending effects will tend to be biased downward due to a negative correlation between incumbent spending and the regression error" (GERBER, 2004: 542).

compared to incumbents spending⁷.

Levitt (1994) argues that campaign spending has an extremely small impact on election outcomes, regardless of who does the spending (LEVITT, 1994: 777). Gerber (1998) points out when the endogeneity of candidate spending levels is properly taken into account, the marginal effects of incumbent and challenger spending are roughly equal (GERBER, 1998: 401). Jacobson (1990) argues that

the ordinary least squares (OLS) regression models reported in most studies are inappropriate for estimating reciprocal relationships; a simultaneous equation system is required. OLS estimates of parameters when the true relationship is reciprocal are biased and inconsistent because endogenous variables (those which have a reciprocal effect on one another), when treated as explanatory variables, are correlated with the error term (JACOBSON, 1978: 470).

Nevertheless, there are controversial findings even among studies that employ two-stage least squares regression. For example, Green and Krasno (1988) reported that incumbent campaign spending coefficients' were positive and statistically significant. On the other side, Jacobson (1978) argued that spending by challengers has a much more substantial effect on the outcome of the election even with simultaneity bias purged from the equation (JACOBSON, 1978: 475). Figure 2 summarizes part of campaign spending literature.

Figure 2 – Literature summary

Author (year)	Argument
Jacobson (1978); Abromowitz, (1988); Ansolabehere e Gerber, (1994); Gerber (2004)	Incumbent spending is ineffective but that challenger spending produces large gains
Erikson e Palfrey (2000); Green e Krasno (1988); Gerber (1998); Levitt (1994)	Neither incumbent nor challenger spending makes any appreciable difference
Kenny e McBurnett (1994); Goidel e Gross (1994); Green e Krasno (1990)	After controlling for quality of challenger and reciprocal causation, marginal effect of incumbent spending is substantial
Krasno, Green e Cowden (1994)	Incumbent spending is reactive to challenger spending

⁷ Normatively, campaign spending limits will favor status quo. According to Jacobson (1978), any reform measure, which decreases spending by the candidates will favor incumbents. This includes limits on campaign contributions from individuals and groups as well as ceilings on total spending by the candidates (JACOBSON, 1978: 489).

Despite scholarly efforts, comparative empirical work is still limited and our current understanding about campaign finance outside of the United States is scarce⁸. Thus, this paper aims to advance our existing knowledge on this subject by analyzing campaign finance regulation in a comparative perspective, giving special attention to Brazil and the United States. The focus regards the level of regulation on the sources of campaign contributions.

3. DATA AND METHODS

The research design adopts nested analysis approach, combining descriptive and multivariate statistics with deep case studies and documental analysis (legislation and jurisprudence). According to Lieberman (2005), nested analysis strategy improves the prospects of making valid causal inferences in cross-national and other forms of comparative research by drawing on the distinct strengths of two important approaches (LIEBERMAN, 2005: 435)⁹. The purpose is to take the most of each research technique.

The importance of comparison

Swanson (1971) argues that thinking without comparison is unthinkable. And in the absence of comparison, so is all scientific thought and scientific research (SWANSON, 1971). Lijphart (1971) defines the comparative method as one of the basic methods - the others being the experimental, statistical, and case study methods - of establishing general empirical propositions (LIJPHART, 1971: 682). And what are the advantages of a comparative research design? First, comparison allows one to estimate in what extent concepts can travel to analyze different social realities. Second, comparison permits one examine in what extent observed results can be reached under different institutional designs.

Case selection

Why to compare Brazil and the United States? First, most what we know about campaign finance was produced by U.S. scholars or/and is about U.S. institutions. Second, both *Tribunal Superior Eleitoral*

8 Palda (1973; 1975), Eagles (1993), Carty and Eagles (1999) examine spending and votes in Canada. Johnston (1979) and Johnston, Pattie and Johnston (1989) analyze the England case. Epstein and Franck (2007) study the French elections. Samuels (2001a; 2001b; 2001c) has done pioneer work on campaign spending in Brazil. Fink (2011) estimates the effects of campaign spending in Germany.

9 To get more information on nested analysis see Lieberman (2005). To a seminal work on the comparative method see Lijphart (1971). To an introduction to case study methodology see Geddes (2003), Landman (2003) and Gerring (2004).

(TSE) in Brazil and Federal Election Commission (FEC) in the United States provide open data on campaign finance, including datasets, specific legislation, learning environment, workshops, etc. Therefore, systematic disclosure of information facilitates comparison. Third, a comparative perspective between Brazil and the United States allows to understand how widely different institutional designs regulate campaign contributions. Figure 3 summarizes some institutional features in a comparative perspective.

Figure 3 - Institutional design features

Feature	Brazil	United States
Electoral system	Proportional	Majoritary
Party system	Multiparty	Bipartisan
District magnitude	8-70	1
Buy electioneering communication	No	Yes
Direct corporation contribution	Yes	No

Besides the fundamental differences in their institutional designs (electoral system, party system and district magnitude), Brazil and the United States also differ on two important features regarding campaign finance. First, in Brazil, 9.504/97 federal law prohibits candidates and parties to buy any kind of electioneering communication (television, radio, newspapers, etc.) The amount of time available for parties and candidates depends upon the quantity of congressmen in the Legislature. Both party and candidate ads are broadcasted and the costs are paid by public resources. In the United States, candidates, Political Action Committees, parties and, independent groups can spend resources on electioneering communication¹⁰. Second, in Brazil, corporations can directly contribute to political candidates. In the United States, corporations contributions cannot flow directly to political campaigns, the procedure is indirect trough Political Action Committees (PACs)¹¹.

10 The term electioneering communication means any broadcast, cable, or satellite communication which (I) refers to a clearly identified candidate for Federal office; (II) is made within 60 days before a general, special, or runoff election for the office sought by the candidate; or 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate (§434(3)).

11 In *Citizens United v. Federal Election Commission* (2010), Supreme Court ruled that limitations on independent expenditures were unconstitutional, allowing both corporations and labor unions to spend unlimited amount of money to independently support or attack candidates.

Variables description

According to King, Keohane and Verba (1994), the most important rule for all data collection is to report how the data were created and how we came to possess them (KING, KEOHANE and VERBA, 1994: 51). This is the core of scientific replicability¹². Thus, it is important to briefly describe how variables were measured. Figure 4 summarizes this information.

Figure 4 – Variables

Variable	Description
V ₁	Foreign entities
V ₂	Corporations
V ₃	State contractors
V ₄	Labor unions
V ₅	Anonymous

All variables are dummies. Each one informs if political actors can contribute to electoral campaigns. If contribution is prohibited variable assumes value 1 and zero otherwise. Data were originally collected by the Institute for Democracy and Electoral Assistance (IDEA)¹³.

4. RESULTS

Figure 5 - Contributions from foreign entities

Foreign entities	N	% (valid)
Allowed	73	64.00
Prohibited	41	36.00
Total	114	100.0

Most countries allow contributions from foreign entities (64%). Australia, Austria, Chile, Denmark, Finland, among others, display this institutional feature. However, 41 nations show some prohibition

¹² King (1995) argues that *the replication standard does not actually require anyone to replicate the results of an article or book. It only requires sufficient in-formation to be provided-in the article or book or in some other publicly accessible form-so that the results could in principle be replicated* (KING, 1995: 444).

¹³ Raw data used here can be download at <http://www.idea.int/parties/finance/db/index.cfm>. A large dataset including variables used in this paper is available at <http://www.qog.pol.gu.se/>

regarding this type of campaign contributions (36%). Argentina, Estonia, France, Israel and Poland are examples of countries that made this institutional choice. The 9.504/97 Brazilian statute prohibits both parties and candidates to receive, directly or indirectly, contributions or anything of value, including any kind of media support, from foreign entities (24, I, 9.504/97). Similarly, according to the Federal Election Commission, it shall be unlawful for a foreign national, directly or indirectly, to make a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election¹⁴. It is also illegal to foreign nationals to make contributions or donations to political party committees. Finally, it is unlawful to foreign nationals make independent expenditures or disbursement for electioneering communication (§441e). On substantive grounds, the prohibition of this type of contribution aims to prevent foreign political actors from influencing electoral outcomes.

Figure 6 - Contributions from corporations

Corporations	N	% (valid)
Allowed	94	81.70
Prohibited	21	18.30
Total	115	100.0

Regarding contributions from corporations, most countries allow this type of donation (81.70%). Ireland, Italy, Jamaica, Japan, among others, show this institutional feature. Only 18.30% of nations have some express prohibition on corporate campaign contributions. Portugal, Bolivia, Belgium, Hungary, among others, made this institutional choice. In Brazil, corporations can directly contribute to political campaigns up to 2% of their annual gross revenue (81, §1º, 9.504/97). If donations exceed the legal ceiling, there is a penalty of five times the amount exceeded (81, §2º, 9.504/97). In the United States, Tillman Act (1907) ban direct contributions from corporations. Current legislation makes unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention

¹⁴ Historically, the ban on political contributions and expenditures by foreign nationals was first enacted in 1966 as part of the amendments to the Foreign Agents Registration Act (FARA). The goal of the FARA was to minimize foreign intervention in U.S. elections by establishing a series of limitations on foreign nationals.

or caucus held to select candidates for any political office¹⁵ (§ 441b). Normatively, prohibitions on corporate contributions aim to prevent disproportional influence of corporate sector on policymaking process.

Figure 7 - Contributions from state contractors

State contractors	N	% (valid)
Allowed	86	76.10
Prohibited	27	23.90
Total	113	100.0

Most countries allow contributions from state contractors (76.10%). Chile, Singapore, Russia, United Kingdom, among others, share this institutional feature. Only 23.90% countries have express prohibition statutes on state contractors' contributions. Czech Republic, Paraguay, Spain, Burkina Faso, among others, adopted this type of ban. In Brazil, national statute 9.504/97 prohibits contributions from state contractors (81, III, 9.504/97). Similarly, in the United States, contributions from state contractors are unlawful (§ 441c). On substantive grounds, this type of prohibition aim to prevent exchange of campaign contributions for governmental contracts benefits.

Figure 8 - Contributions from Labor unions

Labor unions	N	% (valid)
Allowed	98	85.20
Prohibited	17	14.80
Total	115	100,0

Following the trend of less regulation, most countries allow donations from labor unions (85.20%). Belgium, Czech Republic, Mexico, Bolivia, among others, show this institutional feature. Only 14.80% of the cases prohibit this type of campaign contributions. Guatemala, Portugal, Azerbaijan, Poland, among others, adopted this kind of ban. In Brazil, statute 9.504/97 excludes labor unions from contributing to political campaigns (24, VI, 9.504/97). In the United States, Smith-Connally Act (1943) temporarily prohibited contributions from labor unions. In 1947, Congress enacted Labor Management Relations Act (Taft-Hartley Act) banning labor donations ever since. The current legislation includes Labor contributions in the same section of national banks and corporations (§441b).

¹⁵ See Corrado (2005) for more details on indirect contributions.

Figure 9 - Anonymous Contributions

Anonymous	N	% (valid)
Allowed	66	58.40
Prohibited	47	41.60
Total	113	100,0

58.40% of all countries allow anonymous campaign contributions. Paraguay, Iceland, New Zealand, Sweden, among others, show this institutional choice. However, 41.60% of the sample ban this type of contribution. Argentina, France, Belgium, Bulgaria, among others, have this institutional feature. In Brazil, *Tribunal Superior Eleitoral* 23.217/10 resolution made mandatory to both party and candidates to fully disclose information on their campaign sources, indicating both the name and origin of campaign contributions (14, 1º, I, resolution 23.217/10). In the United States, according to the Federal Election Commission, anonymous campaign contributions are permitted up to \$50,00. On substantive grounds, ban on this type of contribution aim to guarantee electoral system transparency.

Finally, we estimate two measures of campaign finance regulation. The first one is just the sum of all above variables. Mathematically, the index varies from 0 to 5 and its interpretation is forward: the higher its magnitude, more regulation on campaign finance system. Value zero means that all contributions are allowed. Value 5 means that all contributions are prohibited. The second measure was based on a principal component analysis (PCA). This technique summarizes shared variance of observed variables in few standardized components. The model reached the following results: a) Kaiser-Meyer-Olkin test of sample adequacy of .751; b) Bartlett test of sphericity significant at .000; and c) 53.11% of cumulative variance. The Pearson correlation between the raw regulation index and the standardized measure reached .997 (p-value<.000). On substantive grounds, the strong correlation suggests that both index are measuring the same phenomena. Figure 10 summarizes descriptive statistics.

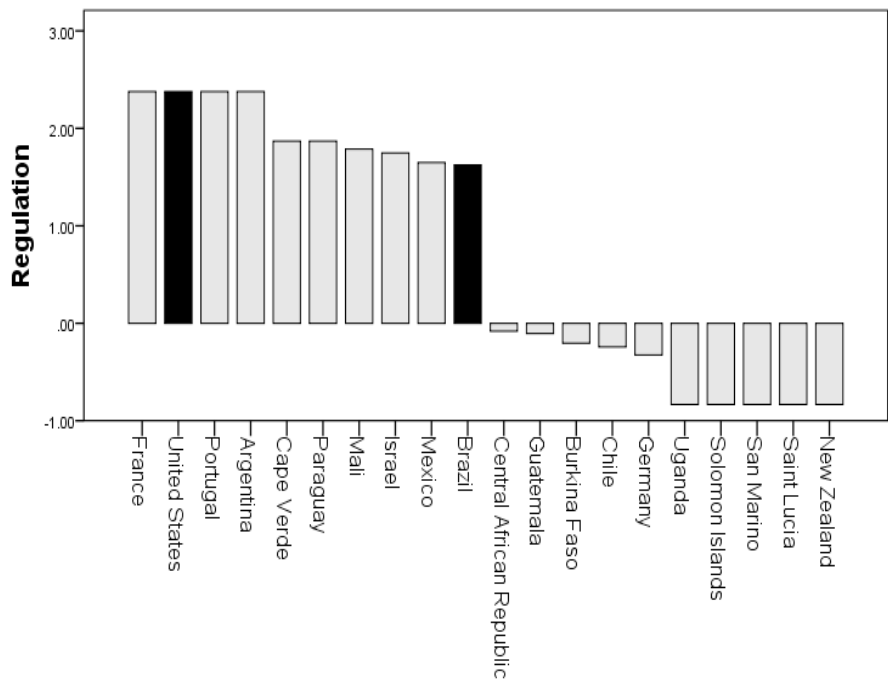
Figure 10 - Descriptive statistics

Regulation Measure	N	min	max	mean	std
Raw	112	0	5	1,36	1,57
Standardized	112	.82	2,39	0	1

On one hand, some countries have very deregulated system,

allowing all types of campaign contributions (Austria, Barbados, Denmark, Finland, New Zealand, Norway, among others). On the other hand, some nations display maximum control over campaign contributions sources (Argentina, Estonia, France, Portugal, United States, among others). On average, the raw measure of regulation suggests that 1.36 up to five bans are adopted for most countries. The standard deviation is higher than the mean, suggesting elevated distribution spread. Figure 11 displays regulation index in selected countries.

Figure 11 - Standardized measure of regulation



For the standardized measure, the mean is 0 and the standard deviation is 1. As far from the mean in the positive direction, more regulation. As far from the mean on the negative direction, less regulation. While France, United States, Portugal and Argentina display maximum level of regulation, New Zealand, Saint Lucia, San Marino and Solomon Islands show a very deregulated system. Figure 12 presents a comparison between Brazil and United States bans on campaign contributions sources.

Figure 12 - Ban on campaign contributions

Sources	Brazil	United States
Foreign entities	X	X
Corporations	--	X
State contractors	X	X
Labor unions	X	X
Anonymous	X	X

5. BRAZIL AND THE UNITED STATES IN A COMPARATIVE PERSPECTIVE

This section examines the historical development of campaign finance in Brazil and the United States. The focus regards the level of regulation on the sources of campaign contributions on both statutes and jurisprudence.

Campaign finance in Brazil

According to Backes (2001), despite different statutes on elections, there is no legal document respecting campaign finance during Brazil Empire period (1822-1889). Regarding popular inclusion, legislation was very restrictive since it required a minimum annual income as formal criteria to allow people the right to vote¹⁶. Therefore, a very limited amount of people was able to participate in the electoral process. 6 National Statute (1889) ban *voto censitário* in Brazil but electoral participation continued limited since legislation prohibited both illiterate people and women the right to vote. During Brazilian Estado Novo (New State, 1930-1945), different institutional changes were adopted: 1) proportional representation for the House of Representatives; 2) creation of Electoral Justice and 3) women right to vote. Despite these innovations, Brazilian 1934 Constitution and further legislation did not address the financing of elections (BACKES, 2001). In short, during two important periods of the Brazilian history -- Empire and New State -- there was no specific legislation regarding campaign finance.

It was during the first democratic period (1946-1964) that campaign finance became an issue. Two elements are important to

16 It was called *voto censitário* and required annual income higher than 100.000 Reis to vote for municipal elections - *Assembleias Parochiais* (92, V), 200.000 Reis to vote for the House of Representatives and Senate elections (94, I) and 400.000 Reis to run for an election office (95, I).

understand this shift. First, the adoption of direct vote for presidential elections. Second, the increase on electorate size. Regarding regulation, 9.258/46 and 1.164/50 National Statutes established a new Electoral Code. In particular, chapter V defined: a) spending limits (143); b) ban on foreign contributions (144, I) and c) prohibition of public contractors to contribute to political campaigns (144, III)¹⁷. Statutes 4.740/65 and 5.682/71 are also important to understand the Brazilian campaign finance historical legislation. They ban contributions from corporate sector for the first time. In particular, section 56 of 4.740 statute prohibited political parties to receive, directly or indirectly, any kind of resource from corporations. Section 91 of 5.682 statute also ban contributions from labor unions. Currently, campaign finance in Brazil is mainly based on three different statutes (9.096/95, 9.504/97 and 11.300/06), in addition to *Tribunal Superior Eleitoral* resolutions¹⁸. Section 23 of 9.504 statute limits individual contributions to 10% of donors' annual gross income previous to electoral year. Regarding own resources, political parties should stipulate the maximum amount that each candidate can spend before elections starts (§ 23, 1). In practice, this means that there is no legal ceiling since parties have discretion to set up any limit. Section 81 limits corporate contributions to 2% of donors' annual gross revenue previous to electoral year. What to say about other sources of campaign contributions? Figure 13 summarizes all prohibited sources.

Figure 13 - Prohibited sources by 9.504/97 statute

Section	Source
I	Foreign entities
II	Administrative public institutions
III	State contractors
IV	Nonprofit organizations
V	Labor unions
VI	Nonprofit organizations funded by foreign entities
VII	Charitable and religious organizations
VIII	Sports organizations
IX	Nongovernment organizations funded by public resources
X	Civil society organizations

¹⁷ Resolution 3.988 (1950) determined that both the *Tribunal Superior Eleitoral* (TSE) and state level agencies (*Tribunais Regionais Eleitorais* - TREs) could investigate claims of illegal electoral activities (BACKES, 2011).

¹⁸ For example, resolution 23.089 (2009) established electoral calendar. Resolution 23.217 (2010) regulates campaign finance receipts and disclosure for candidates and parties committees.

For the purposes of this paper it is important to evaluate how Brazilian campaign finance regulation changed over time. Figure 14 summarizes this information.

Figure 14 - Campaign finance legislation over time

Source	1946	1950	1965	1971	1993	1995	1997	2006	2008	2010
Foreign entities	X	X	X	X	X	X	X	X	X	X
Administrative public institutions		X	X	X	X	X	X	X	X	X
State contractors		X	X	X	X	X	X	X	X	X
Corporations			X	X						
Non-profit organizations					X		X	X	X	X
Labor unions				X	X	X	X	X	X	X
Non-profit organizations funded by foreign entities					X		X	X	X	X
Charitable and religious organizations								X	X	X
Sports organizations								X	X	X
Non-government organizations funded by public resources								X	X	X
Civil society organizations								X	X	X

Contributions from foreign entities had been banned by all Brazilian campaign finance legislation. Since 1950, administrative public institutions and state contractors also were prohibited from making donations. Regarding corporations contributions, both 1965 and 1971 legislation ban it but posterior statutes make it legal. More recently, new political actors were prohibited from making campaign contributions (charitable and religious organizations, sport organizations, non-government organizations funded by public resources and civil society organizations). On substantive grounds, this means that regulation on campaign finance has increased over time.

Campaign finance in the United States¹⁹

As Brazil during Empire period, the financing of elections was not a problem during the early days of American politics (CORRADO, 2005; SMITH, 2001). According to Corrado (2005),

in the early days of the republic, campaign funding was rarely a source of public controversy (...) since candidates usually “stood” for election without engaging in the types of personal politicking

¹⁹ The most comprehensive compilation of campaign finance regulation in the United States can be download at <http://www.fec.gov/law/feca/feca.pdf>

or direct solicitation of votes that have come to characterize modern elections (CORRADO, 2005: 07/08).

Smith (2001) points out that before the Pendleton Civil Service Act (1883) most of public offices were not elected and candidates run without opponents. Candidates use their own resources or contributions of family and friends to cover campaign costs. It was with spoils system that campaign finance became an issue in the United States. In particular, Congress enacted the Pendleton Civil Service Act (1883) determining meritocratic criteria to public employees selection process²⁰. According to Corrado (2005),

the law restrained the influence of the spoils system in the selection of government workers by creating a class of federal employees who had to qualify for office through competitive examinations. It also prohibited the solicitation of political contributions from those employees, thus protecting them from forced campaign assessments (CORRADO, 2005: 9/10).

In 1904, judge Alton B. Parker, the Democratic presidential nominee, charged Theodore Roosevelt of exchanging political favors for campaign contributions (Corrado, 2005). Parker also alleged that Roosevelt was blackmailing corporation monopolies to raise campaign contributions. According to Smith (2001), more than 73% of all Republican general committee resources in 1904 were based on corporate contributions. Roosevelt denied all charges. However, a joint investigation of two different New York committees revealed that New York Life contributed with near to \$ 48,000 for an non-registered account of the Republican National Party Committee in 1904²¹. Since 1890, Nebraska, Missouri, Tennessee and Florida banned corporate contributions to state elections, but after New York Life scandal public opinion demand more regulation. In 1907 Congress enacted Tillman Act.

In 1924, public demand for more regulation arose again after a scandal involving campaign contributions to incumbents candidates

20 Also in 1883 United Kingdom enacted the Corrupt and Illegal Practices Prevention Act. Among its provisions, it made a crime to exchange votes for any economic benefit. In addition, the act imposed campaign spending limits.

21 In 1905 message to the Congress president Roosevelt stated that there is no enemy of free government more dangerous and none so insidious as the corruption of the electorate (...) I recommend the enactment of a law directed against bribery and corruption in Federal elections.

in a non-electoral year. Congress passed new amendments to Federal Corrupt Practices Act (1910), requiring that any contribution over \$ 100,00 must be registered under party disclosure documents. In addition, it established new ceilings for spending for both House (\$5,000) and senate elections (\$25,000). This act constituted a landmark on campaign finance until the 1970s²².

In 1947, Congress ban Labor unions campaign contributions under Labor Management Relations Act (1947), popular knew as Taft-Hartley Act. In 1971, Congress enacted Federal Election Campaign Act (FECA). According to Smith (2001), it aimed to accomplish the following objectives: a) enforce disclosure provisions by adopting specific punishments for law break; b) increase the amount of resources available to public financing of presidential elections; c) establish ceilings on campaign spending, and d) decrease the general costs of elections. FECA (1971) assumed that the increasing costs of elections were direct associated with spending on media communications. In particular, the 1974 FECA amendments limited spending on media to no more than \$100,000 or \$.08 multiplied by the voting-age population of the state in a primary election and no more than \$150,000 or \$.12 multiplied by the state's voting-age population in a general election. However, before Congress enacts FECA general costs of 1968 were estimated around \$ 300 million, compared to \$425 million of 1972 elections²³.

In 1974 Congress enacted amendments to FECA (1971) establishing the most comprehensive regulatory package on campaign finance. Individual limits were defined to \$1,000 and up tp \$25,000 during electoral calendar year. PCAs contributions were also limited to \$5,000. Among different institutional reforms, FECA 1974 amendments established the Federal Election Commission (Corrado, 2005). However, in *Buckley v. Valeo*, Supreme Court struck down most FECA provisions ruling that they infringe the First Amendment²⁴. Supreme Court ruled that while campaign expenditures by individual candidate

22 According to Corrado (2005), *despite the changes, an effective regulatory regime was never established. Though the law imposed clear reporting requirements, it provided for none of the publicity or enforcement mechanisms needed to ensure meaningful disclosure. The law did not specify who would have access to the reports; it did not require that the reports be published; it did not even stipulate the penalties if committees failed to comply. As a result, many candidates did not file regular reports* (CORRADO, 2005: 15).

23 For example, president Richard Nixon spent more than twice in 1972 compared to 1968. Democrat George McGovern spent more than four times the total spent in 1968.

24 Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; of abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances (Amendment I, U.S. Constitution)

is speech and therefore cannot be regulated, campaign contributions do not constitute a form of direct speech and thus could be regulated. The rationale to differentiate expenditures from campaign contributions was to prevent the corruption or appearance of corruption associated with large donations.

a restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money (...) the electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive models of communication indispensable instruments of effective political speech (...) being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often one desires on a single tank of gasoline (...) although the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions (...) the increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy (...) ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption (Buckley v. Valeo, 1976).

.In *McConnell v. Federal Election Commission* (2002), Supreme Court upheld the constitutionality of most provisions of Bipartisan Campaign Reform Act (BCRA -- 2002). The Court ruled that the ban on soft money imposed only minimal effects on speech and corporations could not employ their treasury funds to pay or broadcast express advertisements targeted to the candidate's electorate within

30 days of a primary or 60 days of a general election²⁵. In *Federal Election Commission v. Wisconsin Right to Life, Inc.* (2007), Supreme Court held §203 of the BCRA unconstitutional as applied to political advertisements that criticized Wisconsin's senators for participating in a filibuster to block the confirmation of several of President Bush's judicial nominees. According to the FEC, the Supreme Court concluded that these financing restrictions are unconstitutional as applied to these ads because the ads were not express advocacy or its "functional equivalent". More recently, in *Citizens United v. Federal Election Commission* (2010), Supreme Court held that corporate funding of independent political broadcasts in candidate elections cannot be limited because infringes the First Amendment. In particular, the Court considered that Sections 201 and 203 of Bipartisan Campaign Reform Act (BCRA) were unconstitutional²⁶. This decision overturned the prohibition of both corporate and labor free spending to independently support or oppose candidates in national elections.

Although the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech," §441b's prohibition on corporate independent expenditures is an outright ban on speech, backed by criminal sanctions. It is a ban notwithstanding the fact that a PAC created by a corporation can still speak, for a PAC is a separate association from the corporation. Because speech is an essential mechanism of democracy---it is the means to hold officials accountable to the people---political speech must prevail against laws that would suppress it by design or inadvertence. Laws burdening such speech are subject to strict scrutiny, which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest (...). It is irrelevant for First Amendment purposes that corporate funds may "have little or no correlation

25 Section 441i(a) of FEC states that A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.

26 Section 203 of (BCRA) prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech that is an "electioneering communication" or for speech that expressly advocates the election or defeat of a candidate (*Citizens United v. Federal Election Commission*)

to the public's support for the corporation's political ideas." Austin, supra, at 660. All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech, and the First Amendment protects the resulting speech. Under the antidistortion rationale, Congress could also ban political speech of media corporations.

Figure 15 provides a historical overview of regulatory provisions on campaign finance in the United States.

Figure 15 - Historical development of campaign finance regulation

Regulation (year)	Purpose/provisions
Tillman Act (1907)	Reduce the role of big contributions on federal elections. It make illegal donations from corporations and national banks.
Federal Corrupt Practices Act (1910) (Publicity Act)	Established disclosure provisions and spending ceilings for the House of Representatives elections.
Federal Corrupt Practices (1911) and (1925) amendments	Expanded disclosure provisions in national elections by including Senate seats. Established new ceilings on primary and general elections spending.
Hatch Act (1939) (Clean Politics Act)	Reduce the political influence of federal employees.
Smith-Connaly Act (1943) (War Labor Disputes Act)	Temporarily prohibited labor unions contributions.
Labor Management Relations Act (1947) (Taft-Harley Act)	Ban both labor unions donations and independent expenditures.
The Federal Election Campaign Act (1971)	Enforce disclosure provisions; extend public financing of presidential elections; limit contributions and spending; reduce the role of media communications in elections
The Federal Election Campaign Act (1974) (amendments)	Established the Federal Election Commission
Bipartisan Campaign Reform Act (2002)	Ban soft money. Established new ceilings on contributions limits.

6. CONCLUSION

The principal aim of this paper was to analyze campaign finance in a comparative perspective, giving special attention to cases of Brazil and the United States. The results suggest that most countries show low levels of control over campaign contributions. However, both Brazil and the United States display higher levels of regulation on campaign finance sources, despite their widely different institutional designs. On institutional grounds, both Tribunal *Superior Eleitoral* (TSE) and Federal Election Commission (FEC) provide public open data regarding campaign finance and elections outcomes. Assuming that institutional change can benefit from information about other institutional contexts, it is important to understand how different countries regulate the role of money in politics. Comparative perspective allows evaluate which institutional practices seem to be more efficient and which ones are more likely to work on different institutional designs.

Undeniably, one of main challenges faced not only by scholars but also by policymakers is to properly estimate the effects of electoral rules. This is because any attempt of political reform should be informed by the effects of each institutional choice. This paper aims to advance our current knowledge on campaign finance regulation in general and in both Brazil and in the United States in particular.

7. REFERENCES

- ABRAMOWITZ, A. (1988), Explaining Senate election outcomes. *American Political Science Review*, 82, 385-403.
- ABRAMOWITZ, A. (1991), Incumbency Campaign Spending, and the Decline of Competition in U.S. Elections. *Journal of Politics*, 53: 34-56.
- ABRAMS, B. and SETTLE, R. (1976). The Effect of Broadcasting on Political Campaign Spending: An Empirical Investigation. *Journal of Political Economy*, 84, 5: 1095-1108.
- ANSOLABEHERE, S. and GERBER, A. (1994), The Mismeasure of Campaign Spending: Evidence from the 1990 U.S. House Elections. *Journal of Politics*, 56: 1106-18.
- ANSOLABEHERE, S. (2007), The Scope of Corruption: Lessons from Comparative Campaign Finance Disclosure. *Election Law Journal*, 6, 2: 163-183.
- ANSOLABEHERE, S.; GERBER, A., and SNYDER, J. (2011), Does TV Advertising Explain the Rise of Campaign Spending? A Study of Campaign Spending and Broadcast Advertising Prices in US House Elections the 1990s and the 1970s. Working paper, 2001. Available at: <http://econ-www.mit.edu/files/1211>
- BACKES, A. (2000), Legislação sobre financiamento de partidos e de

- campanhas eleitorais no Brasil em perspectiva histórica. Available at <http://pdba.georgetown.edu/Parties/Brazil/Leyes/financiamento.pdf>.
- BARDWELL, K. (2005), Reevaluating Spending in Gubernatorial Races: Job Approval as a Baseline for Spending. *Political Research Quarterly*, 58, 1: 97-105.
- BOURDOUKAN, A. (2010), O Bolso e a urna: financiamento de campanha em perspectiva comparada. Tese de Doutorado. Universidade de São Paulo. Departamento de Ciência Política.
- BREAUX, D. and GIERZYNSKI, A. (1991), "It's Money That Matters": Campaign Expenditures and State Legislative Primaries. *Legislative Studies Quarterly*, 16, 3: 429-443.
- BROWN, A. (2009), Campaign Spending and Spurious Correlations: Why Self-Financed Gubernatorial Candidates Lose. Prepared for presentation at the annual meeting of the American Political Science Association, held in Toronto, Canada, September 3-6.
- BUCKLEY v. VALEO, 424, U.S. 1, 1976. Available at: http://www.law.cornell.edu/supct/html/historics/USSC_CR_0424_0001_ZS.html
- CARTY, K. and EAGLES, M. (1999), Do local campaigns matter? Campaign spending, the local canvass and party support in Canada. *Electoral Studies*, 18: 69-87.
- CITIZENS UNITED v. FEDERAL ELECTION COMMISSION (2010). Available at: <http://www.law.cornell.edu/supct/html/08-205.ZS.html>
- CORRADO, A. (2005), "Public funding of presidential campaigns", In: A. Corrado, T. E. Mann, D. R. Ortiz e T. Potter (Eds.), *The new campaign finance sourcebook* (pp. 180--204). Washington, DC: Brookings Institution Press.
- EAGLES, M. (1993), Money and Votes in Canada: Campaign Spending and Parliamentary Election Outcomes, 1984 and 1988. *Canadian Public Policy/Analyse de Politiques*, 19, 4: 432-449.
- EPSTEIN, G. and FRANCK, R. (2007), Campaign Resources and Electoral Success: Evidence from the 2002 French Parliamentary Elections. *Public Choice*, 131, 3/4: 469-489.
- ERIKSON, R. and PALFREY, T. (2000), Equilibria in campaign spending games: Theory and evidence. *American Political Science Review*, 94, 595-609.
- FINK, A. The effects of party campaign spending under proportional representation: evidence from Germany. Working paper. Available at: <http://www.ub.edu/economiaempresa/jobmarket/papers/Alexander/ApplicantFileView.pdf>
- FLEISCHMANN, A. and STEIN, L. (1998), Campaign Contributions in Local Elections. *Political Research Quarterly*, 51, 3: 673-689.
- GEDDES, B. (2003), *Paradigms and Sand Castles: Theory Building and Research Design in Comparative Politics*. Ann Arbor: University of Michigan Press.

- GERBER, A. and GREEN, D. (2000), The effects of canvassing, telephone calls, and direct mail on voter turnout: A field experiment. *American Political Science Review*, 94, 653-663.
- GERBER, A. (2004), Does Campaign Spending Work? Field Experiments Provide Evidence and Suggest New Theory. *American Behavioral Scientist*, 47(5), 541-574.
- GERBER, A. (1998), Estimating the effect of campaign spending on Senate election outcomes using instrumental variables. *American Political Science Review*, 92, 401-411.
- GERRING, J. (2004), What Is a Case Study and What Is It Good for? *American Political Science Review*, 98, 2: 341-354.
- GILES, M. and PRITCHARD, A. (1985), Campaign Expenditures and Legislative Elections in Florida. *Legislative Studies Quarterly*, 10, 1: 71-88.
- GLANTZ, S.; ABRAMOWITZ, A., and BURKHART, M. (1976), Election Outcomes: Whose Money Matters? *Journal of Politics*, 38:1033-8.
- GOIDEL, R. and GROSS, D. (1996), Reconsidering the 'Myths and Realities' of Campaign Finance Reform. *Legislative Studies Quarterly*, 21, 1: 129-149.
- GREEN, D. and KRASNO, J. (1990), Rebuttal to Jacobson's New Evidence for Old arguments. *American Journal of Political Science*, 34: 363-72.
- GREEN, D. and KRASNO, J. (1988), Salvation for the spendthrift incumbent. *American Journal of Political Science*, 32, 884-907.
- GRIER, K. (1989), Campaign Spending and Senate Elections, 1978-1984. *Public Choice*, 63: 201-219.
- HAYNES, A., GURIAN, P. and NICHOLS, S. (1997), The Role of Candidate Spending in Presidential Nomination Campaigns. *The Journal of Politics*, 59, 1: 213-225.
- HOGAN, R. (1999) Campaign Spending in State Legislative Primary Elections. *State and Local Government Review*, 31, 3: 214: 220.
- HOUSER, D. and STRATMANN, T. (2008), Selling Favors in the Lab: Experiments on Campaign Finance Reform. *Public Choice*, 136: 215-239.
- HUDSON, R. The effects of campaign spending in Florida congressional elections. Working paper, 2006. Available at: <http://web.bus.ucf.edu/faculty/rhofler/file.axd?file=2011%2F2%2FHudson+Campaign+Spending.pdf>
- JACOBSON, G. (1985), Money and votes reconsidered: Congressional elections, 1972-1982. *Public Choice*, 47(1): 7-62.
- JACOBSON, G. (1976), Public Funds for Congressional Candidates: Who Would Benefit? *Public Policy*, 24: 1-32.
- JACOBSON, G. (1978), The effect of campaign spending in congressional elections. *American Political Science Review*, 72: 469-491.

- JACOBSON, G. (1990), The effects of campaign spending in House elections: New evidence for old arguments. *American Journal of Political Science*, 34: 334-362.
- JACOBSON, G. (2001), *The politics of congressional elections* (5th ed.). New York: Longman.
- JENSEN, J. and BEYLE, T. (2003), Of Footnotes, Missing Data, and Lessons for 50-State Data Collection: The Gubernatorial Campaign Finance Project, 1977-2001. *State Politics and Policy Quarterly*, 3:203-214.
- JEWELL, M. and BREAUX, D. (1988), The Effect of Incumbency on State Legislative Elections. *Legislative Studies Quarterly*, 13, 4: 495-514.
- JOHNSTON, R. (1979). Campaign expenditure and the efficacy of advertising at the 1974 general election in England. *Political Studies*, XXVII, 1: 114-119.
- JOHNSTON, R., A, PATTIE and JOHNSTON, L. (1989), The impact of constituency spending on the result of the 1987 British General Election. *Electoral Studies*, 8, 2: 143-155.
- KENNY, C. and MCBURNETT, M. (1994), An Individual-Level Multiequation Model of Expenditure Effects in Contested House Elections. *American Political Science Review*, 88, 3: 699-707.
- KING, G. Replication, Replication. *PS: Political Science and Politics*, 28: 443-499, 1995.
- KING, G.; KEOHANE, R. and VERBA, S. (1994), *Designing social inquiry: scientific inference in qualitative research*. Princeton: Princeton University Press.
- KRASNO, J., GREEN, D. and COWDEN, J. (1994), The Dynamics of Campaign Fundraising in House Elections. *Journal of Politics*, 56: 459-74.
- LANDMAN, T. (2003), *Issues and Methods in Comparative Politics: An Introduction*, 2^o Edition, London: Routledge.
- LEVITT, S. (1994), Using repeat challengers to estimate the effect of campaign spending on election outcomes in the House. *Journal of Political Economy*, 102: 77-98.
- LIEBERMAN, E. (2005), Nested Analysis as a Mixed-Method Strategy for Comparative Research. *American Political Science Review*, 99, 3: 435-452.
- LIJPHART, A. (1971), Comparative politics and comparative method. *American Political Science Review*, 65, 3: 682-693.
- MILYO, J. (1998), The Electoral Effects of Campaign Spending in House Elections: A Natural Experiment Approach. Working paper, 1998. Available at: <http://ideas.repec.org/p/tuf/tuftec/9806.html>
- OWENS, J. and OLSON, E. (1997), Campaign Spending and the Electoral Process in California, 1966-1974. *The Western Political Quarterly*, 30, 4: 493-512.

- PALDA, K. (1973), Does Advertising Influence Votes? an Analysis of the 1966 and 1970 Quebec Elections. *Canadian Journal of Political Science*, 6: 638-55.
- PALDA, K. (1975), The Effect of Expenditure on Political Success. *Journal of Law and Economics*, 18: 745-71.
- PARTIN, R. (2002), Assessing the Impact of Campaign Spending in Governors' Races. *Political Research Quarterly*, 55, 1: 213-233.
- PATTERSON, S. (1982), Campaign Spending in Contests for Governor. *The Western Political Quarterly*, 35, 4: 457-477.
- PEIXOTO, V. (2009), Financiamento de campanhas: o Brasil em perspectiva comparada. *Perspectivas: Revista de Ciências Sociais*, 35: 91-116.
- RAGIN, C. (1987), *The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies*. Berkeley and Los Angeles: University of California Press.
- SAMUELS, D. (2001a), Money, Elections and Democracy in Brazil. *Latin American Politics and Society*, 43(2): 27-48.
- SAMUELS, D. (2001b), Does Money Matter? Campaign Finance in Newly Democratic Countries: Theory and Evidence from Brazil. *Comparative Politics*, 34: 23-42.
- SAMUELS, D. (2001c), Incumbents and Challengers on a Level Playing Field: Assessing the Impact of Campaign Finance in Brazil. *The Journal of Politics*, 63(2): 569-584.
- SHEPARD, L. (1977), Does Campaign Spending Really Matter? *Public Opinion Quarterly*, 41: 196-205.
- SILBERMAN, J. and YOCHUM, G. (1978), The Role of Money in Determining Election Outcomes. *Social Science Quarterly*, 58: 671-82.
- SMITH, B. (2001), *Unfree Speech: The Folly of Campaign Finance Reform*. Princeton University Press.
- SWANSON, G. (1971), *Framework for Comparative Research: Structural Anthropology and Theory of Action: Essay in Trends and Applications*. Berkeley: University of University of California.
- TUCKER, H. and WEBER, R. (1987), State Legislative Election Outcomes: Contextual Effects and Legislative Performance Effects. *Legislative Studies Quarterly*, 12, 4: 537-553.
- WELCH, W. (1980), The Allocation of Political Monies: Economic Interest Groups. *Public Choice*, 35: 97-120.
- WELCH, W. (1974), The Economics of Campaign Funds. *Public Choice*, 20: 83-97.
- ZOVATTO, D. (2005), Financiamento de partidos e campanhas eleitorais na América Latina: uma análise comparada. *Opinião Pública*, 2, XI: 287-336.

APPENDIX

Figure 16 – Correlation between raw and standardized measure of regulation

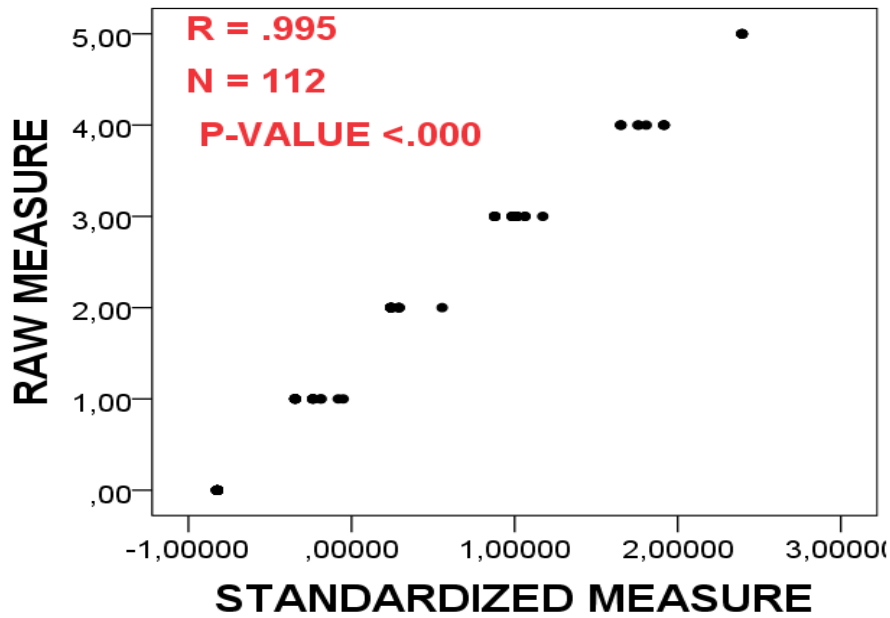
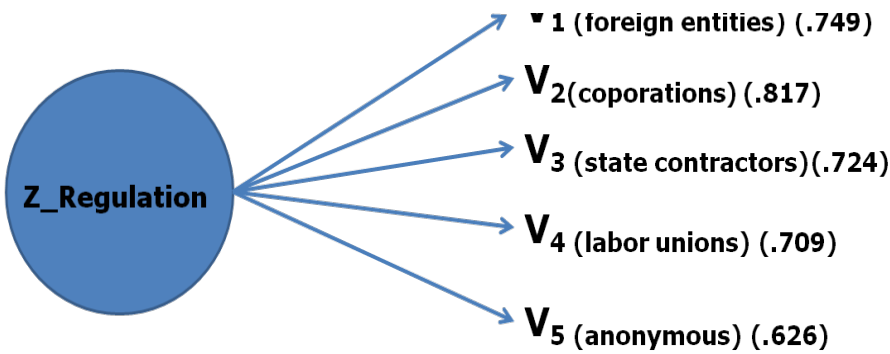


Figure 17 – Factor loadings of the standardized measure of regulation



THE ENVIRONMENTAL ISSUE IN BRAZIL: A MATTER OF PRINCIPLES

Marco Aurelio Peri Guedes

The author has an undergraduation degree conferred by Law School of State University of Rio de Janeiro (UERJ) in 1994. Master's Degree (LLM) in Theory of State and Constitutional Law by Pontifical Catholic University of Rio de Janeiro (PUC-RIO) in 1997. Attorney at Law with practice in Rio de Janeiro from 1998 to 2009. Professor of law at PUC-RIO (1997), FESO (2000-2001) and UCAM/CENTRO (1997-2009). Since 2010, Full Time Assistant Professor of Constitutional, Administrative and Environmental Law of Federal Rural University of Rio de Janeiro (UFRRJ).

Abstract: The current study aims to study the challenges related to Environmental Protection Legal System in Brazil. In fact, although Brazilian legislation concerning environmental protection and reasonable use of natural resources is quite satisfactory in theoretical perspective, the greatest hindrances to nation-wide more efficient environmental protection are the lack of environmental culture and government commitment, which results in insufficient human resources and budgetary provisions to enforce the goals established in legislation. The consequences of such diagnosis is that environmental supervision in the Brazilian Republic occurs mostly at local level and sorely needs of nation-wide enforcement and coordination.

Keywords: Environmental protection in Brazil – Administrative law – Enforcement of constitutional goals.

1. INTRODUCTION

Law professors and lawyers usually say that rights should be taken seriously. Brazil is still constructing a democratic culture based on the respect for the Constitution and the whole legal system. It may seem odd for an American or a European to read this, but in Brazil there is a permanent crisis concerning the concept of authority, often understood as authoritarianism. As a consequence law, as a result of a congressional labor, is permanently ignored or simply disobeyed. In the legal tradition, obedience to the law is the foundation of a truly free and democratic society.

In terms of politics, the Brazilian Republican history presents

an unstable political development with periods of dictatorship and democracy. The political system reflects an unfulfilled gap in civil society which lay down historical roots not yet surpassed indicated by the main events in Brazilian history: the independence and the Republic were proclaimed by the military, acting as tutors of society to 1980. Therefore the main political institutions are not still ready to experience a solid democratic life though society urges reforms on the legal system, the party system, the judiciary system as well the political organization and the performance of the legislative branch of the State. A culture of civil power authority overlapping the military is still being formed.

The role and importance of the Constitution is yet not entirely understood either by society as whole or by the political ruling class as well. After more than twenty five years of democratic life in Brazil, it is possible to say – maybe simply to consider it as a fact - that some parts of the Constitution are respected while others are totally ignored. One of these parts is related to environmental protection. It is necessary to understand that the whole text of the constitution shall be obeyed. DA SILVA says the Constitution does not have useless rules¹. It may seem strange to a European or an American that some people² decide what in the *Charta* is to be obeyed or choose which parts of the Constitution shall be regulated³. From the constitutional perspective, the same behavior binding the people as well as the institutions and the branches of the State can be identified in the respect for the legal system. Otherwise some laws or Constitutional rules simply “*pegam, ou não*” (“they are followed or not”)⁴.

The aim of this paper is to discuss the environmental legal system in Brazil, which is quite complete and well detailed, although menaced

1 DA SILVA, José Afonso. *Direito constitucional positivo*. São Paulo: Saraiva, 2009.

2 Politicians taking part of the Legislative and Executive branches, and sometimes of the Judiciary branch, interpret rules and the Constitution on their personal behalf. Contempt for the Constitution is often present in the corporative world, which explains Brazil as a country with one action in court for every two citizens, i.e half the population is on court for some reason. Sometimes people go to the court only in search of their rights be applied, which could be avoided if the government and corporations observed the law correctly.

3 As an example, the former article 192 of the Constitution which established a Constitutional ‘roof’ for the interest rate in Brazil on 12% yearly. After years being ignored by official banks, official housing system, financial institutions, corporations and etc, the article was suppressed from the Constitution by the amendment 40/29-05-2003. In 2013, without any legislative attempt to reduce the interest rates, the Central Bank (Federal Reserve System) of Brazil reduced the interest rate to 9%. It is important to observe as well that such interferences from the law makers on the financial system are frequent as seen in July 1994 with the real plan when a parity between the real and the dollar as currencies was imposed by an executive act, later converted into law by the Congress.

4 Some lawyers say that depending on the content of the rule it may stick or not, that is, it could achieve people’s respect for the law or the Constitutional command.

by the lack of an environmental culture and a truly commitment of the State to enforce such laws. Despite the apparent consolidation of the democratic project in the Brazilian society, the Constitution of 1988⁵ inspires laws focusing on the protection of the environment though the government lacks an adequate structure for the controlling departments and short budgets to fulfill its task⁶.

From several viewpoints, there are many unsolved issues in the environmental laws and protection policies: lack of structure, budgetary limitations, political shortsightedness, immature on environmental consciousness, lack of public efficiency, and will to apply human and material resources are just some of the main problems related to the nature protection. Furthermore, with a simple observation of the penal law and criminal policies in Brazil it is possible to portrair a terrible but accurate picture of environmental protection in the country⁷.

There is no difficulty on identifying the State as responsible for endeavoring to protect environment and natural resources, by creating official procedures in the pursuit of environmental protection. It is clear that HESSES's concepts⁸ may be applied at this point, due to the well-known resistance of some civil segments of society to accept modernity, development, and the democratic and liberal rule of law, as in Europe and America. The struggle between concrete Constitution and formal Constitution remains and is raged in many fields of law. SKIDMORE's

5 HESSE, Konrad. *A força normativa da constituição*. Porto Alegre: Sergio Fabris, 1997.

6 The Brazilian nationwide daily news O ESTADO DE SÃO PAULO, i.e. *The state of São Paulo*, on an editorial article published on July 14, 2008, entitled *Ecological strip-tease*, reproduces the word of Carlos Minc, then Minister of the Environment. The situation as pictured served as a good example which inspires this paper, as the IBAMA – Brazilian Institute of Environment in charge of the environment protection, has 400 environmental inspectors in the Amazon rain forest (an area with more than 1,9305 million square miles), according to him. The budget of IBAMA for the area at that time was the equivalent of seventeen million dollars, which means that an inspector could not spend more than US\$ 0,10 inspecting every two acres!! Considering the budget it is easy to say that environment is far from being a priority concern for the government. Then and now, priority is only what brings revenue for the State, as taxes do.

7 Nowadays ninety-six per cent of all homicide crimes committed in the land remain unsolved and without punishment, despite continuous protests from society on the last two decades. If life as a fundamental right - as it is established in the fifth article of the Constitution – is disregarded to this extent, why should we expect another approach concerning the environment protection?

8 Konrad Hesse's *The normative force of the constitution*. For him the concrete Constitution was the living power on every society, like armed forces, churches, corporations, political parties etc. The formal Constitution was like a picture of this coexistence of different powers within society living together in the same space with their interests having the state as the battleground for them to clash and try to prevail one over the others in the preservation of these interests. According to Hesse, for one Constitution to endure it is necessary to build a keen correlation between the different powers or factions inside society and the formal text of the Constitution.

studies⁹ can provide a good source of information to understand the background of the Brazilian society.

2. THE CONSTITUTION OF 1988 AND THE NEO-CONSTITUTIONALISM DOCTRINE IT IS ALL ABOUT PRINCIPLES (OR: THE DOMAIN OF PRINCIPLES)

Before reaching the central theme in this paper, it is adequate to elaborate a preview of the constitutional scenery in Brazil in the transitional time from the military period until the new democratic project installed by the Constitution of 1988.

With the end of the military command in 1984, Tancredo Neves' indirect election¹⁰, and the inauguration of President José Sarney, a national assembly was called to elaborate a new Constitution. After a year and a half a democratic Constitution was drafted by the Congress and was proclaimed on October 5, 1988. Innovating the Brazilian constitutional history, the Constitution brings in the first place the fundamental rights, the social rights and then on a second place the organization of the State.

As special characteristics it could be mentioned the end of the rule of legalism - called in Europe positivism thinking - and the influence more intensively of the European Constitutions of the post second world war, with an open display of principles all over the text. According to philosophers of law and constitutionalists, principles are the cutting edge technique created to avoid the Constitution to become outdated by the effects of time. The technique demanded the report of the norm to be open in such a way that the interpreter could build its meaning when necessary accordingly to the time and the values adopted by the society. In so doing the technique allows a permanent flux of input and output of values, information, political changes and conceptions of society that would keep the constitutional text up to date. It was the time of the *neoconstitutionalism* – i. e. new constitutionalism - to be the highest point of the political life in legal society.

The recognition of this new way of thinking came to light few years after the proclamation of the text. From that point on principles were to take an overwhelming position over rules¹¹, so the main goals

9 Thomas Skidmore's book *Brazil: five centuries of change*, *apud* Daibert's paper, p794, footnote 160.

10 Tancredo Neves died a few months after being elected president. His election put an end on twenty years of military government, which began in 1964 with the military revolution happened on march 31. He was not inaugurated President. José Sarney was in charge of continuing the democratic transition and the political agenda.

11 According to Humberto AVILA's book *Teoria dos princípios* – i.e., *Theory of principles*,

of the constitution would be brought into a concrete reality. Dignity of the human being, democracy, freedom, fraternity, welfare, and property would be some of the ideas and values to be pursued by society and by the State as it can be seen in the very opening text of the Constitution, as well as in the first three articles. All these values are legal undetermined concepts which need conceptual framing by the interpreter before being applied. Everyone would feel free to build its own perception and interpretation of the norm which would ground an action and judge an action. And because they are open to various interpretations according to one's values, changeable in time, nothing was predetermined and everything became possible to be pursued. The principles were like – still are - an open gate to achieve such goal on changing society for better.

Based on these new guidelines, the interpreter of the Constitution manages to grasp the desirable meaning of a value inserted on a principle at a specific moment. The Constitution becomes an object of permanent construction and changing – for good and sometimes for bad. Hence the judiciary adopted a more proactive attitude overcoming public administration's natural incapacity of implementing the fundamental and socio-economic rights and principles contained in the *Charta*. More specifically in the financial and budgetary constitutional microsystems a principle emerged as a restraining mechanism, the reserve of possibility. For the State it means the public administration does not deny its constitutional duties, but it acknowledges that they are going to be fulfilled accordingly to the amount of funds hold by the State's treasury in a certain moment, depending of course on the will of the government. Accountants working for the State, central bank technicians and economists now give the final word over the Constitution, deciding which rights would be implemented according to the funds available.

That is why courts can convict the neglecting State, but cannot order it to print money, as they do not master this financial expertise. The controversy is installed in the academic and legal universe and

p. 78: "The rules are norms are immediately descriptive, primarily retrospective and with the pretension of "decidability" (to be decided) and embracement, for which applicability demands the evaluation of correspondence, always centered on the end which gives it support or in principles which are axiologically overlaid, between the conceptual construction of the normative description and the conceptual construction of the facts. The principles are norms immediately finalistic, primarily prospective and with the pretension of complementing and partiality, for which applicability demands an evaluation of the correlation between the state of things to be promoted and the following effects by a behavior taken as necessary to its promotion". Another important reading on principles and environmental protection can be found on the work of Paula Cerski Lavratti, *El derecho ambiental como instrument de gestión del riesgo tecnológico*, pp. 83-106.

citizens watch astonished to the debate. Citizenship as it has been built, based on the fundamental rights, could no longer count on principles to base their claims against the State, because the Judiciary is not able to request the public administration to provide funds where there is none. Politicians cannot be blamed either for deficient conditions left by the predecessor governments, or by economic unfavorable conditions abroad reflecting inside the country¹².

Therefore apparently what emerges as a solution to the issue evolving the enforcement of constitutional culture became distorted in such a way by State lawyers and by some high court judges that the situation returns to the starting point, the stalemate was renewed. So, it is all about a matter of principles, and the will of politicians to make the Constitution a vividly concrete experiment and not a mere letter of intentions¹³. With this brief view of the political major events which has taken place in Brazil on the last thirty years one could easily conclude that the Constitutions have become a theatrical fake to deceive people. It is reasonable to affirm that living under this “reason of the State”¹⁴ in Brazil one should live for centuries in order to find an “astrological merge of ideal factors” – budgetary equilibrium, good will of politicians, environmental consciousness, culture of fundamental rights enforcement – and so the *Charta* being applied harmlessly on a daily basis.

3. ENVIRONMENTAL LAW ENFORCEMENT IN BRAZIL: AN INSIGHT INTO PUBLIC ADMINISTRATION AS THE NATURAL LAW ENFORCER.

Law enforcement in Brazil is related directly with State apparatus, i. e., police forces, State agencies and institutions. Thus a brief retrospective of Brazilian history is needed so the reader can get familiar with the typical difficulties faced by law enforcers and environmentalists¹⁵. Brazil was settled by the Portuguese who ruled the

12 The deception of society came to its climax in June, 2013, when millions of people went to the streets in the main cities of Brazil to protest for better public services, health and education conditions, urban mobility, infrastructure, public security, repelling any attempt to associate the protests with any political party. The protests and rallies lasted for almost three months. Somehow analysts compared the rallies to similar ones occurred in Europe and the Occupy Wall Street movement.

13 As Ferdinand Lassale quoted on his book *The essence of the constitution*, printed in Germany on the end of the XIX century.

14 The French expression ‘*raison d’état*’ comes vividly in mind, as coined by Nicholo Machiavelli in his masterpiece *The prince*, from 1513.

15 This issue was detected by CRAWFORD, Defending public prosecutors and defining

country from April 19, 1500, until its independence on September 7, 1822. The Portuguese empire never raised an efficient administration in the land, but only the minimal structure necessary to protect the colony from other empires' attacks as well as to exploit the natural resources like gold, silver, wood and other plantation goods¹⁶. The independence did not change the frame of the State, which kept the same guidelines as previously applied by the Portuguese, in the field of public administration¹⁷. As long as the land provided wealth to sustain the Brazilian crown, nothing was to be done in a hurry so the country could be modernized. The land had just changed the ruling hands and now was more politically aligned to England, which was interested on the Brazilian market for its industrial goods and banking industry. The Brazilian empire lasted for sixty-seven years, when the Republic was proclaimed by the military on November 15, 1889.

With the Republic proclaimed by the military, the first Republican Constitution came to life in 1891. It opens the cycle of the majority American constitutional influence in Brazil¹⁸. Rui Barbosa was the man in charge of conceiving this Constitution and he put his heart on this job, bringing the Brazilian society nearer the United States of America in terms of political and constitutional organization. However it is widely known by constitutionalists and historians that the very depository of the republican project in Brazil was not on the hands of civil society, but instead on the militaries'. The agricultural and aristocratic ruling

Brazil's environmental "public interest": a review of Lesley McAllister's making law matter: environmental protection and legal institutions in Brazil, p. 619: "Despite the strength of its laws, enforcement remains a problem in Brazil (a point covered more expensively below)". Further, in p. 622-23: "Brazil is a country where, despite an abundance of thoughtful and well-constructed laws, cultural norms and social practice often preclude observance of legal norms". 16 According to DAIBERT's, p. 815: "The colonization era was a mere succession of cycles of overexploitation and exhaustion based on one or two major items. (...). During the centuries of colonial rule, there had been no concern for building institutional capacity, economic development, or social improvement in Brazil, let alone environmental protection".

17 According to DAIBERT's, p. 816: "Independence came also in 1822 but did not mean a true opportunity for the country to build its own political identity. (...). At the time of Brazilian independence, the rural oligarchy was already, for all intents and purposes, the de facto ruling class of the country. Even the urban elite and the bourgeoisie in Brazil were derived from the power of the *latifundiários*". Again, keeping the same line of thinking, at p. 821: "For roughly seventy years following independence, the political, social, and economic situation in Brazil progresses little".

18 This term was marked by North American influence in constitutionalism, but did not mean other constitutional influences were entirely put aside definitely, like French and somehow the first conceptions of German legal concepts and political approaches on state theory. The Brazilian civil code of 1916 was based on the German one of 1900. For more details, see Paes de Andrade e Paulo Bonavides, *História constitucional do Brasil*. 9ª ed. Rio de Janeiro: OAB editora, 2004.

elite until the Republic – favorable for slavery – was then opposing the republican and democratic project, which pursued the aim of modernizing the country in the same way the United States did right after the American civil war in the 1860s.

Anyway, the Republic was not successful in modernizing the public administration under republican and democratic guidelines. Therefore, society could not expect much from a public administration composed by clerks chosen according to political alliances, guided by non democratic and non republican criteria to fulfill proper technical qualifications required to the job. All the following Constitutions failed on this purpose also¹⁹. In terms of the doctrine of administrative law, even under the current Constitution of 1988 the process of modernizing and bringing public services unto a modern conception remains a challenge in a society which lives a permanent struggle between conservative segments contrary to modernization and other favorable and genuinely adherent to the republican project and concept. The 1988 Constitution was clear on establishing criteria for selecting clerks by wide open public exams for all citizens who wish to join the State clerk staff. This criterion, as many other principles firmly established in article 37, try to develop a profound transformation on public administration, by imposing the concepts and republican values of transparency, democracy, efficiency, legality, morality and many others²⁰.

The historical inefficiency of the Brazilian State since independence has never changed – and for this critical analysis the three branches of the state are considered. It was not before the fifties of the XX century that Brazil paid some attention to the environmental issue. Society was underdeveloped and nature protection could not be matter of interest in a country which did not know sophisticated industrial methods, mass production and modernity itself. Furthermore Brazil remained an agricultural society until the late seventies. Although its insertion in the international society of nations was increasing, the inland reality followed a different rhythm. The political frame was unstable since the end of World War II, with the proclamation of the democratic Constitution of 1946 and the Constitutions of the military regime of 1967 and 1969. Only a few years before the restoration of the democratic life in 1982, a bill numbered 6.938/81 was approved by the Congress and considered a very advanced piece of legislation for the time in terms of environmental protection and enforcement²¹, as it still

19 Constitutions of 1934, 1937, 1946, 1967, 1969.

20 Article 37 specifies principles for the public administration on all federative levels, i. e., the Union, states and counties: legality, depersonalization of the public administration, morality, publicity and efficiency.

21 Says DAIBERT in p. 830: “Nevertheless, during the military governments’ rule, a surprising number of laws concerning land, the environment, or both were enacted”.

remains.

The bill n. 6.938/81 creates the PONAMA – Política nacional do meio ambiente, i.e., national environmental policy, indicating the environmental values to be protected, the guidelines, the principles and the courses of action to be adopted and implemented by all levels of the federation; it means that the Union, the states and the counties were to share an equal responsibility according to its both budgetary and administrative capabilities. Reflecting the advance on this issue, says DAIBERT “*In 1985, an executive order created the first Brazilian Ministry of Urban Development and the environment*”²². The law was enacted seven years prior to the current Constitution proclaimed on October 5, 1988. It was the consequence of the main international treaties and conventions have signed by the Brazilian diplomacy concerning international environmental law since the late 1950s. In fact Brazil plays an important role as a player in terms of environment engagement, having participated in almost all international forums in the concert of nations, as noticed by PATRIOTA²³.

Following this tendency of struggling for a better future and the motto which was carved in the souls of the seventies generation on the last century – “*think global act local*” – the Brazilian Constitution of 1988 states in the article 226 the values which are mandatory for the public administrations in all levels²⁴. The article is inserted in a constitutional microsystem of norms and commandments related to the social order organization²⁵. The microsystem itself is inserted in a much wider and broader cosmos of rules, the Constitution itself guided by the opening text and the principles contained in articles 1 to 3. To understand the current view of constitutional law, it is necessary to perceive that a new era for this branch of law has been inaugurated in Brazil, bringing to its soul and heart the predominance of the principles over the rules as a way to keep the Constitution of 1988 open to a permanent flow of input changes and new social values from society. In so doing this new technique leaves the interpreter the task of interpreting the Constitution

22 DAIBERT, p. 835. Aside, the first political party was founded on 1986, the Brazilian Green Party (Daibert, p. 835).

23 PATRIOTA, Antonio de Aguiar. *An introduction to brazilian environmental law*. 40 Geo. Wash. Int'l. Rev 2008-2009. Disponível em <http://docs.law.gwu.edu/stdg/gwilt/PDFs/40-3/40-3-1-Patriola.pdf>. Acessado em 24 de setembro de 2013.

24 Art 225. All have the right to an environment ecologically balanced, good of common use of the people and essential to a healthy quality of life, being imposed to the public authority and community the duty to defend it and preserve it for the present and future generations.

25 The social order in Brazilian Constitution belongs to Title VIII, embracing articles 193 to 232. The title covers a wide spectrum of issues, including social security, education, science and technology, social communication, environment, family, youth, adolescent and elder, and Indians.

– as well as the law – to build the concrete and real meaning of the norm based on a concrete case, which will be considered valid and adopted by society, if confirmed by the courts of law. Though this technique means that too much freedom is required to choose the grounds and to raise a new truth to be followed and observed by the society, the founders of the new republican State started in 1988 established in the first three articles of the Constitution the values which shall be followed in the process of building of new constitutional reality²⁶.

These values represent the commitment of society to maintain the democratic project with freedom, equality, preservation of the private property and the highest one, the dignity of the human being²⁷. The last one indicates for the State a major turn in the history of Brazilian society, which has been characterized by lacking maturity to live and experience a democratic government and the ideal concept of human rights. So, the dignity of the human being is the starting point to fulfill (represent) the will of the constitution all over its text. It has a vital importance on the chapter of the nature protection, because the main guideline is to preserve nature for the present and the future generations, reflecting the intergenerational equilibrium principle.

The Constitution of 1988 is ‘salted’ with (is plenty of) principles throughout the text, which may be and are often used to counterbalance the constitutional rules as well as to perform as hermeneutical vectors, applied for other principles and the rules of the entire legal system as a whole. The ‘*relato da norma*’²⁸ – i.e., the report of the norm – is wide open in the case of principles and closed on the rules. This is why principles tend to have a longer resilience on the ruling reality, in comparison with rules which tend to be put aside by the flow of time due to social transformations. Principles under such new constitutional engineering shall prevail over rules, keeping the way open to get new inputs of the social reality. The Constitution so conceived is kept up to date with the transformations and changes of society in a constant input-output mechanism. In case of principles clashed in a concrete case level, the interpreter had to choose which principle to apply and the technique is based upon the weight the interpreter gives to the interest to prevail in that specific case, valid only for that case. A similar further case may receive another solution by the use of another principle. This construction leaves to the judges and courts the task of measuring the political backgrounds of the cases with the current legal and

26 See arts 1st, 2nd and 3rd of the Brazilian Constitution.

27 The principle of the dignity of the human being was already in the text of the German Constitution of Weimar – 1919. Its first appearance in a Brazilian constitutional document was only sixty-nine years later. Even now the principle is far from being a concrete experience.

28 See BARROSO, Luís Roberto. *Curso de direito constitucional contemporâneo*. 4ª ed. São Paulo: Saraiva, 2013.

constitutional frames in order to decide properly the case. In a certain way similar to the U.S. legal system, one decision will never be the same as another case though of the facts are alike; in effect, Brazil has been adopting the Anglo-Saxon system of judicial precedents, with previous and similar cases directly influencing the decision on a following one. Such conception has been object of criticism, because it represents a bypass in the traditional conception of Brazilian constitutional decision making system.

4. STATE BUDGETARY LIMITATIONS (WHAT?) AND CONSTITUTIONAL HERMENEUTICAL ISSUES

Brazil as a developing country has always had (or: has) budgetary limitations. There are too many goals to be achieved by public administration and an equal amount of political demands from society to be served by limited funds. The creation of a welfare state in Brazil was with the Constitution of 1934, clearly influenced by the social revolutions occurring in the world at that time, such as the Mexican Constitution of Querétaro of 1917, the Soviet Constitution of November 1918 and the Weimar Constitution of august 1919. All the following Constitutions – 1946, 1967, 1969 and the 1988 – either democratic or not kept the compromise of a welfare state in order to reduce the social and economic inequalities in society, at a time when Brazil was predominantly rural. Nevertheless, the country has never been prepared economical or financially to create, to support and to keep definitively a welfare state structure.

With the Constitution of 1988 Brazil tries again to raise a version of a social State following the idea established in the pioneer Constitution of 1934, deeply influenced by the German Social Democratic Constitution of Weimar, signed on August 11, 1919. Therefore, the articles from 6 to 8 establish a vast panorama of social rights to be accomplished by the State and followed by private businessmen, mainly related to labor rights. The Constitution of 1988 was daring in face of the turning point of world history occurred at that time: the fall of the Berlin wall, the decay of communism and the beginning of the collapse of the welfare state in the European states. The neoliberalism thinking was emerging as an overwhelming idea in the western world, deeply shaking political parties compromised with the idea of the welfare state.

The question of equality guaranteed by a State public policy is problematic in a poor society as the Brazilian is. It becomes worse (dramatic) if seriously examined in a State where the public administration is historically ineffective. The cost of all these social fundamental rights are high for both parts – State and market – and despite being obligatory and considered mandatory rules which can

be object of judicial claims²⁹, a limit to these costs has already been reached. It is shameful to recognize that even the fundamental rights of the first generation such as the right to safeguard life and property are not entirely assured by the State, as it can be seen by the high statistics of violence and menace to both personal integrity and property inside the land.

Constitutional authors have to deal with a new issue then, i.e., how to raise a welfare state in a country with a huge budgetary deficit. Without a solid financial stability and having to deal with a remaining inflationary culture, such drain of resources have to be refrained. State lawyers conscious of this dramatic constitutional frame have found a way to contain the money drain and to respect the constitution as well, and the solution is a principle conceived by the German constitutional doctrine, the principle of the reserve of possibility³⁰.

What has been considered as a solution to the lack of State efficiency and mandatory rules in order to build a satisfactory welfare state, the use of principles as a hermeneutical technique puts the legal academic society on a stalemate (at stake). Courts from different ranks now have a door to open (an escape) whenever they are confronted by citizens claiming their social rights, mainly health and education –, because courts do not feel comfortable to intervene in the State budget or during the fiscal year. Nor they want to be blamed for producing a negative number on the budget due to unforeseen expenses by the politicians or public accountants. Anyway, it should be assumed that human rights have no price, otherwise would have to admit the sad reality that the budget could only confirm those rights if the numbers were positive. Then it seems undeniable that social rights are a matter of principles. It depends on which principles we can counting on. It all depends on the *Weltanschauung* of the public administration, its ideological and political grounds and the degree of commitment from the ruling party. If life depends so much on health and education, and if

29 This is the case of education and health, considered by the Constitution as fundamental rights. The Brazilian judiciary system is constantly asked by citizens through civil actions, and sometimes by civil society associations which present their demands on class actions, to provide the right injunction and to convict and to oblige state organs to supply a certain medicine, or even to accept a pupil in a school. In most of the cases the action is not accepted due to the principle of the reserve of the possibility.

30 See the paper of Rafael Sergio Lima de Oliveira and Mario Lucio Garcez Calil presented in the XVII CONPEDI Congress in Brasília-DF, on 2008, describing the origins of the principle at the German constitutional court – in which is named after *Vorbehalt des Möglichen* - in the 1970s and its field of action on the social rights, as following the famous German case *numerus clausus Entscheidung*. The way this principle was imported to Brazil and how it is being distorted by public administration to avoid the constitutional duties against citizenship clearly portraits the problem of the environmental protection and how to create an aura of credibility concerning environmental law.

they were put aside so easily by such superficial arguments, how could we actually believe that environmental law and protection will deserve a much bigger attention from the State as trees and animals don't have the right to vote.

5. CONCLUSIONS

Nature protection in Brazil does not lack environmental laws. There are plenty of them. The issue lays on the degree of the commitment of the State to enforce environmental laws by providing minimum conditions to competent agencies, especially in terms of human and budgetary resources to uphold the Constitutional provision of environment protection.

It is necessary a more serious attitude towards environmental protection administrative branch, so every citizen and every businessperson knows that breaking the law will no longer be tolerated, specifically those related to nature protection. Fines are a good and reasonable mechanism to give some sort of punishment for polluters, but they should be more effectively enforced and the sum transferred to the State treasury instead of being pardoned, cancelled, or reviewed by higher administrative instances.

Truth to be told, these issues are but the same previously seen on other areas of administrative law, which is the lack of political commitment verified through all levels of the federation to provide enough material and human resources in order to enforce the constitutional goals³¹.

However, considering current standards of general public administration established on Brazilian Federation, one could actually see that central government (Federal Union) still lacks of institutional and political resources to establish comprehensive environmental projects on a national level. In sum, given the lack of material and institutional (but not legal) provisions at federal level, a "bottom-up" approach of environmental supervision has been established so far, since only local authorities (counties or *Municípios*) have both human and budgetary resources available to enforce environmental supervision.

Therefore, it is clear that all kind of civil servers and especially politicians (as law-makers) must urgently be aware of these grave problems related to environmental cause. In fact, it would be truly advisable to create a completely new branch of Brazilian public

31 See CRAWFORD, p. 623, apud McALLISTER: "Environmental agencies tend to be weak both in terms of their resources and their power to coerce compliance". CRAWFORD, p. 623: "By contrast, at the state level, again as in the United States, the resources for environmental enforcement at the agency level vary greatly", reporting an advance in the agenda in Brazil in the 1980s and 1990, but shortages in resources.

administration, directly related to the Environmental protection and enjoying of a higher degree of constitutional accountability in such a way to finally and properly address environmental issues on a national level.

6. REFERENCES

- ANDRADE, Paes de e BONAVIDES, Paulo, *História constitucional do Brasil*. 9ª ed. Rio de Janeiro: OAB editora, 2004.
- ÁVILA, Humberto. *Teoria dos princípios*. 8ª ed. São Paulo: Malheiros. 2008.
- BARROSO, Luís Roberto. *Curso de direito constitucional contemporâneo*. 4ª ed. São Paulo: Saraiva, 2013.
- BRASIL. *Constituição da república federativa do Brasil*, de 05 de outubro de 1988.
- CRAWFORD, Colin. *Defending public prosecutors and defining brazil's environmental "public interest": a review of Lesley Mcallister's making law matter: environmental protection and legal institutions in brazil*. 40 Geo. Wash. Int'l L. Rev. 619 2008-2009. Disponível em <http://docs.law.gwu.edu/stdg/gwlr/pdfs/40-3/40-3-2-crawford.pdf>, acessado em 21 de setembro de 2013.
- DAIBERT, Arlindo. *Historical views on environment and environmental law in Brazil*. In 40 Geo. Wash. Int'l L. Rev. 779 2008-2009. Disponível em <http://www.questia.com/library/1P3-1862224401/historical-views-on-environment-and-environmental>, acessado em 21 de setembro de 2013.
- DA SILVA, José Afonso. *Direito constitucional positivo*. São Paulo: Saraiva, 2009.
- DE OLIVEIRA, Rafael Sergio Lima e CALIL, Mário Lúcio Garcez. *Reserva do possível, natureza jurídica e mínimo essencial: paradigmas para uma definição*. Trabalho publicado nos anais do XVII Congresso nacional do CONPEDI, realizado em Brasília - DF, em novembro de 2008. Disponível em http://www.conpedi.org.br/manuel/arquivos/anais/brasil/11_369.pdf. Acessado em 24 de setembro de 2013.
- DI PIETRO, Maria Sylvia Zanella. *Direito administrativo*. 26ª ed. São Paulo: Atlas, 2013.
- FIORILLO, Celso Antonio Pacheco. *Curso de direito ambiental brasileiro*. São Paulo: Saraiva, 2013.
- GASPARINI, Diogenes. *Direito administrativo*. 17ª ed. São Paulo: Saraiva, 2012.
- HESSE, Konrad. *A força normativa da constituição*. Porto Alegre: Sergio Fabris, 1997.
- LASSALE, Ferdinand. *A essência da constituição*. 9ª ed. São Paulo: Saraiva, 2009.

LAVRATTI, Paula Cerski. *El derecho ambiental como instrumento de gestión del riesgo tecnológico*. Tarragona: Publicaciones URV, 2011. 118p.
McALLISTER, Lesley K. *On environmental enforcement and compliance: a reply to professor crawford's review of making law matter: environmental protection and legal institutions in brazil*. 40 Geo. Wash. Int'l L. Rev. ? 2008-2009. Disponível em <http://docs.law.gwu.edu/stdg/gwlr/PDFs/40-3/40-3-3-Mcallister.pdf>, acessado em 21 de setembro de 2013.

PATRIOTA, Antonio de Aguiar. *An introduction to brazilian environmental law*. 40 Geo. Wash. Int'l. Rev 2008-2009. Disponível em <http://docs.law.gwu.edu/stdg/gwlr/PDFs/40-3/40-3-1-Patriola.pdf>. Acessado em 24 de setembro de 2013.

QUARESMA, Regina; OLIVEIRA, Maria Lúcia de Paula e RICCIO, Farlei. *Neoconstitucionalismo*. Rio de janeiro: Forense, 2009.

SKIDMORE, Thomas. *O Brasil Visto de Fora* .2ª ed. Rio de Janeiro: Paz e Terra, 2001.

SKIDMORE, Thomas. *Brazil: five centuries of change*.

FORCED TAX COLLECTION PROCEEDINGS IN BRAZIL: *AN OVERVIEW OF FEDERAL LAW NO. 6,830*

Bruno Fernandes Dias

Prospective graduand 2014 of International Law at University
of the State of Rio de Janeiro. Public Attorney at the Attorney-
General's Office of the State of Rio de Janeiro. Lawyer.

Abstract: In Brazil, despite there being specific legislation regulating forced tax collection proceedings, these are still largely influenced by case law of national courts. We are now living in the third decade of Federal Law No. 6,830, promulgated in 1980, which aimed to guarantee greater privileges to the treasury in the course of the debt collection saga. However, the many loopholes and lacunae gaping throughout the text have left all stakeholders – government, taxpayers and judges – somewhat exasperated. Part II of this Paper analyzes the main features of forced tax collection proceedings: registration of the tax liability, presumption of liquidity and certainty; definition of “responsible” persons in terms of the law; collateralization and challenges to the debt; and the tax liability vis-à-vis other debts. A brief look is given to other pieces of procedural legislation related to tax disputes, most importantly the suits for a writ of mandamus; actions for restoration of undue payments, and actions for annulment. Finally, summaries of case law of the Superior Court of Justice are considered. These form an essential part of Brazilian sources of case law, most especially in tax proceedings.

Keywords: Forced tax collection - overdue tax liability - Federal Law No. 6,830.

I. INTRODUCTION

The aim of this study is to briefly describe the main mechanism of debt collection Brazilian public entities employ before local courts, in actions filed against indebted persons and companies. On the one hand we find, in Brazil, specific legislation regulating relevant aspects of the judicial proceedings of this kind. On the other hand, developing in thorough detail these juridical norms, national courts have contributed

greatly to the definition of rules which forced tax collections should abide by.

However, the practical reality that surrounds these collections seems to be much richer and more interesting than its legal regulation suggests. Indeed, few things in Brazilian law have so bad a reputation as forced tax collections. From all angles they receive criticisms, feed angers and cause desperation. The Judiciary blames such actions as the main cause of inundation of files on its shelves. The administrative body which controls most of the activities of Brazilian courts – the National Council of Justice¹ – has sought to make feasible some alternative tools of debt collection, aiming to reduce the amount of work courts need to coordinate when handling pending forced tax collections. In this vein, back in 2010, the Council decided as follows in Petition of Provision No. 200910000045376: it considered valid a private protest of certificates of overdue tax liability – locally known as *certidões de dívida ativa*² –, and in doing so established that the debtor could be subjected to indirect means of collection and that he should bear the expenses of said proceeding³ ⁴. Although important, this provision did little in trying to achieve its aim: data from the Council still shows that a total of 29.2 million forced tax collections are currently pending throughout the country. This amount corresponds to an impressive 32% of the total of 92 million cases standing before the Judiciary⁵.

Civil society as well sees itself as a victim to this spate. Many claim that this type of tax collection violates various guarantees the Constitution asserts to Brazilian persons and companies, specially the principle of due process of law and of adversary proceedings. More generally, they complain of the expenses involved in keeping up a

1 Brazil. Constitution (1988). Article 103-B, paragraph 4.

2 Throughout this paper, for didactic purposes, the expression “tax liability” will be used in place of the Portuguese expression “dívida ativa”. It must be noted, however, that Article 2 of Law No. 6,830 stipulates that within the concept of *dívida ativa* one also finds debts which are not properly related to taxes, but instead are derived from other kinds of public law legislations. Except when expressly referred, this distinction is not relevant to the aspects of forced tax collection proceedings this paper aims at describing.

3 DECISÃO do CNJ contribui para a redução do número de execuções fiscais. Website of the National Council of Justice, 13 Dez. 2013. Available at: <<http://www.cnj.jus.br/noticias/cnj/27161-decisao-do-cnj-contribui-para-a-reducao-do-numero-de-execucoes-fiscais>>. Access on: 29 Jun. 2014.

4 Later, in 2012, Federal Law No. 12,767 expressly gave the government the right to use this indirect means of collecting debt, whereby data of debtor is sent to credit protection firms, thus allowing other corporations to assess the debtor’s credit history and refrain from doing business with him.

5 EM pauta a desjudicialização da execução fiscal. Website of the National Council of Justice, 30 Jan. 2014. Available at: <<http://www.cnj.jus.br/noticias/cnj/27472-em-pauta-a-desjudicializacao-da-execucao-fiscal>>. Access on: 29 Jun. 2014.

proper structure to hold such a substantial amount of disputes⁶.

Disputes in regard to federal taxes take up a central position at this stage – in this general category one observes a clear predominance of cases the government files against companies, which are twelve times more frequent than those cases companies file against the government. Data has shown that the legal expenses of pending cases override the costs related to lawyers' fees. Currently, out of those cases Brazilian companies litigate before national courts, tax disputes are the ones which make up the greater financial input; whilst consumer disputes represent a greater number of processes. Companies bear, for instance, the costs involved in posting an undertaking in court to judicially discuss charges made against them by the fiscal administration. Other factors commonly featuring in such cases are the negative economic repercussions which crop up when financial assets are inadvertently frozen (in the form of bank deposits, for instance) at an amount greater than that charged by the government. Even when the charges are considered to lack legal foundation, companies also need to spend money on accountancy services, and must make provisions for possible losses.⁷

The Executive also faces a dilemma. Billions of *reais*⁸ are currently registered as overdue tax liabilities, but the tools to collect them prove to be somewhat artificial or purely inefficient. A study made by the Institute for Research in Applied Economics, in 2011, has shown that every forced tax collection lasts on average eight years and two months. According to this research, the summons of the debtor alone – that is the primary act by which the defendant forms part of the process – takes up to five years. Furthermore, the seizure of any asset takes yet another year. In other terms, it takes up to six years just to locate the assets of the defaulting taxpayer. Against this background, the research has tried to implement some degree of rationalization in the criteria one uses to determine the minimum amount above which it becomes economically recommendable for the govern to try to collect the debt.⁹

6 GASTO de empresas com processos chega a R\$ 110 bi. **Valor Econômico**, São Paulo. 4 Feb. 2014. Available at: <<http://www.valor.com.br/legislacao/3418112/gasto-de-empresas-com-processos-chega-r-110-bi#ixzz34O1tYy8w>>. Access on: 18 Jun. 2014.

7 See: note 6.

8 It is estimated that the federal government has more than R\$ 500 billions *reais* to collect as tax liabilities. See: DÍVIDA ativa da União chega a R\$557,5 bilhões, valor comparável ao PAC 1. **Contas Abertas**. 14 May. 2012. Available at: <<http://www.contasabertas.com.br/website/arquivos/1148>>. Access on: 19 Jun. 2014.

9 The rationale to calculate this amount makes use of a break even analysis. "Taking in consideration the total cost of a tax foreclosure and the probability of successfully collecting the debt, one may state that the break even point – the point in which it becomes economically justifiable to proceed with a tax foreclosure is R\$ 21.731,45 *reais*. That is to say: it is unlikely that the federal government collects more money than it spends in tax foreclosures whose total debt is less than R\$ 21.731,45 *reais*" See: NOTA Técnica. Custo e tempo do processo

In the midst of a significant quantity of cases, one collateral effect is the hindrance in the development of some proceedings, which individually add to very high amounts and which oftentimes originate from solvent companies. The reaction to this sort of inefficiency has so far been feeble. Such a conjuncture has made the Brazilian Central Bank create mechanisms and structures aimed solely and specifically to litigate against companies whose debts totalled to more than seven million *reais*. The origin of the said arrears varies substantially. Perpetrated irregularities in exchange operations, and other forms of operations committed by residents living abroad, but having repercussions in Brazil, could trigger the performance of the Bank and the consequent application of fines. What draws our attention at this point are the particular strategies which have been adopted by the Bank in order to enhance debt collection. Perhaps the main one of those, rather paradoxically, is an *alternative* to the usual forced tax collection, and not an *improvement* of this remedy: the protest of certificates of overdue tax liabilities, which was made viable, without expenses for the Bank, by means of the agreement with the Institute of Studies for the Protest of Titles in Brazil¹⁰.

The contribution of the Legislative Branch, in its turn, seems simply to reaffirm that forced tax collections are too complex to be solved. Currently, parliamentary discussion is ongoing regarding Bill No. 5,090/2009, whose purpose, amongst other things, is to create a scheme of “Administrative Forced tax collection”¹¹. As the new scheme should empower tax authorities to seize debtor’s assets, criticism has been raised regarding the constitutionality of this measure, mostly in the light of the principle that no threat or violation to rights could be excluded from the consideration of the Judiciary¹². Given the fact that no other legislation of relevance seems to be in the making, however, the legal developments which have taken place in this matter, as will be seen throughout this study, almost always emanate from courts.

II. THE BASIC STRUCTURE OF FEDERAL LAW NO. 6,830

The first legal statute to mention forced tax collections in Brazil

de execução fiscal promovido pela Procuradoria-Geral da Fazenda Nacional. Nov. 2011. Available at: <http://www.ipea.gov.br/agencia/images/stories/PDFs/nota_tecnica/111230_notatecnicadiest1.pdf> Access on: 23 Jun. 2014. Freely translated.

10 BC apertará o cerco a grandes devedores. **Valor Econômico**. São Paulo, 27 Apr. 2014. Available at <<http://www.valor.com.br/financas/3507244/bc-apertara-cerco-grandes-devedores#ixzz34NzMYYotQ>>. Access on: 18 Jun. 2014].

11 Brazil. Chamber of Deputies. Bill nº 5080/2009. Available at: <<http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=431260>>. Access on: 1 Jul. 2014.

12 Brazil. Constitution (1988). Article 5, XXXV.

was Law-Decree No. 960, of 17th December 1938, under the auspices of the Constitution of 1934¹³. In 1973, with the issuing of the Code of Civil Procedure of 1973, the norms of procedural law provided by means of Law-Decree No. 960/38 were revoked, following the understanding expressed by the Supreme Federal Court¹⁴. For this reason, forced tax collections were no longer filed under a specific set of rules.

This landscape only came to change with the issuing of Law No. 6,830, in 1980. Recital No. 223 highlighted that the objectives aimed by the model proposed therein consisted in guaranteeing greater privileges to the treasury in seeking satisfaction of its credits. One hoped it would thus facilitate and simplify the collection of tax liabilities¹⁵.

This law is composed of 42 articles. The main issues it concerns are the following: concept of Tax Liability (Article 2); legal provision that the amounts charged are presumably correct (Article 3); list of persons who may be charged by means of forced tax collections (Article 4); formal requirements that the proceedings of forced tax collections should abide by (Article 6)¹⁶; acts and effects derived from the moment the Judiciary processes the case (Article 7)¹⁷; admitted forms of collateralizing the debt so that the debtor may challenge the charges (Article 9); debtor's assets which may be seized (Article 11); proceedings to be followed when the debtor intends to challenge the debt (Articles 16 to 20); rules about the use of seized assets (Articles 21 to 24); legal regime of tax liabilities compared with other sorts of debts a person or a company may have (Article 38); applicable rules when the debtor or his assets are not found (Article 40).

II. 1. The Tax Liability Concept

This is a fundamental notion to this study. The legal definition of Tax Liability represents, to a certain extent, the intermediary point between the activities developed by means of fiscal agents, when

13 NASCIMENTO, Márgara Bezerra. *Execução fiscal: administrativa ou judicial?*. Âmbito Jurídico, May 2013. Available at: http://ambitojuridico.com.br/site/?n_link=revista_artigos_leitura&artigo_id=13327&revista_caderno=2 6. Access on: 29 Jun. 2014.

14 Brazil. Supreme Federal Court. Recurso Extraordinário nº 94.071/SP. Minister Aldir Passarinho, 26/04/1984. DJ 24-08-1984, pp.13479.

15 MARTINS, Vinícius Camargos. A nova execução fiscal. Jus Navigandi, Feb. 2010. Available at: <<http://jus.com.br/artigos/14350/a-nova-execucao-fiscal>>. Access on 29 June. 2014.

16 Procedural aspects and documents which must form part of tax liability foreclosures are enumerated in Article 6 of Law No. 6,830. This provision clarifies the judicial and litigious features of forced tax collections.

17 The logic of the relevant procedural steps is to summon the debtor and then focus on the measures necessary to find his assets. After being notified, he is granted 5 days either to pay the debt or pledge an asset as security. In default of such the debtor's assets may be levied for execution.

these monitor persons and companies and check if all dues were paid according to law; and the activities of those professionals which are also included in the structure of the tax administration, but which, as public lawyers, exercise privately the judicial collection of debts which the taxpayers failed to spontaneously pay off. The purpose of registering a debt as an overdue tax liability is to improve collection, by means of unilaterally creating an enforceable remedy without any kind of written intervention of the debtor.¹⁸

It should be noted that apart from Federal Law No. 6,830/80, rules emanating from other laws also play an important role when it comes to forced tax collection proceedings. For example, the Federal Constitution outlines basic rules in regards to charges which public entities are authorised to pursue, apart from other rules of an authoritative kind which result in the charge of pecuniary values.¹⁹ Thus, Article 153 provides that the federal government may charge, amongst others, tax upon the import of foreign goods and upon income. In turn, Article 155 authorizes States to charge tax upon operations of circulation of goods. Other charges are also regulated by the Constitution. Such is the case of the rule for environmental protection entrenched in Article 225 paragraph 3, for fines charged against persons and companies in violation of environmental rules may be registered as an overdue liability and thus follow a proceeding similar to that of a forced tax collection.

Both the treasury as well as taxpayers are subject to yet another general set of rules aimed at organizing the performance itself of tax authorities at the moment of monitoring persons and companies, and eventually formalizing administrative proceedings of collection. One also has in mind, here, a reality which takes place prior to the moment of registering the debt as an overdue tax liability: in practical terms, what takes place is an administrative act against which the taxpayer may still as yet defend himself and which the tax administration, by means of its bodies and administrative courts, may still come to review.²⁰ Article 142 of the National Tax Code enshrines the basic rule in the matter. It reads that the act of assessment is what gives rise to the proceeding of collecting taxes in regards to which the taxpayer is default. Upon commencement of this proceeding, it often happens that the charges are

18 CARVALHO, Paulo de Barros. *Curso de Direito Tributário*. São Paulo, 20a ed. rev. São Paulo: Saraiva, 2008. Pág. 578.

19 Scholars give prominence to the role of the Constitution in legitimizing legislation passed by the federal government, as well as by the states and the municipalities. The Constitution objectively describes facts which may put by the ordinary legislators (federal, state or municipal) as abstract taxable events. See: CARRAZZA Roque Antônio, *ICMS*, 12th ed. São Paulo: Malheiros, 2007, pp. 34-35.

20 Brazil. National Tax Code. Article 201.

overruled by the upper bodies of the tax administration. It is only upon termination of this proceeding, and when its conclusion has shown that the allegations of the taxpayer shall not be accepted (or when the taxpayer has not even presented any challenge) that the concept of Tax Liability starts to crop up. Article 201 of the National Tax Code refers to these procedural dynamics, which usually encompasses the hearing of appeals by panels composed solely of tax collectors and, at a final level, by panels composed both by tax collectors and private sector-indicated experts, collectively named Council of Taxpayers.

After being registered as an overdue tax liability, tax charges go on to be influenced with a greater visibility by Federal Law 6,830. This law intends to regulate the forms through which the tax administration will attempt to collect its debts, a goal that, in Brazil, requires the intervention of the Judiciary and the technical work of lawyers, both taxpayers' and government's.

Meanwhile we may also see a more general dimension within the concept of tax liability, which is of a budgetary kind. As a whole, debts to be collected aggregate substantial amounts which go into the calculation of what the government is supposed to receive and invest²¹. Hence, Article 2 of Law 6,830 makes express reference to Federal Law No. 4,320 of 1964, the national statute for public finances. In Article 39 paragraph 2 of Federal Law No. 4,320, a distinction is made between Tax Liability (*Dívida Ativa Tributária*) and Non-Tax Liability (*Dívida Ativa Não Tributária*), both of which aim to take in not only all those situations which concern pecuniary obligations which affect the national budget, but also all those aspects which alter the individual amount of each debt in a concrete manner, such as the inflation adjustment interests, fines, etc.²²

II. 2. Registration of Tax Liability

The formal act of registering tax liabilities is intended to be subjected to an administrative legality control (Article 2, paragraph 3 of Federal Law No 6,830). There will hardly be any uniformity in the rules or parameters utilized in such activity by the innumerable administrative sectors of the country, in the various federal levels. Generally, this task is run by automated computer programs, developed and sold by specialised public or private companies, and designed to ensure acceptable standards of information. The depth of the juridical and technical analysis may change, on another hand, in accordance with

21 Because it applies to the federal, state and municipal governments (article 2), Law No. 6,830 is formally federal, but has a national nature. Therefore, in all of these three government levels, the basic rules for tax foreclosures are the same.

22 Brazil. Federal Law No. 6,830. Article 2, paragraph 2.

the personal inclinations of the responsible agents; with the amounts in question; and with the complexity which oftentimes characterize the necessary stages of administrative discussion between the assessment of the debt and the administrative final decision, usually separated by an interval of some years.

II. 3. The presumption of certainty and liquidity of Tax Liability

This feature of debts registered as overdue tax liabilities originates from various premises of the legal regime of public law which regulates tax administration, and which in Brazil is characterised by a strong predominance of the public interest over the private sphere. Article 3, single paragraph, of Federal Law No. 6,830, establishes a relative nature to the presumption of certainty (that is, that the charges are in accordance with the relevant rules), and liquidity, (that is, that the value of the debt, such as that informed by the administrative authority, is correct)²³. Considering that such presumption is relative, it “may be refuted by an unequivocal proof”. The scope of this principle, nevertheless, does not limit itself to the need of the unequivocal proof, and argumentatively legitimises the need of collateralizing the debt so that the debtor may challenge the charges (Article 9).

II. 4. Debtors

Article 4 of Federal Law No. 6,830 lists the persons against whom forced tax collections may be filed. These are: debtor; successors; surety; the estate; bankruptcy estate; person responsible, in terms of law, for debts, tax-related or otherwise, of natural or juridical persons of private law; any sort of successors.

Indeed, it is fairly common that forced tax collections be filed against third parties, other than the original debtor. Under the general category of persons the law considers to be “responsible”, one often finds members of companies having chronicle financial problems (Article 135, III, of the National Tax Code). This Article lays out a rule stating that directors, managers or legal representatives of companies may become personally liable for debts resulting from acts of abuse of power, acts in violation of law, or in violation of the acts of organization or acts of incorporation.

Many controversies have arisen in this respect and one finds in case law the circumstances in which the lifting of the corporate veil is considered to be acceptable – to the detriment, some would argue, of

23 CAIS, Cleide Previtalli. *O Processo Tributário*. 5th ed. rev. e ampl. São Paulo: Ed. Revista dos Tribunais, 2007, pp. 600.

entrepreneurship in the country²⁴. In this regard, as a matter of fact, private law, contract-related, disputes prove to be treated differently from public law, tax-related cases. The Superior Court of Justice has ruled that when it concerns private interests only, lifting the corporate veil requires proof that the member purposely exhausted the company's estate so as to circumvent the company's debts. On the other hand, in tax cases, provided that the requisites to Article 135 of the National Tax Code are satisfied, disregarding the corporate entity is possible. Either way, merely failing to settle a debt does not suffice for the corporate veil to be lifted.

II. 5. Collateralizing and challenging the debt

Generally, in the most relevant cases, the debtor collateralizes and challenges the debt. Of course, this turns the situation into one which resembles a normal action suit where an administrative act is brought before the Judiciary for review. Collateralization rules are provided by Article 9 of Federal Law No. 6,830, which brings forth some possibilities to the defendant, such as: placing a deposit in cash to a bank account managed by the court; offering a bank surety; even yet, offering property to be levied upon, such as bonds; precious stones and metals; real estate; ships and aircrafts; vehicles, movables and livestock; and rights and actions (Article 11).

Controversies over collateralization may arise, for instance, if taxpayers wish to secure the debt with a particular object, and the public attorney, taking into consideration the existence of a more liquid or valuable object, purports that the best option should be that other one. It often happens that the parties simply cannot come to an understanding regarding the value of the object in question. Trivialities such as the charging of interest, or the period of validity, also lead to bank sureties issued by prominent institutions end up being rejected.

Throughout the forced tax collection proceeding, whilst parties might still be discussing collateral issues, the judge may rule on a matter and thus give rise to appeals which may be heard on different panels and several courts. There also exists a provision for the debtor to pay only a part of the debt and collateralize for the remainder (Article 9, paragraph 6).

Discussions are often raised on issues regarding collateralization *vis-à-vis* the need of certificates of suspended tax liabilities. Such a certificate mostly affects the activities of companies that have public contracts with the government, and/or lines of credit with bank

24 STJ protege bem de sócio de empresa irregular. **Valor Econômico**, São Paulo. 21 Mar. 2014. Available at: <<http://www.valor.com.br/legislacao/3488368/stj-protege-bem-de-socio-de-empresa-irregular#ixzz34Nzh MmnE>>. Accessed on: 19 Jun. 2014.

institutions interested in verifying the financial situation of its borrowers. Should this certificate be required as proof of good standing and tax clearance, the company's interest in collateralizing often supersedes its interest in challenging the merits of the charges. This may bring about the situation where the collateral offered is fit and proper for the acquisition of the certificate, but not sufficient to cause the cessation of the foreclosure acts. The principal provisions which consider this type of document are Article 205 and 206 of the National Tax Code: the first regulating the so-called "negative certificates", through which one is informed that the taxpayer has no debt; the second, regulating the situations in which the taxpayer, despite having debts, adopted actions so as to collateralize its off-payment.

In extreme cases, proof of good standing and tax clearance may be required not only for secondary aspects of the activities of the company, but also in order to obtain a permit to do business. This is a frequent scenario in the cigarette industry, by means of Law Decree No. 1,593/1977. Article 1, paragraph 2, of the Decree provides that the concession of a special permit for the manufacturing of cigarettes depends on tax compliance. However, this rule is not only applicable to the companies themselves, but has a wider scope. It aims at avoiding that those involved in the cigarette industry abuse the corporate veil to circumvent tax laws. Thus, this Law Decree also requires that tax payment compliance is proven by "members (natural persons), directors, managers, administrators and proxies", and also "corporations controlling the [company], as well as their respective members, directors, managers, administrators and proxies".

In terms of Article 2(II) of the Law-Decree there also operates a rigid system of cancellation of the special permit. In such a case, the administrative sanction is exercised prior to any forced tax collection, or even any such possible circumstance where the issue of the company's standing and tax clearance is considered under the auspices of Articles 205 and 206 of the National Tax Code. In accordance with this provision, the special permit could be cancelled at any time by the conceding authority, if, following its concession, there exists a failure to discharge a debt or actually to comply with any ancillary tax obligation.²⁵

Where the recovery of a debt should reach the stage of a forced tax collection, nevertheless, the debtor could still opt to present his defence on the merit on issue. For this reason, the law establishes a 30-day term spanning from the moment in which an undertaking

²⁵ Case-law emanating from the Supreme Federal Court has been favorable to the government in cases where the constitutionality of Law-Decree No. 1,593 has been challenged. See Supreme Federal Court. *Recurso Extraordinário nº 550769*. Minister JOAQUIM BARBOSA. DJe 3 Apr. 2014. See also: Supreme Federal Court. *Ação Direta de Inconstitucionalidade nº 3.952*, still pending of a final judgement.

is posted (Article 16). The scope of such challenge is wide, but not unrestrained, since no eventual compensation²⁶ or counterclaim²⁷ could be examined (Article 16, paragraph 3). All matters that are relevant to the defendant's arguments could come to be debated in this action, including allegations which might have already been raised before the administrative bodies. Actually, the structure of public law unfolds a gulf in the type of allegations debtors make in judicial and administrative courts. Traditionally, the latter do not recognise that the law, which served as a basis for action made by the fiscal agent, may be declared unconstitutional.

Arguments that are predominantly legal in nature, as opposed to simple factual statements, might be downright endless. Apart from those cases where the legal issue is well-defined, but in the case at hand has been wrongly applied by the tax authority, or misunderstood by the taxpayer, there exist other cases where there simply is no consensus regarding the meaning of the law. From a federal viewpoint, some controversies ongoing in Brazil are: determination of a rule regarding the validity of increase of rate of import²⁸ and export²⁹ tax; possibility of imposing taxes upon profits made abroad by corporations controlled by Brazilian companies³⁰; possibility of equating a product imported from a country signatory to the Mercosul to a national product, in the tax regime regarding industrialized products³¹; possibility of charging taxes upon financial operations when applicable, in theory, a commercial protection treaty between countries³²; necessity, in order to obtain exemption of the tax upon rural property, for annotations in the registry of deeds of the areas of the estate in which use is restricted by environmental reasons³³.

II. 6. Tax liability vis-à-vis other debts

The general precepts regarding the relation of tax liabilities and

26 Brazil. National Tax Code. Article 170.

27 Brazil. Code of Civil Procedure. Article 315.

28 Brazil. Superior Court of Justice. Recurso Especial nº 191.426/CE, Minister HUMBERTO GOMES DE BARROS, DJ 27 Sep. 1999, p. 48.

29 Brazil. Superior Court of Justice Recurso Especial nº 964151/PR, Minister JOSÉ DELGADO, DJe 21 May. 2008.

30 Brazil. Superior Court of Justice Recurso Especial nº 1325709/RJ, Minister NAPOLEÃO NUNES MAIA FILHO, DJe 20 May. 2014.

31 Brazil. Superior Court of Justice Recurso Especial nº 1205393/RJ, Minister MAURO CAMPBELL MARQUES, DJe 16 Apr. 2013.

32 Brazil. Superior Court of Justice Recurso Especial nº 228.324/RS, Minister JOÃO OTÁVIO DE NORONHA, DJ 01 Jul. 2005, p. 458.

33 Brazil. Superior Court of Justice EDcl no AgRg no Recurso Especial nº 1315220/MG, Minister ARNALDO ESTEVES LIMA, DJe 08 May. 2014.

other liabilities of the debtor are laid down in Article 29 of Federal Law No. 6,830. This provision determines that forced tax collections are not hindered by bankruptcy proceedings. This means that the forced tax collection may be decided, and may proceed as usual, even when there coexist other recovery proceedings against the insolvent debtor and when his estate is already known to be insufficient to satisfy all due debts. Article 29 certainly is not the only rule to consider this issue, and at some degrees, this rule is far from being absolute. However, as a rule, the right of public entities to collect debts may only be limited when another public entity also has debts to recover from that person or company. Sharing schemes will vary according to the federal levels involved, and, rather importantly, Article 31 provides that in insolvency proceedings the disposal of the debtor's assets may only be allowed if there is proof of tax clearance or with the consent of the treasury.

In Article 186 of the National Tax Code one notes important details to this structure. Amended in 2005, Article 186 establishes that tax liabilities take priority over any other type of debt, regardless of its nature or of the time it was assessed, except for the labor related debts. Specifically in the case of insolvency, the legislator chose to place the tax credits in the third position of preference. They follow those originated from labor legislation, with a limitation to hundred-and-fifty minimum wages per creditor and those derived from work accidents. Secondly one finds debts with security interest, the limit being that of the asset (Article 83, I and II of Federal Law No. 11,101 of 2005).

II.7. Other procedural legislation related to tax disputes

The scope of application of Federal Law 6,830, however wide, is not exhaustive in regards to the procedural forms in which tax disputes arise and are settled in Brazil. Both taxpayers and the government may make use of remedies provided by other sorts of legislation. From the government side, Federal Law No. 8,397, of 1992, provides for provisional remedies to be filed as a way of anticipating and speeding up stages of a regular forced tax collection. The law is aimed at debtors fitting the provision of Article 2, that is to say, debtors who right from the start will be perceived as not being capable of easily satisfying their debt. Article 2 brings forth examples such as that of a debtor who "contracts or attempts to contract debts which endanger the liquidity of his estate"; or which "transfers or attempts to transfer his estate to third persons". The provisional measures envisioned by Federal Law No. 8,397 ensure the inalienability of the debtor's assets, limited to the amount of the debt.

Article 38 of Federal Law No. 6,830, on the other hand, also mentions other remedies taxpayers may draw on when challenging tax

charges: suit for a writ of mandamus; restoration of undue payments; and action for annulment.

By means of Article 5, LXIX, of the Federal Constitution, and Federal Law No. 12,106, of 2009, suits for a writ of mandamus are highly used against illegalities or abuses carried out (or about to be carried) by public authorities³⁴. One of its advantages is the rapidity in which it is heard in courts. Apart from this law referring to tax issues only to create a restriction – the impossibility of tax set-offs be granted by provisional remedies, as laid out in Article 7, paragraph 2 –, suits for a writ of mandamus are routinely used by taxpayer's lawyers to annul (or avoid the practice of) administrative charges. The basic premise here is that the documentary evidence be unequivocal and thus be filed since the beginning, an entirely different scheme than that which rules ordinary suits. Several different subjects are brought to courts by means of these suits, for example: possibility of Brazilian companies sending money abroad, without having to withhold income tax, in operations related to payments made to commercial partners that had allowed the use of telephone lines outside the national territory, having in view the discrepancy between internal legislation and the International Telecommunication Union³⁵; possibility of clearing goods through customs without paying tax on the circulation of goods, considering the debate over the levy of the tax on medical devices imported under a lease with option to purchase³⁶; possibility of importing cod without having to pay tax on the circulation of goods, in view of the exemption granted in the ambit of the GATT³⁷; the legality of the special tax regime of drawback³⁸.

An action for restoration of undue payments, in turn, takes place when taxpayers wish to challenge the charges after having paid what the tax authorities deemed to be due. In Article 165 of National Tax Code we find the basic circumstances which justify this type of action. It is worth pointing out, for instance: an error in identifying the debtor; in determining the applicable rate; in calculating the sum of the debt; or in elaborating or checking any document relative to the payment; reform, annulment, revocation or termination of the decision in which

34 MEIRELLES, Hely Lopes. *Mandado de Segurança*. 30a ed. São Paulo: Malheiros, 2007. Págs. 25-26.

35 Brazil. Superior Court of Justice AgRg no Recurso Especial nº 1104543/RJ, Minister BENEDITO GONÇALVES, PRIMEIRA TURMA, julgado em 04/05/2010, DJe 10 May. 2010.

36 Brazil. Superior Court of Justice AgRg no Recurso Especial nº 1205993/SP, Minister BENEDITO GONÇALVES, PRIMEIRA TURMA, julgado em 26/10/2010, DJe 05 Nov. 2010.

37 Brazil. Superior Court of Justice AgRg no Ag no Recurso Especial nº 551.068/RJ, Minister HUMBERTO MARTINS, SEGUNDA TURMA, julgado em 23/09/2008, DJe 23 Oct. 2008.

38 Brazil. Superior Court of Justice AgRg no Mandado de Segurança nº 11.084/DF, Minister JOSÉ DELGADO, PRIMEIRA SEÇÃO, julgado em 26/04/2006, DJ 22 May. 2006, p. 137

the charges were considered to be correct.

Taxpayers may also make use of an action for annulment. Its scope – that of attempting to somehow avoid tax charges – is essentially the same as all other remedies. Likewise, allegations taxpayers may present by means of an action for annulment resemble those taxpayers would use in the abovementioned remedies. Nonetheless, amongst advantages and disadvantages, actions for annulment do not require that the taxpayer's claim be based on a liquid and certain right, as happens with a suit for the writ of mandamus. Indeed, it is quite common that the merits of the taxpayer's challenge will only be aptly demonstrated following a phase of auditing of documents or of the company's operations. Another inducement for the use of this remedy is that it does not require that the debtor should post an undertaking before he challenges the charges. It is a disadvantage, however, that by simply filing this remedy the debtor should fail to put a stop to any forced tax collection that might have been filed against him.

Finally, one should refer to a remedy commonly named by Brazilian practitioners as “*exceção de pré-executividade*”. This remedy originated from scholarly writings and case-law³⁹ rather than from a statutory basis. It was conceived, both in tax-related cases as well as in private law-related disputes, to allow debtors to promptly present claims relating to a general sense of public order. In practical terms, at any given point of a forced tax collection a debtor may use this remedy so as to seek the annulment of the tax liability, provided that he produces all documentary evidence to support his allegations. Indeed, no further fact-finding would be permitted, otherwise the action would be dismissed by the court. However, since debtors are not required to post an undertaking when using this remedy, the scope of the annulment is rather narrow and might not refer to general challenges against the charges. An account of issues which might come to the fore in a *exceção de pré-executividade* would include, for instance: absolute lack of jurisdiction; limitation to the collection of the debt; irregularity in the service of summons; previous payment or offset of the debt.⁴⁰

III. SUMMARIES OF CASE LAW OF THE SUPERIOR COURT OF JUSTICE

“Entries in the annals of dominating jurisprudence”⁴¹ of the

39 CAIS, Cleide Previtalli. *O Processo Tributário*. 5th ed. rev. e ampl. São Paulo: Ed. Revista dos Tribunais, 2007, pp. 694.

40 CAIS, Cleide Previtalli. *O Processo Tributário*. 5th ed. rev. e ampl. São Paulo: Ed. Revista dos Tribunais, 2007, pp. 696-703.

41 Being a literal translation of “*verbete da súmula de jurisprudência dominante*”, this expression may be aptly replaced by “summary of case law”. One should note that that is not a reference

Superior Court of Justice, hereinafter referred to as “summaries of case law”, represent the understanding of the Court regarding various topics of federal legislation. According to the Constitution, this Court has jurisdiction to hear appeals originating from second instance courts throughout the country; and in this capacity it plays a harmonizing role in the application of federal legislation (Article 105, III). In most cases, this affects local courts in an advisory, rather than a mandatory manner. Thus, local judges may decide cases – and they indeed often end up doing so – contrary to what was determined in a summary of case law. However, procedural legislation contains provisions which make the decisions based upon summaries of case law extremely difficult to be reformed⁴². Here one takes a look at some of these precedents, a result of more than 20 years of existence of the Court.

Summary of case law 58, of 1992, establishes that “once a forced tax collection is filed, the subsequent change of domicile of the debtor does not deprive the court of its jurisdiction”. Such reasoning, which was not directly expressed in legislation, reflects an already mentioned practical aspect of forced tax collections: the difficulty to perform in a timely manner clerical tasks necessary to summon the debtor and to seize his assets. As it usually takes a significant span of time, the Court decided that the delay in the performance of acts of this nature, even if the debtor would have changed his domicile, would not be relevant to jurisdiction.

Summary of case law 112 rules over the suspension of the enforceability of tax liabilities, much to the complement of Article 151 of the National Tax Code. Article 151, II, reads that a deposit of the total amount of the debt should have the effect of suspending its enforceability, but the rule is not clear as to whether other forms of payment (that is to say, not in cash) have the same effect, neither as to whether the deposit of a partial amount could partially suspend the enforceability of the liability. In this vein, precedent 112 states that “the deposit could only suspend the enforceability of a tax liability if it covers the charges entirely and if it is done in cash”.

Summary of case law 121 determines that “in forced tax collections, the debtor shall be notified, personally, of the day and time of the judicial sale”. This rule lays down, therefore, the procedure to be observed in judicial sales, when the activities carried out by the government’s lawyer result in asset freezing. The Court seems to note in such a situation the gravity which could justify an exceptional act in the course of any forced tax collection. Normally, only lawyers in a judicial

to a single case heard by the court, but rather a general guideline drawn by the court itself from its understanding expressed in different individual cases under similar circumstances. In Brazil, usually one speaks only of “súmula” followed by a number to refer to said guidelines.

42 Brazil. Code of Civil Procedure. Articles 517, paragraph 1, 543-C and 557

procedure would need to be notified regarding the acts produced and to be produced within the process (Articles 39, I and 234 of the Code of Procedure). Meanwhile, here the Court said one is to give notice also to the interested party.

Concerns with judicial sales also led the Court to summary of case law 128, in 1995. It is laid down that “in forced tax collections there shall be a second attempt of judicial sale, if during the first attempt there was no bidding higher than that formerly appraised”. Indirectly, the precedent makes reference to the proceeding of appraisal of the asset to be sold (Article 13 of Federal Law No. 6,830), which is carried out by a public agent subordinated to the structure of the Judiciary and which serves as parameters to repayment of the debt.

In 1996, by way of summary of case law 153, the Court decided upon an important issue concerning the dynamics of forced tax collections and of motions to stay execution. Article 16 of Federal Law No. 6,830, the main rule on the matter, does not provide for the necessity of the government paying lawyer’s fee if it abandons the lawsuit against the debtor after a motion to stay had been already filed. In filling that gap, summary of case law 153 also comes to the complement of Article 26 of Federal Law No. 6,830, which states that in regular forced tax collections – not those in which there has been a motion to stay execution, governed by summary of case law 153 –, if the certificate of an overdue tax liability is cancelled, the case is to be dismissed and the parties are to bear no costs of loss of suit.

The Court decided, in 1997, that “the intervention of the Prosecution Office is unnecessary in forced tax collections”. The Brazilian Constitution states that the Prosecution Office carries out an essential function in the justice system, as it is responsible for defending the legal order, the democratic regime and of the social and individual unwaivable rights (article 127). The court clarified that for the regular course of forced tax collections it is not necessary that members of the Prosecution Office be notified. Hence, these officials do not have to take a stand regarding tax charges, nor regarding procedural acts carried through in order to locate the debtor and his assets.

Summary of case law 409 brings about one specific feature of two more general concepts: peremption and limitation. One thinks of peremption when considering the time elapsed between the time the taxable event occurred and the time of assessment. Limitation, on the other hand, considers the time elapsed between the time the administrative procedure of assessment is finished and the time the forced tax collection is filed. Articles 173 and 174 of the National Tax Code provide, respectively, a period of five years. What summary of case law 409 is concerned about is the way a debate over the issue of limitation may come to the fore in forced tax collections. It reads that

a judge may decide on the matter *ex officio* (Article 219, paragraph 5, of the Code of Civil Procedure), as opposed to the view that the debtor should expressly raise it in his challenge.

More recently, in 2010, summary of case law 435 introduced a rule of great significance to companies and persons in management positions. To fully understand that, some general observations on Brazilian tax law might come in handy here. Companies should abide by a set of ancillary obligations established by tax authorities in order to facilitate monitoring and collection of taxes (Article 113, paragraph 2, of the National Tax Code). Summary of case law 435 puts into force precisely a consequence for defaulting one of these ancillary obligations, in regard to which there was no consensus in case law: the obligation of informing tax authorities of any change in tax domicile. Concisely, if the corporation fails to comply with this obligation, its managers may become liable for tax-related debts. Such a scenario often happens in forced tax collections when a process server attempts to summon the company in the address it had previously informed to tax authorities, but which it no longer occupies. Summary of case law 435 considers this to be an illegal dissolution and consequently a violation of law, as per Article 135, III, of the National Tax Code.

IV. CONCLUSION

This study attempted to describe the main features of forced tax collections in Brazil. After thirty-four years in force, however, there seems to be no indication that Federal Law No. 6,830 might soon be replaced. While one waits for a sudden congressional move on Bill No. 5,090/2009, forced tax collections will still be abundant and exclusively a matter handled by courts. It comes as no surprise, though, that this remedy hardly delivers what it promises to the government, whilst it still unnerves taxpayers and judges. Sometimes it takes years just to get passed over the administrative discussion of the assessment made by the monitoring tax authorities. Having to wait for another long period just to summon the debtor – and hopefully find his assets – should be not only frustrating, but also budget threatening. For those taxpayers intending to actually challenge what they consider to be in excess of the law, Federal Law No. 6,830 offers little flexibility in terms of collateralization and burden of proof rules. In the vortex of such a battlefield, courts find themselves having to deal with quite a number of cases, and a gaping legislation too. When thinking about forced tax collections in Brazil, indeed, one is reminded of an Oscar Wilde character, who had no enemies, but was intensely disliked by his friends.

REFERENCES

BOOKS:

CAIS, Cleide Previtalli. *O Processo Tributário*. 5th ed. rev. e ampl. São Paulo: Ed. Revista dos Tribunais, 2007.

CARRAZZA, Roque Antônio, ICMS, 12th ed. São Paulo: Malheiros, 2007

CARVALHO, Paulo de Barros. *Curso de Direito Tributário*. São Paulo, 20a ed. rev. São Paulo: Saraiva, 2008.

MEIRELLES, Hely Lopes. *Mandado de Segurança*. 30a ed. São Paulo: Malheiros, 2007.

CASE-LAW:

Ação Direta de Inconstitucionalidade nº 3.952.

AgRg no Ag 551.068/RJ, Rel. Ministro HUMBERTO MARTINS, SEGUNDA TURMA, julgado em 23/09/2008, DJe 23/10/2008

AgRg no MS 11.084/DF, Rel. Ministro JOSÉ DELGADO, PRIMEIRA SEÇÃO, julgado em 26/04/2006, DJ 22/05/2006.

AgRg no REsp 1104543/RJ, Rel. Ministro BENEDITO GONÇALVES, PRIMEIRA TURMA, julgado em 04/05/2010, DJe 10/05/2010

AgRg no REsp 1205993/SP, Rel. Ministro BENEDITO GONÇALVES, PRIMEIRA TURMA, julgado em 26/10/2010, DJe 05/11/2010

EDcl no AgRg no REsp 1315220/MG, Rel. Ministro ARNALDO ESTEVES LIMA, PRIMEIRA TURMA, julgado em 24/04/2014, DJe 08/05/2014.

REsp 1205393/RJ, Rel. Ministro MAURO CAMPBELL MARQUES, SEGUNDA TURMA, julgado em 09/04/2013, DJe 16/04/2013.

REsp 1325709/RJ, Rel. Ministro NAPOLEÃO NUNES MAIA FILHO, PRIMEIRA TURMA, julgado em 24/04/2014, DJe 20/05/2014.

REsp 191.426/CE, Rel. Ministro HUMBERTO GOMES DE BARROS, PRIMEIRA TURMA, julgado em 19/08/1999, DJ 27/09/1999.

REsp 228.324/RS, Rel. Ministro JOÃO OTÁVIO DE NORONHA, SEGUNDA TURMA, julgado em 12/05/2005, DJ 01/07/2005, p. 458.

REsp 964151/PR, Rel. Ministro JOSÉ DELGADO, PRIMEIRA TURMA, julgado em 22/04/2008, DJe 21/05/2008).

LEGISLATION:

Code of Civil Procedure, 1973.

Constitution of the Federative Republic of Brazil, Constitutional text of 5 October 1988.

Federal Law No. 6,830.
Federal Law No. 12,767.
National Tax Code, 1966.

OFFICIAL DOCUMENTS:

IPEA, *Nota Técnica. Custo e tempo do processo de execução fiscal promovido pela Procuradoria-Geral da Fazenda Nacional*. (http://www.ipea.gov.br/agencia/images/stories/PDFs/nota_tecnica/111230_notatecnicadiest1.pdf)

Martins, Vinícius. *A nova execução fiscal*, (<http://jus.com.br/artigos/14350/a-nova-execucao-fiscal>)

Nascimento, Márgara. *Execução fiscal: administrativa ou judicial?*, (http://ambitojuridico.com.br/site/?n_link=revista_artigos_leitura&artigo_id=13327&revista_caderno=26)

WEBSITES:

Câmara dos Deputados www.camara.gov.br
Contas Abertas www.contasabertas.com.br
Portal CNJ www.cnj.jus.br
Supremo Tribunal Federal www.stf.jus.br.
Valor Econômico www.valor.com.br

MORAL, POLITICS AND METHOD: *THE INFLUENCE OF RONALD DWORKIN'S PHILOSOPHY ON THE BRAZILIAN SUPREME COURT*

Luciano Del Monaco

Pontifical Catholic University of São Paulo - PUC/SP.

Contact: lucianomonaco@gmail.com.

Nuria López

Pontifical Catholic University of São Paulo - PUC/SP.

Contact: nuria.lcs@gmail.com

Abstract: This article analyses the use of Ronald Dworkin's philosophy by the Brazilian Supreme Court. After the Constitution of 1988, the Supreme Court gained a new and broader role in Brazilian political scene. At this time, the work of Ronald Dworkin (and its Brazilian editions) became popular and served as justification for four of the most important cases on the Supreme Court: the fidelity of Congressist's members on their Political Party; the permission of embryonic stem cells research; the unconstitutionality of press regulation; and the homosexual civil union. Dworkin's philosophy is a part of the changing-role of the Supreme Court in Brazil. This article offers a demonstration of the use of this philosopher in this in-progress process.

Keywords: Ronald Dworkin - Brazilian Supreme Court - Legal Interpretation.

BRIEFLY INTRODUCTION ABOUT BRAZILIAN SUPREME COURT'S ROLE AND DWORKIN'S WORK INFLUENCE IN IT

This paper will study how the work of the late Ronald Dworkin is being used by the Supreme Court of Brazil, its impact on all the cases that it was applied and possible prognosis regarding future developments. There are just four cases using Dworkin's work in Brazilian Supreme

Court: the Case of Congressist's Fidelity on their Political Party¹; Case of Constitutionality of Biosecurity Law/Permission of embryonic stem cells research²; Case of Unconstitutionality of Press Regulation³; and the Case of Homosexual Civil Union⁴.

It is also needed to advise before-hand that we will also provide explanation on the political and judiciary system when needed in order to clarify how and why the Brazilians Justices turned their attention to Dworkin. A very interesting idiosyncrasy of the Supreme Court of Brazil is that, despite ruling an incredible number of cases every year (a total amount of 90.058 decisions issued in 2012⁵), Dworkin was quoted only in a handful number of cases (seven in total, three of them regarding the Case of Congressist's). However, all of them can be considered hard cases⁶, and while small in numbers, they have serious proportions, both on political and juridical aspects. The stated above is, of course, relevant - but is not enough to explain the whole picture.

The following statement is somewhat trivial (in the American judicial tradition, at least), that the Supreme Court is a third political arena⁷. Looking at the matter by a historic point of view the political use of the judiciary lies at the roots of the theory of judicial review.

1 Mandado de Segurança nº26602/DF, Partido Popular Socialista – PPS x Presidente da Câmara dos Deputados, Relator Ministro Eros Grau; Mandado de Segurança nº 26603/DF, Partido da Social Democracia Brasileira – PSDB x Presidente da Câmara dos Deputados, Relator Ministro Celso de Mello, and Mandado de Segurança nº 26604/DF, Partido Democratas – DEM x Presidente da Câmara dos Deputados, Relatora Ministra Carmen Lúcia, all judged on 07/03/2007. Full Sentences respectively available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=555539>; <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=570121>; <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=552057>.

2 Ação Direta de Inconstitucionalidade nº 3510, Procurador Geral da República x Presidente da República, Relator Ministro Ayres Britto, judged on 05/29/2008. Full Sentence available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=611723>

3 ADPF nº130, Partido Democrático Trabalhista – PDT x Presidente da República e Congresso Nacional, Relator Ministro Ayres Britto, judged on 04/30/2009. Full Sentence available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=605411>

4 Ação de Descumprimento de Preceito Fundamental nº 132, Governador do Estado do Rio de Janeiro, Relator Ministro Ayres Britto and Ação Direta de Inconstitucionalidade nº 4277, Procuradora Geral da República, Relator Ministro Ayres Britto, all judged on 04/04/2011. Full Sentences respectively available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628633>; <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628635>.

5 Information from the website of the Supreme Court, link: <http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=decisoesgeral>

6 Most of these 90.058 cases are very straight-forward, workaday decisions, they are ruled by Supreme Court due to the characteristics of the Brazilian appeal system.

7 Considering that both Brazil and United States of America have a lower house and a higher house (first and second arenas).

Despite the historic explanation, the fact is that the Supreme Court in Brazil (which was created in 1891) never had political influence nor held a public discussion - during most of its life the Supreme Court was a methodical, technical and powerless institution⁸. The Court was so much a non-factor that Justice Aliomar Baleeiro published in 1968 a book entitled "The Supreme Court, another unknown stranger"⁹ (free translation). Expressions like "the political agenda of the Court" were simply non-existent in Brazil at all.

The turning point was the Constitution of 1988 (promulgated after twenty-four years of a military dictatorship) and the return to a democratic system of government and a relative well balanced power distribution between the institutions. Hand-to-hand with this frame was the Constitution itself, a very prolific text (a total of 347 articles¹⁰) filled with an incredible range of rights. After a dictatorship, a democracy is put in place and the new Constitution means for the Supreme Court to implement these rights. That was a fertile compound to develop a political agenda.

An institutional change was triggered by the Constitution, and this kind of evolution takes some time, the Court needed to renew itself and its composition, bringing to the hall a new generation of Justices. We could pinpoint the end of the transition at the year of 2003, when Justice Moreira Alves retired after twenty eight years of service, he was well known by his technical and conservative attitude, being averse to an interpretation of the Constitution which strayed from the legal aspects and delved into the political field.

In short, after this whole process the Court found itself with enough freedom to act, means to act, finally a place (although small in the beginning) in the public opinion¹¹ - and, the most important, a mission – "*to protect and to abide the Constitution*"¹². Needless to say, the Brazilian Justices took to themselves the task of shaping the Constitution in a manner consistent with their political, ideological and juridical ways of thought.

A remarkable 'discovery' of this paper revolves around the cases where the work of Ronald Dworkin was quoted. We perceived that

8 We should not simply blame the Court, it is need to highlight that during the whole twentieth century the Brazilian political frame was filled with dictatorships and some brief periods of democracy between them.

9 Original title in Portuguese: "O Supremo Tribunal Federal, esse outro desconhecido".

10 There are very important matters in the Constitution, of course, but there also some silly ones, like the article 242, §2 "The Pedro II School, localized in the city of Rio de Janeiro, will still be kept in the union possession" (the Union does not have any other schools) [free translation].

11 Since the passing of the Law nº 10.461/2002 all the hearings of the Supreme Court were televised live (after this law other higher courts in Brazil started their own television feed).

12 Reference in Brazilian Constitution: article 102, *caput*.

more than being hard cases¹³ - they were cases which are to be solved in the Legislative, by a public and democratic discussion. However, they were not discussed there and remained unsolved for a long period of time, 'forgotten' both by the Lower and Higher Chambers. Or there were laws that found strong opposition in the Legislative and needed to be stamped by the Court. In one way or another, when the Justices of the Supreme Court had the chance to solve these questions, they did – declaring the unconstitutionality of norms, its constitutionality, giving it an interpretation sometimes *contra legem* (against the normative text) to conform the law to the Constitutional principles.

It is unnecessary to highlight that by this process the Supreme Court delve in the competence of the Legislative, taking the burden of solving difficult and highly unpopular matters off the back of the Legislative. This process of progressive emptying of the Legislative (which turns a blind eye to the competences transgressions performed by the Court), also known as democratic crisis, is not new, both world-wide and in Brazil - as pointed out by Oscar Vilhena Vieira on his paper about the growing power of the Supreme Court:

A second point of view sees an ampliation of the Law's and Judiciary's roles as result of the retraction of the representative system and its inability of comply the promises of justice and equality, inherent to the democratic ideal and incorporated in the contemporary constitutions. At this point, there is an appeal to the judiciary as it is the last guardian of democratic ideals. It causes, evidently, a democratic situation, for, while trying to fulfill the lacks left for the representative system, judiciary only contributes to the ampliation of the democracy authority's crisis itself.¹⁴

Also, another helpful information is that the translation of Dworkin's work to Portuguese is very recent, as to be shown further in this paper, which can also explain the lateness of his arrival in Brazil. For example, the Brazilian edition of *Taking rights seriously* [Levando os direitos a sério] dates from 2002; *Life's dominion* [O domínio da vida] dates from 2003; and *Sovereign Virtue* [Virtude Soberana] dates from 2005. Nevertheless, according to the data of one of the most important congress¹⁵ in the country, Dworkin was quoted 977 times in 120 different works, indicating that despite being something *new* he also is subject of attention and study in Brazil. It did not take too long until it reach the Supreme Court.

13 Cases which have complex and difficult solution and can be solved in a multitude of ways, often one of them contradicts and exclude the other.

14 Oscar Vilhena, "Supremocracia" in Revista Direito GV, nº08, Jul-Dec/2008, p.443.

15 CONPEDI – IndexaDireito. Link: <http://150.162.138.7/authors/report?page=4&size=50>

1. CASE OF CONGRESIST'S FIDELITY ON THEIR OWN POLITICAL PARTY

This political question started on Brazilian Congress and ended up (as it usually does) on the tariff trial of Supreme Court. The problem is that many Congressists (Deputies or Senators) were voting against their own Political Party directions. In Brazil the election for Congress demands a Party filiation. There is no such thing as an independent candidature, as there is in the US. Each vote goes to the Party, then it is calculated a coefficient for each Chair, that are distributed to the Parties with more votes. But then, inside the Parties, the Chairs are distributed between the candidates with more votes. It is usual that a candidate with more votes in a Party with fewer votes is not elected (because his Party was not able to get enough Chairs), while a candidate with few votes in a Party with plenty votes is elected. This system encourages individual campaigns during the elections; Parties usually include popular/famous people as candidates – to help the Party to get a good colocation in the coefficient calculus. But then, when they are already in Congress, they do not want to follow the Parties directions. Its votes are subject to all kind of games – lobbies (that in Brazil are not regulated); personal interests; own electoral bases interests, etc.

The matter was first lead to the Electoral Superior Court (Superior Tribunal Eleitoral – TSE), that also has a consuler competence. The Parties wanted to know if it was possible for a Congress Member to vote against his Party direction's, since the Chair belongs to the Party (according to our constitutional system); or if Congress Members can vote whatever they please, since the Party get Chairs because of the votes the candidates receive (according to the same constitution system). Also, to make the question more complex, Brazilian Constitution literally lists the hypothesis of Chair loss – and this was not one of them.

The Electoral Superior Court decided that the Congress Chairs belongs to the Party, that could expulse the disloyal Member in that hypothesis. The idea of the Court was to privilege the Parties (and so, the political programs) despite of the individuals voted for the people.

Of course, the case reached the Supreme Court – it was judged in the MS nº 266602/DF; 26603/DF and 26604/DF, on 07/03/2007. In this case the decision of Electoral Superior Court was confirmed by a “moral interpretation of the Constitution”, as stated in the vote of Justice Menezes Direito¹⁶. He claimed that the interpretation of the Constitution by the Supreme Court sometimes imposes an “*objective definition of the extension of a specific legal dispositive or the value system that present, and cannot be taken just in the historical, grammatical, systematical*

16 Full Sentence, pp. 48-50.

meaning” of the traditional method of interpretation. And for a broader interpretation that “*propitiate an adequate presence of the Constitution in the social life*” he uses Dworkin’s moral reading:

It is not for other reason that Ronald Dworkin faces what he calls the moral reading of American Constitution. Enhancing that “of course the moral reading is not appropriate to everything a constitution contains” (extracted of the original edition, p. 17), Dworkin shows that many times history does not reveal nothing that help us to know what the authors of the Constitutions wanted to say when established general principles¹⁷.

Justice Menezes Direito was searching for a justification for a moral reading, or more precisely, a political reading of the Constitution. Both judicial results – let the Parties or let the Congressists have the Chair - were legally possible. Choosing the Parties was, in a certain point, a political decision to favor the Parties structures. In Brazil, as the Judiciary is seen as a technical institution, it is necessary to justify a political decision-making giving it an academic, scientific argumentation. Dworkin was very helpful for the Justice who, by quoting him, said that “*the moral reading do not dispense the personal conviction of each interpreter*”. And then uses Dworkin as scientific argumentation:

I not only concede but emphasize that constitutional opinion is sensitive to political conviction. Otherwise, as I said, we would not be able to classify jurists as conservatives or moderate or liberal or radical with even the success we have. The question is rather whether the influence is disreputable. Constitutional politics has been confused and corrupted by a pretense that judges (if only they were not so hungry for power) could use politically neutral strategies of constitutional interpretation. Judges who join in that pretense try to hide the inevitable influence of their own convictions even from themselves, and the result is a costly mendacity. The actual grounds of decision are hidden from both legitimate public inspection and valuable public debate. The moral reading

17 All the translations from Portuguese are made by the authors.

offers different counsel. It explains why fidelity to the Constitution and to law demands that judges make contemporary judgments of political morality, and it therefore encourages an open display of the true grounds of judgment, in the hope that judges will construct franker arguments of principle that allow the public to join in the argument. (...) The moral reading insists, however, that this influence is not disreputable, so long as it is openly recognized, and so long as the convictions are identified and defended honestly, by which I mean through proper arguments of principle not just thin slogans or tired metaphors. (extracted of the original edition, p.46)

The Justice found this argument fascinating and considered that the *“interpreter cannot be distant of human reality in which the interpretation is done, and that is sufficient to take it off the Science or the technic, being the judicial decision”* [and here quoting Dworkin again] *“proposes that we all-judges, lawyers, citizens- interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice”* (extracted of the original edition, p.2).

He also pointed that a moral (or a political) reading was necessary in this case to improve the *normative force of the Constitution*, in reference to the work of Konrad Hesse [1959] with this title. Saying that a specific interpretation gives or optimize the *normative force* of some constitutional norm became a very popular argument in Brazilian Courts. It came along with a principiology thesis as Dworkin's. Justice Menezes Direito finished his vote by stating that he *“ponderate what best meets principles and fundamental values printed in the Constitution itself”*.

Thereby, even that the hypothesis in judgment was not listed by the Constitution as a case of Chair loss by Congressmen, the Supreme Court, agreeing with Justice Menezes Direito made the Congressist's Fidelity also a case of loss of electoral mandate – changing deeply the political game in the whole Legislative.

2. CASE OF EMBRYONIC STEM CELL RESEARCH OR THE CONSTITUTIONALITY OF BRAZILIAN BIO- SECURITY LAW

The possibility that embryonic stem cell research can provide significant scientific breakthroughs to mankind is undeniable, but it is also a highly questionable decision when we include religious and

moral questions into the equation. In this case, it was sanctioned the Law 11.105/2005 (Bio-security Law) approving research utilizing embryonic stem cells and it was immediately brought to the attention of the Court (the ruling was passed in 2007).

The Attorney General of Justice¹⁸ proposed the lawsuit, arguing the unconstitutionality of the fifth article, which, if was ruled out, would render the Law completely ineffective. More than a discussion of Constitutional Law, the entire discussion in the Court was a clash of more liberal and conservative Justices, the first trying to preserve the Law as it was enacted by the Legislative and the latter trying to insert in the text forms of restriction regarding research utilizing embryonic stem cells.

In the end, by a thin margin (six votes to five), the Court decided to sustain the Law without any addition or restriction.

At first glance, it would seem that the case described was a normal discussion of unconstitutionality, yet it was a very atypical one. On a regular basis, a Law is passed after a relative consensus about its matter is agreed on, in this case that did not happened¹⁹. The Law was passed but the discussion was nowhere near the end - the very substance of the Law was discussed in the Court, rendering the discussion in the Legislative useless (by doing it all again), thus invading the competence of the Legislative.

As the other cases above, this was another situation where the Supreme Court had a very major and decisive role, in the end of the day the Law's fate rested upon the political and moral positions of the Justices. We can throw the Legislative through the window then. Is there any reason to have a forum of public discussion if the final decision is taken by a Court where the Legislative point of view has no impact?

Having depict the case, is high time to investigate why the work of Ronald Dworkin was used, and its place in the arguments brought to the discussion.

Justice Ayres Britto was the first to vote, and, as said before, he disregards the previous state of the discussion. It is needed to say that he voted to sustain the law.

Being the first to vote he had the opportunity to drive the debate

18 The Attorney General of Justice has a functional independency, the decision to propose a lawsuit before the Supreme Court is a decision which does not need to be approved by another authority.

19 In Brazil the religious faction is very powerful in the Congress, in 2012 they had 63 of the 513 members of the Low House and 3 of the 81 members of the High House. The ones listed here are only declared members of this informal group, though they are very strong before the public opinion (a large portion of the Brazilian people follows a religion, especially of Christian tradition). To be fair, it is almost a miracle the fact that Law 11.105/2005 passed with the text the way it was.

into a point which was dear to him, he knew that was impossible to ignore the whole controversy about the origin of life²⁰. Considering the practical, and theoretical, impossibility of pinpointing the exact moment of the origin of life he choose to lead the discussion to the field of the woman - her freedom about her body and her connection to the fetus.

In order to construct his thought he used the theory of Ronald Dworkin exposed in the book entitled "Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom" . Of his works Dworkin is more well-known by his rights theory²¹ and decision-making theory²², and most of his quotations in Brazil revolve around this two theories, however, in this particular case the Justices (not only Justice Ayres Britto) used his moral (in some degree, philosophical) theory - which is almost unknown in Brazil.

At first, Justice Ayres Britto brushed aside any doubts concerning potential homicide of fetus, stating, grounded in Dworkin, that the Law protects in different ways the person during his whole life:

"Convergently, the statement that the Law protects life differently in each step of the biological development of a human being is the basis of the thought of Ronal Dworkin, north-American constitutionalist, as it was exposed in his book entitled "Life's Dominion" [the Justice used the portuguese version, but we will bring the quotes of the original]. This protection increases as the human being evolves, and start thickening, in direct proportion of the investment provided in this evolving process: natural investment and personal investment of the parents and family. It can also be called proportional legal protection, in proportion of the amount of investment, that is both a natural and personal investment, since it is a fact that as the progress goes on the frustration, regarding a possible failure, increases (the rising curve of expectation only turn itself in a downward curve with the coming of old age). Check up this elucidating quote: "We believe, as I said, that a successful human life has a certain natural development - conception, fetal development, and infancy- but it then extends into childhood, adolescence, and adult life in ways

20 There are different positions; in general religious positions have a tendency to acknowledge the act of conception as being the very beginning of the human life.

21 Exposed, with more detail, in "Taking Rights Seriously".

22 Exposed, with more detail, in "Law's Empire".

that are determined not just by biological formation but by social and individual training and choice, and that culminate in satisfying relationships and achievements of different kinds. It ends, after a normal life span, in a natural death. It is a waste of the natural and human creative investments that make up the story of a normal life when this normal progression is frustrated by premature death or in other ways. But how bad this is -how great the frustration-depends on the stage of life in which it occurs, because the frustration is greater if it takes places after rather than before the person has made a significant personal investment in his own life, and less if it occurs after any investment has been substantially fulfilled, or as substantially fulfilled as is anyway likely.”²³

By this point of view the fetus, when being a stem cell, does not enjoy full protection, because it is a possible future person, a potential yet undeveloped. Another quote of Dworkin work, to strengthen the notion that the fetus have a development curve in order to fulfill his potential, was made in the footnote 10 of his vote:

“While Saint Augustine (V century A.D) declared himself unsure regarding the existence of the soul since the moment of the conception, Saint Thomas Aquinas (XIII century A.D) ‘Catholicism’s great thirteenth-century philosopher-saint, Thomas Aquinas, held firmly that a fetus does not have a intellectual or rational soul at conception but acquires one only at some later time- forty days in the case of a male fetus, according to traditional Catholic doctrine, and later in the case of a female’. As Ronald Dworkin said about the author of the Summae Theologiae: ‘Aquinas’s view about fetal development, which he took from Aristotle, were remarkably prescient in some respects. He understood that an embryo is not an extremely tiny but fully developed child who simply grows larger until birth, as some later scientists with primitive microscopes decided, but an organism that develops

23 Full Sentence, pp. 168-169.

through an essentially vegetative state, then a stage at which sensations begin, and, finally, a stage of intellect and reason'."²⁴

To connect his argument, and shifting completely the focus of the discussion to the woman, restating the whole bound between woman and fetus:

"It is the excerpt found at page 62-63 [77 in the Portuguese version] of the previously mentioned book "Life's Domain". At the same page that Dworkin resumes the quote of Adriene Rich in order to say that: 'By ignoring the unique character of the relationship between pregnant woman and fetus, by neglecting the mother's perspective and assimilating her situation to that of a landlord or a woman strapped to a violinist, the privacy claim obscures, in particular, the special creative role of woman in pregnancy. Her fetus is not merely "in her" as an inanimate object might be, or something alive but alien that has been transplanted into her body. It is "of her and is hers more than anyone's" because it is, more than anyone else's, her creation and her responsibility; it is alive because she has made it come alive. She already has an intense physical and emotional investment in it unlike that which any other person, even its father, has; because of these physical and emotional connections it is as wrong to say that the fetus is separate from her as to say that it is not'. (...) Actually, a fetus is an organism that, in order to stay alive, needs the continuity of the pregnant woman life. It does not survives on its own. It grows inside a body that also grows with it. Throbs alongside another pulse and also breaths in pair. It does not know what is solitude, because it denies the laws of Physics that two bodies cannot occupy at the same time the same space. If, since its firsts signs of neural formation, it already knows the voice and laughter of whom feeds and carry it, it will bear forever a sentimental bound. Bound impossible to forget! As the man finishes its role in

24 Full Sentence, pp. 198.

the process of the formation of a new being while in the very act of conception, the woman does not her role with the production of fertilized egg. Similar egg is only the beginning of a internal path that can both lead to life outside, after going through the womb, as it can end, naturally, in a burial urn ('.. the terrifying, absolute dying of the light as stated in the clear metaphor of Ronald Dworkin in is important book).''²⁵

The conclusion of the vote was to sustain the law. Even though the moral theory of Dworkin was used in his argument it is difficult to measure its influence in the decision. The more honest position is to consider it a piece of the argument, but not a major one - the vote will not crumble if we take this argument out of the picture.

In the wake of Justice Ayres Britto others Justices followed. Justice Carmen Lucia, which also voted to sustain the law, followed a similar thought-track. Although similar arguments she only quoted a small phrase of Dworkin, in the footnote 7, in her vote:

"Ronald Dworkin highlights the sanctity of a dignity life, shaping a vast and broad work about its dominion, exposing it as "The second claim that the familiar rhetoric can be used to make is very different: that human life has an intrinsic, innate value; that human life is sacred just in itself; and that the sacred nature of a human life begins, even before the creature whose life it is has movement or sensation or interests or rights of its own."... If the great battles over abortion and euthanasia are really about the intrinsic, cosmic value of a human life, as I claim they are, then those battles have at least a quasi-religious nature, and it is no part of the proper business of the government to try to stamp them out with the jackboots of the criminal law."'²⁶

In all fairness, the quote does not tell us anything new that the common sense itself could not tell (life is important), and does not help us to understand her vote - if it was not there no one would missed it.

²⁵ Full Sentence, pp. 188-191.

²⁶ Full Sentence, pp. 370.

3. CASE OF INCONSTITUTIONALITY OF PRESS REGULATION

In February 27, 2008, the Supreme Court judge the constitutionality of the Press Regulation in the ADPF nº130. This regulation dates from 1967 on the Military Regime in Brazil and established special penalties for journalists, between other authoritarian norms, that intend to restrain press communication.

In a precautionary analysis Justice Menezes Direito²⁷ decided to suspended the effects of this law, and consequently, all the judicial demands about it, until a final decision had been taken. Based in Dworkin's work about the relation between the press and the government he voted to suspended the whole press regulation, all while considering its role during the Brazilian dictatorship in the seventies; especially restrained freedom of speech and – here we have Dworkin – the political role of the press (which was suppressed by the press regulation law). When Dworkin talks about the press (possibly thinking about the American press) he claims that it have grown together with the government in a *kind of constitutional symbiosis*.

“these two institutions have grown in power together, in a kind of constitutional symbiosis: the press has the influence it does in large part because much of the public believes, with good reason, that a powerful and free press is a wise constraint on official secrecy and disinformation. The most basic intention of the framers was to create a system of balanced checks on power; the political role of the press, acting under a kind of limited immunity for mistakes, now seems an essential element of that system, exactly because the press alone has the flexibility, range, and initiative to discover and report secret executive misfeasance, while allowing other institutions in the checks-and-balance system to pursue these discoveries if and as appropriate”

The majority of the Court decided to suspend just some few key-norms in the law (and not the whole law) until the final decision. Over a year later, on April 30, 2009, the Court reunited again to issue a final decision in this case.

Justice Ayres Britto, that was reporting the case to the Court²⁸ said that freedom of thinking and freedom of expression are legal norms

27 Full Sentence, pp. 21-22.

28 Full Sentence, pp. 61-61.

much closer of “norms-rules” than of “norms-principles”, because its politics and philosophic primacy demanded them to be applied in all situations, independently of its private or public nature.

Justice Menezes Direito²⁹, that had mentioned Dworkin before, based his vote on an American case quoted by Dworkin. It was the case *New York Times vs. Sullivan* about the First Emend. The Brazilian Justice said that “in that decision was created the limitation about the proof for that public agents could receive indemnification, having to proof the existence of “effective malice”, namely, the proof that the journalists not only were careless or negligent researching to report, but also that published it knowing it was false or with reckless disregard for truth or falsity of the information it contained”.³⁰ Based on the vote of Justice Brennan in that case, Justice Menezes Direito understood that often there is a bad placement of information, but stated that it also happens in all kinds of human activities – and when it happens it is possible to require adequate reparation in civil and criminal law. Thus, there is no rational explanation able to justify the existence of a special regulation for the press, which goes hand to hand with democracy, and should not have its role repressed. And so, proclaimed his vote:

“Considering that the actual Press Regulation was born with inspirations incompatible with the constitutional principle of press freedom, in the terms of the reasons I deduced above, I repeat the vote I uttered when voted the precautionary, considering the Law nº5.250, from 1967, incompatible with the discipline of the Federal Constitution of 1988.”

4. CASE OF HOMOSEXUAL CIVIL UNION

At the beginning of this paper we pointed out that, in some of the cases addressed, the Legislative simply did not take part in the discussion, and that the Court took to itself the matter. The most evident, crystal clear of all the cases is the following one (at the moment the last one where Dworkin’s work was used) - the case of homosexual civil union.

We also mentioned that in Brazil the religious faction in the Legislative is very strong and have a lot of influence in the public opinion. It seems fairly obvious that the matter of homosexual union is a highly unpopular and contradictory subject, thus the Legislative “ran to the hills” and tried to avoid the problem.

29 Full Sentence, pp. 93-94.

30 Op. cit., p. 331.

Of course there is a LGBT³¹ community in Brazil, and the approval of homosexual civil union is in their agenda³², they also have representatives in the Legislative, but nowhere near as powerful the religious faction. It is needed to say that the LGBT community read correctly the current events and observed that the situation was not a stale-mate, they were losing, in the long-run probably they would win, but it would take a relative large amount of time.

Since the Legislative route lead to a dead-end they turned their attention to the Court, where they had a possibility that their case would be discussed³³, they (we are encompassing a multitude of NGOs and others amici curiae) proposed the lawsuit in 2008 and the final ruling was issued in 2011.

As it is world-wide, the Court cannot create law, and in Brazil marriage³⁴ (civil union status³⁵), is regulated by law, which also defines what is a family. It would be impossible to plead that the Court instituted the possibility of homosexual marriage, so a constitutional short-cut was found.

The Brazilian Constitution (a very prolific text) itself intends to protect the family, to do so is needed to define what is a family:

Article 226 - The family is the base of the society, enjoying special protection of the State

§ 3º - Concerning the effects of the protection of the State, is acknowledged the stable union by a man and woman as a familiar entity, the law must facilitate its conversion in marriage.

§ 4º - It is also acknowledged as familiar entity, the community composed by any of the parents and their descendants. (free translation)

The argument of the LGBT community rested upon the 226

31 Initial's of Lesbian, Gay, Bisexual, and Transgender.

32 When we depict the LGBT Brazilian community it looks similar to their counter-parts in other countries, they are, usually, people with higher education and more money than the average person.

33 Since the Court decides its own agenda of judgments it is very possible that a controversial subject is left untouched for a long period of time (sometimes to "cool things down" or simply to never issue a ruling).

34 Implications, legal effects, people who can marry, etc.

35 The status of civil union, and its legal effects, is very similar to the marriage, although different in a formal way, since in this situation the couple does not have a legal document proving their bound.

article in order to acknowledge that a homosexual marriage (civil union) is also a familiar entity, and that the Constitution did not exclude this possibility. Nevertheless the text refers only to the traditional union (man and woman), however, it is not the only model possible (as shown in the paragraph fourth of the article 226), thus it is possible to include, via interpretation, another model³⁶.

Another argument used is that the Constitution itself stated the equality of rights for citizens³⁷ - so there is no justification to deny that the homosexual constitute a family like other citizens, after all the law shall not distinguish, and shall not deny, rights granted to others only because they have a different sexual orientation.

Surprisingly enough, the public opinion did not pose a threat, the opposition was very sparse, and supportive to the claim of the LGBT, in general³⁸. The final decision ruled not only recognized the homosexual marriage (civil union) as a familiar entity, it also granted to them the right to have a civil union³⁹ - a awe-inspiring case of unanimous consensus (all the 11 Justices agreed upon the decision, even if deviating about the arguments).

This is a typical atypical case. The Legislative stayed still when a controversial subject arose and put things to a hold due to the lack of political will. The groups interested in a change in the legal system abandoned the Legislative as a forum of public debate due to its lethargy and self-inducing emptiness, and searched for another way. These groups found the Court, willing to promote its own agenda, that in a lot of points coincides with the propositions plead by these groups.

The end of history is always the same, the Court (or the groups interested), create a legal short-cut so as to bypass the Legislative and “solve” the controversy.

Bearing the whole picture in front of us we are able to determine why the work of Ronald Dworkin was used, and its place in the arguments brought to the discussion.

As it was in Bio-security case Justice Ayres Britto was the

36 Considering that the article 226 placed the family in a central place, so important that the State was bound to protect it.

37 Article 5 - Every and all are equal before the law, without distinction of any nature, guaranteeing to the Brazilians and foreigners residents in Brazil the inviolability to the right of life, freedom, equality, security and properties, in the following terms: (...).

38 It is very weird that the same public opinion that elected the officials of the Legislative (both houses) clearly against homosexual marriage found themselves sympathetic to the cause after it was brought to attention of the Court.

39 After the ruling it was decided by the Supreme Court that each State, through their own Higher Court, received the task to regulate the procedural steps needed for a homosexual couples to formalize their relationship, thus, in some way, (the formal document is somewhat different) marrying these couples.

first to vote, but did not make any reference to Dworkin, however the next Justice to vote⁴⁰, Justice Luiz Fux quoted Dworkin in his vote. In general lines the whole argument is about rights, in focus, the right of freedom - approached as a right of equal treatment. During the vote Justice Luiz Fux drafted a conclusion strongly based in a moral reading of the Constitution, as can be seen when we point out that the work quoted was “Freedom’s Law: The Moral Reading of The American Constitution”.

How we perform the moral reading of the Constitution is a very important question, it is possible that we read the text biased by our own convictions (in some way it is impossible to not be biased). Aligning himself with Dworkin’s proposition of moral reading he exposes the almighty principle of this operation: Every and all individual must be treated with equal respect and consideration, in a equality of rights and opportunities.

“We cannot give in, in this case, to considerations of moral order, except for one, that is, by the other hand, indispensable: That all individuals shall be treated with equal consideration and respect. This statement is the basis of the moral reading of the constitution as suggested by Ronald Dworkin (Freedom’s Law: The Moral Reading of The American Constitution. Cambridge: Harvard University Press, p. 7-8), that, although analyzing the USA constitutionalism, draw conclusions perfectly applicable to the Brazilian constitutional law. I believe that the principles that the principles set out in the Bill of Rights, taken together, commit the United States to the following political and legal ideals: government must treat all those subjects to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms more specifically designated in the document, such as the freedoms of speech and religion. [specially the liberties exposed in the Fourteenth Amendment].”⁴¹

40 In Brazil the order of voting goes this way: The first to vote is the Justice who received the case via a random distribution, afterwards vote the newest member of the Court, the last one to vote is the dean Justice.

41 Full Sentence, pp. 65-66.

In this first quote is grounded the first base, the needed equality - nevertheless, until this point there is no way to explain how this equality will be achieved. Still in Dworkin's wake, the way to make this desired possibility real is through the intervention of the State:

*"Still discussing equality, Dworkin, in other book (Sovereign Virtue: The theory and practice of equality), clarifies his point of view about the principle of equality. 'This book's argument- the answer it gives to the challenge of equal concern- is dominated by these two principles acting in concert. The first principle requires government to adopt laws and policies that insure that its citizen's fates are, so far as government can achieve this, insensitive to who they otherwise are-their economic backgrounds, gender, race, or particular sets of skills and handicaps. The second principle demands that government work, again so far as it can achieve this, to make their fates sensitive to the choices they have made'. Taking these factors into account, it is impossible to ignore the juridical validity of homosexual stable relationships, it is the same as putting a unjustified disadvantage when comparable to heterosexual stable relationships. The State responsibility is to ensure that the law grants to everyone equality of opportunity, in a way that each individual is enable to live his life autonomously and by his owns purposes, and that sexual orientation does not constitutes an obstacle to the pursuit of personal objectives. The same reason applies, certainly, in all aspects of life and not only to material and professional matters - if known before-hand that subjecting an homosexual to all the embarrassment of being forced to hide a relationship with a partner, or not being able to expect that their relations have any legal effect due to the stable relationship [as it occurs in heterosexual stable relationships] is, without a doubt, a arbitrarily reduction of opportunities."*⁴²

A characteristic of the Court is that there are two ways of interaction between the Justices, the reading of the vote (others Justices

42 Full Sentence, pp. 66-67.

can manifest themselves during the reading, requesting the right to speak) and the debates that can occasionally be held (they are not required). While in the discussion, Justice Luiz Fux reinforced his view regarding equality, restating his position.

“[Justice Fux - Oral discussion] Regarding the principle of equality, I gathered two quotes of Ronald Dworkin when he prompts us to perform a moral reading of the constitution - the book titles is Freedom's Law: The moral reading of the American Constitution. What Dworkin says? The government - and we are the government, we practice acts of government too, acts which are inherent to the Public power - if the Legislative does not take action the Court must fill its place. Here considering 'government' as the act of serving as a mediator of the interests of the parties, that did not arrive, by a friendly discussion, in a agreement. As Dworkin states: ' I believe that the principles that the principles set out in the Bill of Rights, taken together, commit the United States to the following political and legal ideals: government must treat all those subjects to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms more specifically designated in the document, such as the freedoms of speech and religion.] - specially the liberties exposed in the Fourteenth Amendment. In a another work, more recent, 'Sovereign Virtue: The theory and practice of equality', Dworkin highlights that: 'This book's argument- the answer it gives to the challenge of equal concern- is dominated by these two principles acting in concert. The first principle requires government to adopt laws and policies that insure that its citizen's fates are, so far as government can achieve this, insensitive to who they otherwise are-their economic backgrounds, gender, race, or particular sets of skills and handicaps. The second principle demands that government work, again so far as it can achieve this, to make their fates sensitive to the choices they have made'.

It is verified, under the perspective of equality, that the recognition of stable homosexual relationships is a logical conclusion extracted from the articles of the Constitution, it is a respect held in consideration to the Constitution.”⁴³

The final decision was unanimous, so it is very complicated to ponder how much impact the work of Dworkin had, it can be said that it was very relevant, the notion of moral reading was used to steer the argument and gave it a theoretical base to justify the proposition of constitutional interpretation. Another point to strengthen its relevancy is that, since (even being the second to vote) Justice Luiz Fux shaped the final decision in a way that others Justices followed. However, having said that, every Justice's vote have a personality, although, in this case, the discussion revolved (most of the time) around equality of treatment and freedom.

Of course, it is impossible to mathematically measure the impact of Dworkin (since we delve on area of arguments, by definition a non-exact area). On the other hand, it is fully possible to perceive that it was, of all the cases, the one which Dworkin work had the most influence in the construction of the argument and usage of relevant quotes.

CONCLUSIONS

Although recent in Brazil, Dworkin's philosophy become vastly known – and reached the Supreme Court precisely in a changing-time of its institutional role. The most discussed issue on Dworkin's philosophy is the method suggested in *Taking rights seriously*. Surprising, the Supreme Court used his moral and political work that is less known in the country, but served best for the purposes of these cases judgments – all hard cases that demanded moral and political positions of the Justices. Brazilian Supreme Court embrace Dworkin philosophy for improve its own political role by extending legal interpretation to offer solutions on institutional crisis and social claims.

REFERENCES

- Dworkin, Ronald, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM, New York, Vintage Books, July 1994.
- Dworkin, Ronald, SOVEREIGN VIRTUE: THE THEORY AND PRATICE OF EQUALITY, London, Harvard University Press, 2002.

43 Full Sentence, pp. 80-81.

Dworkin, Ronald, *TAKING RIGHTS SERIOUSLY*, Cambridge, Massachusetts, Harvard University Press, 1978.

Vilhena, Oscar. SUPREMOCRACIA in *Revista Direito GV*, nº08, Jul-Dec/2008, p.443.

PENSION DEFICIT IN BRAZILIAN SOCIAL SECURITY SYSTEM: *LEGAL REMARKS AND STRATEGIES TOWARDS FINANCIAL SUSTAINABILITY*¹

Cristiane Miziara Mussi

PhD in Social Security Law by Pontifícia Universidade Católica de São Paulo - PUC / SP. Master of Laws in Social Relations (subarea Social Security Law) by PUC / SP. Specialist in Consumer Law by UNIRP. Adjunct Professor of tax Law and Social Security Law at the Federal Rural University of Rio de Janeiro - UFRRJ; Research Group Leader certified by CNPq. Attorney at law.

Marcos Roberto Pinto

PhD in Accounting by Universidade de São Paulo - USP / SP. Master in Accounting by Universidade Federal do Rio de Janeiro - UFRJ / RJ. Adjunct Professor at the Federal University of Rio de Janeiro – UFRJ.

Abstract: The present article consists in the brief analysis of the evolution of the Brazilian General Regime Social Security, depicting its frailty against subsequent legal reforms through which it has passed in recent years. It also deals with the impact of socioeconomic changes on the current and future financial sustainability of the Brazilian pension system. In fact, the evolution of the statistics concerning such social indicators can be quite decisive for the future sustainability of the Brazilian social security system. For this, we used the phenomenological method - hermeneutics, by privileging theoretical studies and analysis of documents and texts. Such research is very important in order to provide a glimpse of the general social security regimen in Brazil and its future prospects. The main results show that there is a budgetary concern due to the growth in life expectancy and declining birth rate. Even with the absence of the current financial deficit proclaimed by the media and the federal government, there will be the need for reform to fit the budget of Brazil's future Social Security System. According to our analysis, the improvement of Brazilian Social Security requires

¹ Translated by: Bruno Rodrigues de Almeida

legal autonomy of the Social Security Revenue (thus preventing the withdrawal of it funds to defray social security benefits belonging to another public sectors), the increase of minimum wage in the country, and public policies to stimulate the entry of informal workers in the General Social Security Regimen. Furthermore, this article suggests that, as a matter of immediate public policy, the Brazilian government should focus more energetically in improvement of educational systems, which presents itself as a strong indicator for the improvement of social welfare budget.

Keywords: Brazilian Social Security - Financial Sustainability - Financial Regime.

1. INTRODUCTION

Created in order to protect the social needs caused by so-called “social risks”, the Brazilian Social Security has been structured and subsequently modified since its inception, reaching the pinnacle of Brazilian Legal Order in the Federal Constitution of October 5, 1988, included as a component of the Social Security System².

Within Brazilian legal order, Social Security is the institution through which State and Civil Society conjointly sustain an important vessel for safety network. In this perspective, this study presents an overview of the historical evolution of Social Security in Brazil, marked by its constant reforms, in order to promote reflection on current economic and financial aspects of its financial sustainability towards future developments of welfare budget in Brazil. This study also presents economic and financial data of the current situation of social security that supports that suggested changes would actually improve the future balancing of the welfare budget.

2. SOCIAL PROTECTION IN THE PENSION CONTEXT

Grounded in the need for supporting workers, social security is undoubtedly the most efficient mechanism of social protection in Brazil. Designed to protect the worker, this kind of social insurance mobilizes State and civil society institutions to provide a wide coverage of social needs. Thus, while the Consolidation of Labor Laws – (CLT) protects the employee during his or her active period, the Social Security Legislation ensures a decent livelihood in the retirement to those who

² Article 194 of 1988 Constitution estates that three different institutions compose Brazilian Social Security System: Health, Welfare and Social Security.

have performed remunerated activities³.

Drawing on the need for social protection, pension means planning. In seeking a legal concept of social security, it is possible to consider it as the embodiment of the idea of prevention against possible social risks to which the whole of society, regardless of economic status. It means that State authorities become responsible for administering the finances reverted to them (directly or indirectly) by civil society institutions in order to provide for social security funding (MUSSI, 2010, p.153).

Security, in the conceptual sense, comes from the idea of prevention. Within the years, public policy makers realized that individuals are subject to certain misfortunes (illness, death, disability, old age etc.), needing support from the State, when facing situations of social risk. (SÜSSEKIND, 1955, p. 42).

When dealing with the concept of social risk, we must bear in mind that risk is associated with the idea of the future. Risk, therefore, represents a future event, uncertain, but possible. An event can be considered as “social risk” if it implies potential damage or loss for not just the individual but also his or her family and even that local community to which he or she belongs (FEIJÓ COIMBRA, 2001, p 17)⁴.

Upon the occurrence of a harmful event, the once potential social risk actually becomes a claim, which entitles the individual (and/or his or her family) to be secured by the (SÜSSEKIND, 1955, p 13)⁵.

Heloísa Hernandez Derzi points out that likelihood is also required to the concept of social risk, since an event considered impossible of occurring cannot be object of social security (2004, p. 61).⁶

Social risk is danger to which the whole society is subject. Historical experience has shown that although some risks may initially inflict directly the worker, their consequences can radiate throughout

3 Article 11 of Law Number 8.213/1991 determines the subjects to General Regimen of Social Security: employees, domestic employees, individual contributors and special insurance cases.

4 *In verbis*: “Risco é o evento futuro e incerto, cuja verificação independe da vontade do segurado. A legislação social desde logo voltou-se para a proteção de determinadas espécies de riscos, cuja ocorrência traria desfalque patrimonial ao conjunto familiar do trabalhador, ou seja, a morte do segurado, ou a perda de renda deste, por motivo de incapacidade laborativa, decorrente de doença, acidente ou velhice) ”.

5 *In verbis*: “dá-se o nome de risco ao perigo a que está sujeito o bem segurado, seja esta pessoa ou coisa, ante a possibilidade da ocorrência de um acontecimento previsível que lhe cause dano. Esse acontecimento ou evento danoso, quando ocorrido, transforma o risco em sinistro [...]”.

6 *In verbis*: “a futuridade e a incerteza são igualmente elementos lógicos do conceito de risco. Um evento de impossível realização não pode ser objeto de seguro; logo, o evento deve ser de possível ocorrência”

society.

Considering the practical inconveniences caused by such risks, Otto Von Bismarck (1883, Germany), regarded to be “*the father of social insurance*”, noted the need to hedge against risks that afflicted workers and actually resulted in the lack of restfulness and general satisfaction .

Social Security System was thus created. For the first time in its history, the State was responsible to compensate the misfortunes that afflicted workers. The role of State transmutes from a merely welfare to protectionist one. (CASTRO & LAZZARI, 2010, p. 44) ⁷.

The standard of Social solidarity, currently applied to many Social Security Systems such as the Brazilian one, was historically first established in Great-Britain in the year of 1944, through Beveridge Plan, elaborated by English Economist William Beveridge during the World War II. Such plan aimed to include all society in the funding of Social Security, in order to find ways of fighting the five ‘Giant Evils’ of ‘Want, Disease, Ignorance, Squalor and Idleness’.

Risks such as old age, sickness, disability, maternity, are gaining new contours and social security protection worldwide. The State authorities protect not because institutional benevolence, but out of actual social necessity, and civil society must also contribute to its funding because it is necessary to be prescient.

Primarily associated with the notion of harm, the concept of risk has evolved in the social doctrine, considered, in our times, as a situation of “necessity” as suggested by Almansa Pastor (1991, p. 223):

Y es que la noción de daño no se ajusta fielmente a la función protectora del seguro social, ya por defecto, ya por exceso. Por defecto, porque existen acaecimientos deseados y felices (nupcialidad, natalidad, etc.) que no pueden ser considerados como dañosos en sí, y, sin embargo, son merecedores de protección, en cuanto provocan una onerosidad económica o necesidad como consecuencia. Por exceso, porque así como la necesidad supone la falta de bienes esenciales, necesarios para la vida del sujeto protegido, el daño sobrevenido puede referirse a bienes superfluos que exceden los

⁷ *In verbis* : “No modelo bismarckiano ou de capitalização [...] somente contribuíam os empregadores e os próprios trabalhadores empregados, numa poupança compulsória, abrangendo a proteção apenas destes assalariados contribuintes. Ou seja, embora o seguro social fosse imposto pelo Estado, ainda faltava a noção de solidariedade social, pois não havia a participação da totalidade dos indivíduos, seja como contribuintes, seja como potenciais beneficiários”

necesarios, en la medida en que sean atacados por el acaecimiento. Si, pues, la consecuencia abarca necesidades que no son dañosas, al tiempo que rechaza daños que no constituyen necesidades, ha de concluirse que el concepto necesidad conviene mejor que la noción del daño.

Thus, the reason for Social Security protection evolved from the eventuality of harm to potential necessity, because policy makers realized that social risk not only justifies in the occurrence of harmful events. One example is motherhood leave of female workers, which cannot be associated with the idea of damage. Still, it requires the woman to drop her workplace during a certain moment of her pregnancy to give birth and to provide for the early cares of her newborn, a period in which family expenses are likely to increase. Without social security protection, not only the woman but also her husband and children would be helpless in this time of need.

In the light of such arguments, the need for social insurance becomes an essential mechanism of social protection, especially in the case of the venues provided by Social Security System, which are fundamental rights constitutionally protected within many legal orders, such as Brazilian.

3. SOCIAL SECURITY IN BRAZIL: BRIEF HISTORICAL OVERVIEW.

The idea of Social Security is historically associated with the awareness towards the need of a network of social protection for workers, the main source of wealth of the country.

In Brazil, Social Security System is relatively recent, since its first landmark is Legislative Decree number 4,682, of January 24th, 1923, also known as Eloy Chaves Law, which implemented the Cash Retirement and Pensions System for workers in Railroad industry, which represents the implementation period of Brazilian Social Security System.

Following that milestone, and due to increasing popular demand, Brazilian Government established several other Institutes of Retirement and Pensions (*Institutos de Aposentadorias e Pensões* – IAP's) between 1933 and 1959.

This represents the second period of social security in Brazil, also known as the period of its expansion, during which each category of workers was protected by a different institution. In this scenario there was comes the Institute of Retirement and Pensions for Naval Workers

(IAPM)⁸, the Institute of Retirement and Pensions of Bank Workers (IAPB)⁹, the Institutes of Retirement and Pensions of Workers in Commerce (IAPC)¹⁰, Institute of Retirement and Pensions of Industrial Workers (IAPI)¹¹, Institute of Retirement and Pensions of Public Servers (IPASE)¹² among others.

The Third Period represents the Unification. Brazilian government realized that not only the management of so many different institutions proved to be very difficult, but also that many workers were still not contemplated within the IAP's structure. Thus, it was decided to unify the pension system rules in 1960, through the enactment the Organic Law of Social Security - LOPS (Law nº 3807 of August 26th 1960), establishing a single standard to which all workers would subject. One should notice that unlike IAP's system, Law 3.807/60 (LOPS) expressly excluded from its reach civil public servants and rural workers.

Starting in 1977, the fourth period of social security in Brazil takes place, also known as restructuring period. During this period, government created three different institutions that would enforce the provisions of Law nº 3.807/60, through Law 6.439, of September 1st, 1977, which implemented the National System of Social Security (SINPAS), the Institute of Financial Management of Social Security (IAPAS) and the National Institute for Medical Treatment Social Security (INAMPS).

Finally, the Federal Constitution of 1988 inaugurated the fifth period of social security in Brazil, also known as Social Security System period. In this context, article 201 establishes that Social Security as one of the components of Social Security System, which also encompasses health and social assistance within its structure.

Notwithstanding, article 6 of the of 1988 Charter lists social security as a social right:

Article 6. Education, health, food, work, housing, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute are social rights, as set forth by this Constitution. (CA No. 26, 2000; CA No. 64, 2010)

Brazilian State should provide for social essential needs, through the adoption of measures to compensate individual weakness,

8 Decree 22.872 of 06/29/1933.

9 Decree 24.615, of 09.07.1934.

10 Decree 24,273, of 05.22.1934.

11 Law 367 of 12.31.1936.

12 Decree-Law 288 of 02/23/1938.

thus enforcing fundamental social rights as established by Brazilian Constitution, and such compensation is enacted by public policies based on distributive justice and material equality (OLIVEIRA, 1996, p. 19)¹³.

Brazilian Social security – comprised within the context of Social Security System – is defined in Article 194 of 1988 Charter as “an integrated whole of actions initiated by the Government and by society, with the purpose of ensuring the rights to health, social security and assistance”.

Enacting the need for participation of the whole society in Social Security System, Constitutional Amendment number 20 (in December 15th, 1998) introduced the new section VII for the sole paragraph of article 194, establishing the democratic and decentralized nature of administration, through quadruple management, with the participation of workers, employers, retirees, and the Government in the related collegiate organs.

Corroborating the importance of social participation in Social Security, articles. 10 and 204 of the current Constitutional Charter, estates that:

Article 10. The participation of workers and employers is ensured in the collegiate bodies of government agencies in which their professional or social security interests are subject of discussion and resolution.

Article 204. Government actions in the area of social assistance shall be implemented with funds from the social welfare budget, as provided for in article 195, in addition to other sources, and organized on the basis of the following directives: (CA No. 42, 2003) (...)

II – participation of the population, by means of organizations representing them in the formulation of policies and in the control of actions taken at all levels.

Emphasizing its solidary nature, article 195 of the current Brazilian Bill of Rights determines that resources to the Social Security

13 *In verbis*: “o Estado se apresenta, então, como meio de satisfazer as necessidades sociais, através de medidas que compensem as fraquezas dos indivíduos, pela introdução dos direitos sociais. Essa compensação se justifica em nome de uma justiça distributiva, da equidade ou da igualdade de oportunidades”

System are to allocated directly (via social contributions) and indirectly (through funds originated from the budgets of the Federal Union, Member States, Federal District and Municipalities).

Furthermore, article 201 of the Federal Constitution of 1988 confers protection to some selected social risks by ensuring: I - coverage of the events of illness, disability, death and old age; II - maternity leave to pregnant working women; III - protection to workers in involuntary unemployment situation; IV - family allowance and imprisonments benefit for dependents of low income insured individuals; V - pension by death of the insured person, man or woman, to be paid to the spouse or partner and/or his/ her dependents, subject to the provisions of § 2.

4. BRAZILIAN PENSION SCHEMES

Regarding the Brazilian Social Security, Constitutional Charter of 1988 establishes three pension schemes (or regimens) in Brazil: Special Social Security System (Regime Próprio de Previdência Social), General Social Security (Regime Geral de Previdência Social) and the Supplemental Security also known as Private Security.

According to *caput* of Article 40 of 1988 Constitution, only tenured civil servants are entitled to Special Social Security Scheme (RPPS).

Article 40. Employees holding effective posts in the union, the states, the federal district, and the Municipalities, therein included their associate government agencies and foundations, are ensured of a social security scheme on a contributory and solidary basis, with contributions from the respective public entity, from the current employees, retired personnel, and pensioners, with due regard for criteria that preserve financial and actuarial balance and for the provisions of this article.

Hence, Paragraph 13 expressly determines that temporary workers, public employees and those who solely occupy commission offices (legally characterized as of free appointment and discharge) belong to the General Social Security regimen (RGPS):

Paragraph 13. The general social security scheme applies to employees who hold exclusively commission offices declared by law as being of free appointment and discharge, as well as other

temporary posts or public positions.

Federal Law number 8.112 of December 11th 1990 establishes the rules and regulations of Special Social Security for tenured civil servants of the Federal Union and, symmetrically, Member States, Federal District and Municipalities must regulate Social Security Schemes to their own tenured civil servants.

The General Scheme - RGPS is disciplined by art. 201 of the Federal Constitution of 1988, having contributory and compulsory membership as its main characteristics.

In this scheme, contributions and prospective payments are subject to criteria in order to preserve financial and actuarial balance, and all workers in general are included, ranked by welfare legislation in five categories: employees, domestic workers, casual workers, single taxpayers and special insured. In addition, even those without an official steady income can registry in the General Scheme of Social Security, contributing in the quality of voluntary insured.

The General Regimen of Social Security is regulated by Federal Law number 8.213, of July 24th 1991, which disciplines the kinds of benefits conferred in the GRSS, while Federal Law number 8.212, also from July 24th 1991, regulates the funding plan for the General Scheme. In addition, Decree Number 3048 of May 6th, 1999 establishes practical regulations for the provisions set in the above mentioned laws.

Both Special and General Schemes are structured under the financial arrangement PAYG, which means the money reverted to the scheme by a member is not kept under his or her account, so those in active period actually fund the monthly benefits of those who already are regarded thus establishing a high degree of solidarity between generations (BALERA; MUSSI, 2014, p.43).¹⁴

One must notice that the major concern in this scheme refers to the number of contributors. There must be a sufficient number of contributors to the maintenance of social security benefits. In the future, given the apparent decline in the birth rate and the increasing life expectation of Brazilian population, Federal government will have to restructure the contributions system in this scheme, or face, otherwise severe budgetary imbalance (MUSSI 2010, p. 100).

Furthermore, article 202 of the Federal Constitution establishes the possibility of Private Systems of Social Security of voluntary

14 *In verbis*: “[...] existe solidariedade entre gerações: o indivíduo contribui para a geração que hoje necessita de proteção, para receber o benefício amanhã, quando será amparado pela geração futura. A Previdência Social adota o regime de repartição simples, em que há alto grau de solidariedade entre os participantes (segurados). Os trabalhadores em atividade financiam os inativos, que, no futuro, quando na inatividade, também serão financiados pelos trabalhadores em atividade”.

adhesion and contribution, in order to supplement GRSS incomes. Such pension scheme is clearly contractual in nature and involves establishment of a pre-composed background under the rules of capitalization system, regulated by Complementary Laws 108 and 109 both from May 29th, 2001.

5. FUTURE OF BRAZILIAN SOCIAL SECURITY SYSTEM

For the maintenance of the General Social Security System, it needs to keep its financial and actuarial balance, in order to provide social protection for future generations with

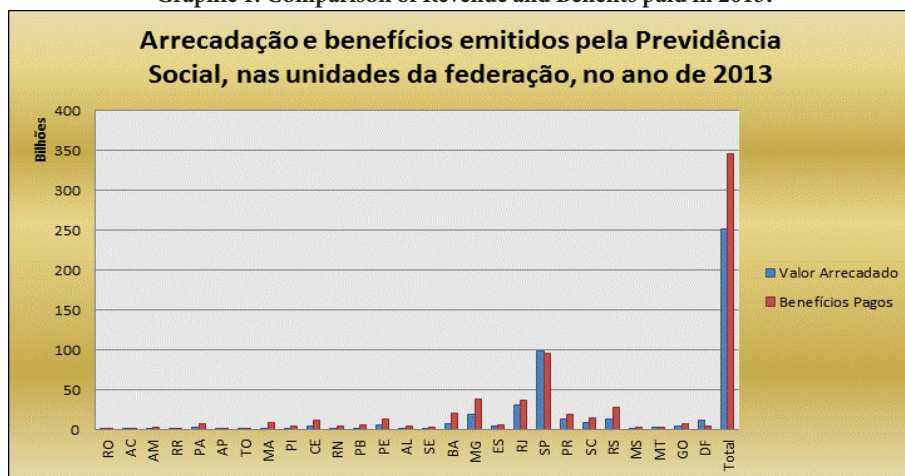
In Brazilian legal scenario, numerous proposals for pension reform were presented, many scholars have spoken and finally, the so awaited reformulation was enacted through Constitutional Amendment 1998 number 20, of December 15th, 1998. However, this reform was not able to remedy the problems mentioned by the Federal Government such as increasing cash-flow issues, and the desired equality between the rules for Special and General Social Security Schemes.

Moreover, increased longevity, declining birth rates and changes in the labor market reflected governmental concerns. Thus, there was a new Social Security Reform, carried forth by Constitutional Amendment number 41 in December 19th 2003, which focused mainly in the issues to keep financial and actuarial balance of the Social Security System.

Since then, Brazilian scholars and policy makers discuss about new proposals for pension reform in Brazil, and numerous bills have been presented accordingly, without any solid result by the year 2014.

Comparing collected amount by Social Security in each State of the Brazilian federation, and the respective value of benefits paid will reveal current trend of deficit. In fact, an analysis of the year 2013 shows a general unbalance throughout Brazilian Member-states. The only exceptions to this trend are the state of São Paulo and the Federal District, which, display surplus roughly equivalent of US\$ 5 billion. Although such numbers can be quite meaningful in isolate perspective, the positive result on these Member States were not enough to offset the total deficit in the focused year. On such note, the grand total of benefit payments surpasses by nearly US\$ 50 billion the collected amount in the respective period.

Graphic 1: Comparison of Revenue and Benefits paid in 2013.

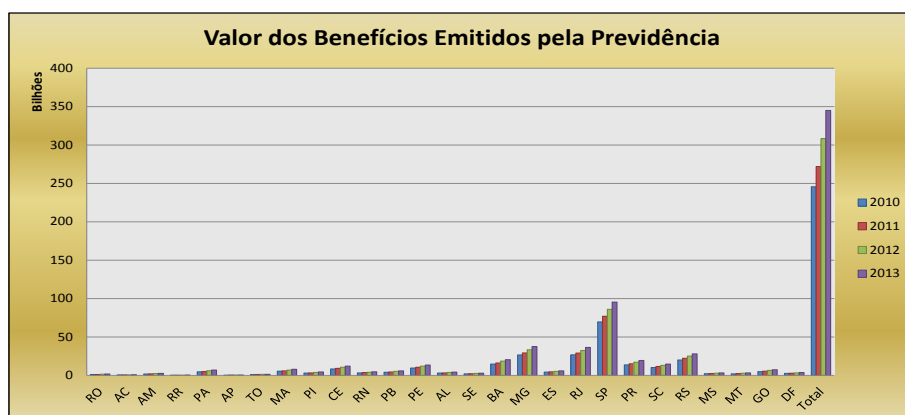


Source: Synthesis Dataprev

Municipal Statistics. Available at: <<http://www.previdencia.gov.br/estatisticas/>>. Accessed: 17/09/2014.

From such data, it is clear that one of the main factors for the mentioned imbalance is the successive increase on the benefit payments within Social Security System. In the period between 2010 and 2013, there was an increase of 40.4% in the total amount of new benefits financed by social security agencies. Such growth is caused not only the increase in the value of benefits paid, but also because of the inclusion of about 3 million new beneficiaries into the system, which represent a 11% increase on social security expenses.

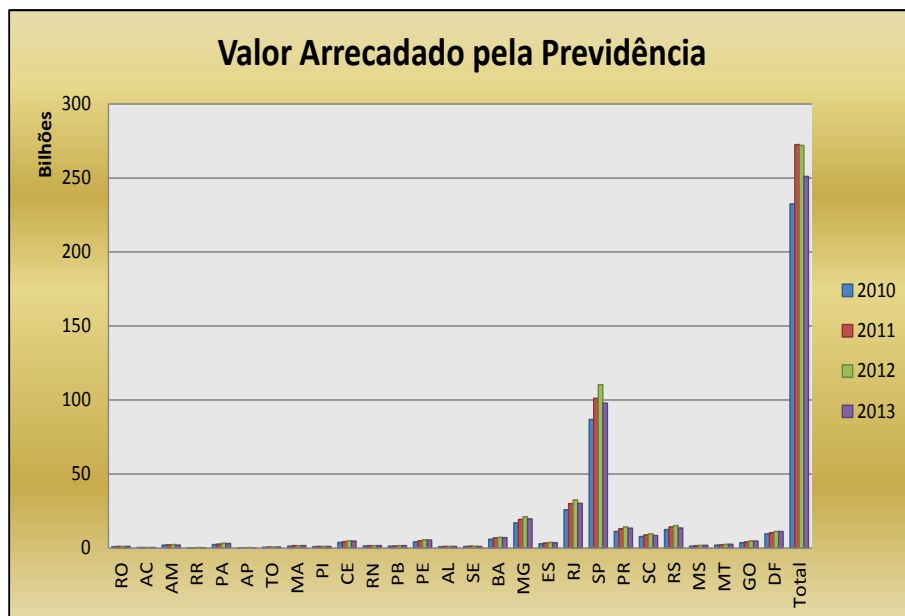
Graph 2: Benefit Payments in the period 2010-2013.



Source: Synthesis Dataprev Municipal Statistics. Available at: <<http://www.previdencia.gov.br/estatisticas/>>. Accessed: 17/09/2014.

On the other hand, albeit increase on overall expenses, there has been no corresponding collection increase for the same period. This becomes clear in the comparison between the years 2013 and 2012, which shows an overall decline in the Social Security System collection in the Federal Units and consolidates a loss of 8% in the total collection amount within the focused period.

Graph 3: Collection of Social Security, in the period 2010-2013.



Source: Synthesis Dataprev Municipal Statistics. Available at: <<http://www.previdencia.gov.br/estatisticas/>>. Accessed: 17/09/2014.

Right now it is important to highlight that such data exclusively represents collection through GRPS (*Guia de Recolhimento da Previdência Social*), which is made directly by workers and their employers.

However, pursuant to Federal Constitution of Brazil of 1988, and Federal Law nº 8212/1991, Brazilian Social Security System has other funding sources (art. 194, sole paragraph item VI, of Federal Constitution). Brazilian Society, as a whole, is called upon the duty to contribute to Social Security whether directly (through social contributions) or indirectly (through taxes). In fact, besides GRPS, there are also other social contributions from other venues such as those obtained with the funding of lottery games, or the revenue obtained by

federal authorities with the auctions of seized and abandoned properties, among others.

Notwithstanding, a more comprehensive approach on economic and financial sustainability of the Brazilian social security system must also include governmental programs for areas such as social security, social assistance and healthcare. Registering all revenue sources for the financing of this system, just within the yearly budget of 2013, for example, there is a surplus of roughly US\$ 65 billion in the same period.

Table 1: Revenue from financial sources of the social security system

FONTE DE RECEITAS	2013	2012
COFINS - CONTRIB. P/ A SEGURIDADE SOCIAL	201.527.000.000	174.470.000.000
CONTRIBUIÇÃO PARA O PIS/PASEP	51.899.000.000	46.217.000.000
CSLL - CONTRIB. SOCIAL S/ LUCRO LÍQUIDO	65.732.000.000	57.514.000.000
RECEITA PREVIDENCIÁRIA	331.937.000.000	302.321.000.000
TOTAL	651.095.002.013	580.522.002.012

Source: Secretariat of the Federal Revenue of Brazil - Center studies tax and customs.

Available at: <www.receita.fazenda.gov.br/publico/arre/2013/Analismensaldez13.pdf>.

Accessed: 23/09/2014.

Table 2: Expenses with governmental programs implemented in the areas of social security, social assistance and healthcare in the federal budget for the year 2013.

COMPONENTES DO SISTEMA DE SEGURIDADE SOCIAL	DESPESAS IDENTIFICADAS NO ORÇAMENTO DE 2013
MINISTERIO DA PREVIDENCIA SOCIAL	373.556.078.146,78
MINISTERIO DA SAUDE	30.832.422.846,75
TRANSFERÊNCIAS (SAÚDE)	44.038.428.584,37
MINISTERIO DO DESENV. SOCIAL E COMBATE A FOME	621.239.050,77
TRANSFERÊNCIAS (ASSISTÊNCIA SOCIAL)	111.514.589,44
BOLSA FAMÍLIA	24.890.107.091,00
PROGRAMA DE ERRADICAÇÃO DO TRABALHO INFANTIL	8.467.295,00
GARANTIA SAFRA	285.433.019,21
PESCADOR ARTESANAL	6.681.302.123,66
APLICAÇÕES DIRETAS	25.990.087,61
TOTAL DAS DESPESAS EXECUTADAS	481.050.982.834,59

Source: Union Comptroller General - Transparency Portal <<http://www.portaltransparencia.gov.br>>. Accessed: 23/09/2014.

Thus, social security system displays surplus, not only within its own direct contribution/benefit payments dynamics, it has also helped in balancing of Brazilian Government's expenditure, which resulted in primary surplus of roughly US\$ 30 billion in the year of 2013, according to Brazilian Banking Authority¹⁵.

Even so, over the last 20 years, encouraged by selected Social Security scholarly opinion, under risk of "bankruptcy of Brazilian social security system", Brazilian Federal Government has placed Social Security among the issues which demanded emergency strategic plans of the State. Such reality has led to a number of uncertainties and, especially, the insecurity of the worker who has always contributed in anticipation of future social security guard. In this scenario, numerous restrictions were made to contain the so-called "pension deficit."

In fact, there are several alarming problems affect Brazilian workers in the Social Security area such as the reduction of the benefit of retirement for contribution period (through implementation of the "social security" factor); the abuse of regulatory powers conferred to the Ministry of Social Security, constantly issuing Instructive Measures and Decrees extrapolating the limits prescribed in the Social Security Legislation (Law 8.212/91 and Law 8.213/91); the wrongful denial of disability benefits, under the allegation the insured is fully able to work activities; the flawed process of rehabilitation, whose responsibility is the responsibility of social security; the low-income criterion to the aid-seclusion benefit; the lacking of increase of pension benefits, which became incompatible with the economic reality experienced in Brazil, among other factors.

Policy makers often estate that Social Security System is in high deficit situation, which cause successive discussions over the need of other institutional reforms. Nonetheless, because of alleged deficit alarm, Brazilian society feels constantly insecure about this topic, sharing mixed-up opinions between the institutionalized desire for a calm and decent retirement and the possible "threat" of new social security rules.

One might consider that despite the dispute between those defending the Welfare State politics and those supporting a stronger Economic Balance, Social Security should be regarded as a fundamental right, a mandatory collective insurance, in order to maintain the minimum subsistence of its insured members and beneficiaries.

On the other hand, since the implementation of Social Security in the early 20th century, the actuarial and demographic situations of Brazilian society have changed dramatically. For instance, official statistics show that life expectation of the population was under forty

¹⁵ www.bcb.gov.br/pec/indeco/Port/ie4-02.xls. Acesso: 23/09/2013

(40) years old, and the families were extremely numerous¹⁶.

However, with the steady growth of life expectation of the population and declining birthrates, new pension reforms are expected in the near future, in order to keep balance of the pension budget.

Another study also disclosed by IBGE (Brazil Projection of population by sex and age: 1980 to 2050) (Revised 2008)¹⁷ concludes that in 2010 the average life expectation for both sexes is 73.40, arriving at 81.29 in 2050.

Such data also demonstrates the process of aging of the Brazilian population. According to IBGE, in 2008, for every 100 children between 0-14 years there were 24.7, individuals of 65 years old or older. Between 2035-2040 the elderly population will be 18% higher than the children and, in 2050, this ratio may be up 100 to 172.7¹⁸.

In order to demonstrate such position, it is necessary to analyze the comparative study regarding income, economic and financial profile of Brazilian Social Security, held by Brazilian Social Security System in collaboration with the United Nations Development Programme - UNDP.

In this survey, relevant Human Development Indicators of the 25 Brazilian cities with the highest surplus in Brazilian Social Security were compared with those HDI indicators belonging to the 25 municipalities that showed the greatest deficits in Social Security System within the same period.

16 In the statement carried by the Brazilian Institute of Geography and Statistics, the life expectancy in 1910 was 33.4 years pass, in 2000, to 64.8 years, as shown in the Table below: Brazil: Unity: years of life

Period	Life expectation
1910	33,4
1920	33,8
1930	35,7
1940	43,3
1950	52,3
1960	54,9
1970	58,8
1980	59,0
1990	62,6
1991	62,6
2000	64,8

Source: IBGE Available at: <<http://seriesestatisticas.ibge.gov.br/series.aspx?vcodi-go=POP210&t=esperanca-de-vida>>. Accessed in: 06/13/2014.

17 Studies and surveys and demographic and socioeconomic information 24 Available at: <http://www.ibge.gov.br/home/estatistica/populacao/projecao_da_populacao/2008/projecao.pdf>. Access in: 16/06/2014, p. 57.

18 Studies and surveys and demographic and socioeconomic information 24 Available at: <http://www.ibge.gov.br/home/estatistica/populacao/projecao_da_populacao/2008/projecao.pdf>. Access in : 06/16/2014, p. 55.

Table 1 - Socioeconomic Indicators

Human Development Indicators	Average of Cities with Surplus	Average of Cities with Deficit.
%Rural/Total	1.65	2.61
Fecundity Rate	1.65	1.6
Aging Rate	6.66	7.76
School Attendance Rate (0-3)	34.21	27.86
Analphabetism Rate	3.85	4.53
Fundamental Education Rate	65.14	62.21
High-School Education Rate	49.24	45.24
Superior Education Rate	18.74	14.11
% Formally Occupied	71.56	68.62
% Formally Occupied with Superior Education	20.24	16.5
Unoccupied Rate	6.23	8.88

Source: Atlas HDI - UNDP and Synthesis Dataprev Atlas of Human Development of Municipalities. Available at: <http://www.pnud.org.br/IDH/Default.aspx?indiceAccordion=1&li=li_AtlasMunicipios>. Accessed: 17/09/2014. Municipal Statistics. Available at: <<http://www.previdencia.gov.br/estatisticas/>>. Accessed: 17/09/2014.

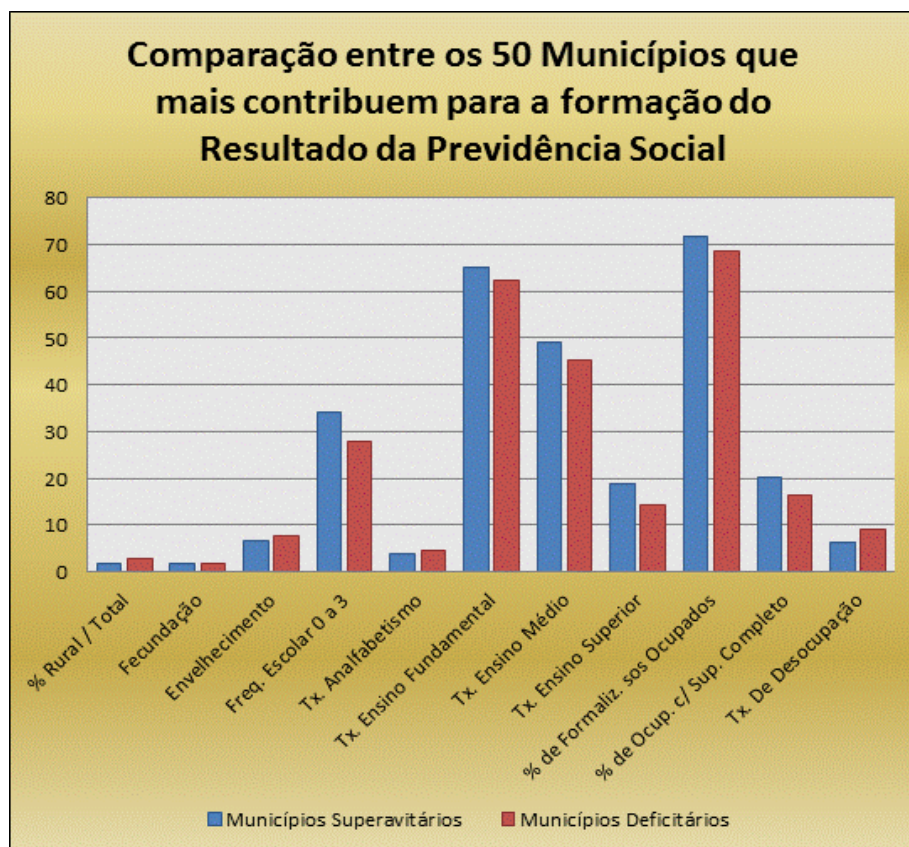
This study can guide Governmental authorities to plan for public policies towards positive effects on the financial sustainability of the Retirement System. In this sense, the influence of the indicators related to the area of education rates might present solutions of immediate impact, as well as those related with medium and long-term results.

Among the indicators with potential for immediate impact stands school attendance rate of children aged between 0 and 3 years. In this case, there are increasing demand from families seeking vacancies in Brazilian public daycare centers. This strongly influence pension schemes, because without security and daycare for children many parents (single, married or otherwise engaged) need to withdraw from formal workplaces to provide care for their children. Consequently, these parents have lower conditions to contribute to the Social Security System.

The analysis reveals that with higher education workers usually have higher income, which means higher contribution capability. Thus,

increasing rates of fundamental education, High School education and Superior education among Brazilian population plays extremely important role for future sustainability of Social Security System.

Chart 4: Comparison of Socioeconomic Indicators



Source: Atlas HDI - UNDP and Synthesis Dataprev. Atlas of Human Development of Municipalities. Available at: <http://www.pnud.org.br/IDH/Default.aspx?indiceAccordion=1&li=li_AtlasMunicipios>. Accessed: 17/09/2014. Municipal Statistics. Available at: <<http://www.previdencia.gov.br/estatisticas/>>. Accessed: 17/09/2014.

In addition to indicators relating to educational activities, other factors, even when not directly under the influence of public policies, also interfere with the result of Brazilian Social Security System. Among these indicators, stands the impact of those benefits paid to rural workers. Within the group of municipalities with surplus, there are less rural workers to receive beneficiary participation from the rural labor is

lower. Meanwhile, in those with higher deficit, there are relatively more rural workers supported by Social Security System.

The State, as custodian of society and public administrator, will have to find other subsidies to ensure the maintenance of the General Social Security, which does not imply in further new restrictions of the rights of Social Security insured members, as occurred in the pension reforms brought through Constitutional Amendments and n.20/1998 n.41/2003.

For that, we suggest some emergency measures. Among these measures firstly comes the need for the State to ensure decent conditions for workers, especially with regard to the minimum wage policy, to meet the real needs of the families supported by the workers in such condition, in order to their children don't have the need not start their activities so young¹⁹.

Within such perspective, some might consider that Brazilian workers retire still at a young age, but those often forget to say that this only happens because of early entry into the labor market, given the need to supplement the family income. Guaranteeing an efficient minimum wage policy, with corresponding adequate education and health systems, people will join the Social Security in a later period with a higher income, and thus, the increase the retirement age.

Other possible solutions are the binding of the revenue reverted to the General Regime of Social Security, preventing its budget to be spent on the payment of inactive civil servants of Special Regime of Social Security, and the comprehensive inclusion of occupants of informal work positions into General Regimen of Social Security. With this, we might secure a funding specifically targeted to the General Social Security Regimen and a greater number of contributions from the individual and voluntary insured, who are mostly excluded from social security protection.

Art. 165, § 5, number III of the Federal Constitution of 1988 provides that the Annual Budgetary Law shall include the Social Security System Budget, covering all institutions and bodies linked to it, the direct or indirect administration, as well as funds and foundations instituted and maintained by the Government.

According to Ricardo Pires Calciolari, this constitutional provision has never been enforced, since 1988 until 2008 no Government actually implemented the constitutional provision. Only in 2006, under pressure from the Court of Auditors and through an article in the Budget

¹⁹ For a worker could cover basic expenses during the last month of 2013, he should receive a minimum wage of R \$ 2,765.44, according to a survey conducted by Dieese (Department of Statistics and Socioeconomic Studies). The required value is 4,086 times the minimum wage in period, at \$ 678. In December 2012, the amount determined to meet the expenses of a family was R \$ 2,561.47, or 4.12 times the minimum of the time (R \$ 622).

for the year 2006, Social Security System was contemplated as part of the general budget of the Union, but only as an attachment which was called ‘table statement of revenue and expenditure of the Union - Social Security’ (CALCIORARI, 2009, p 148-149)²⁰.

The same author believes that until today Brazil does not have an proper budget on Social Security System, but rather a mere balance between revenues and expenditures (2009, p. 149). Following up, the biggest problem that a considerable part of the Social Security Budget expenditure is focused on payment of retired servants of the Federal Union (19%), which should happen if a proper budgetary provision for the General Regimen of Social Security was thus established (2009, p.154-155)²¹.

Actually, we need to draw the distinction between the funding of General Social Security System and the Special Security System. These are distinct schemes with constitutionally defined social contributions, therefore the payment of the benefits of retirees of the Union cannot be considered as an expense to be supported by General Social Security Regimen.

With respect to rural workers, often regarded as one of the main causes of the alleged deficit of Brazilian pension, it is actually adoption of comprehensive inclusive public policies. The vast majority of rural workers are unaware of the fact that they have been legally included into the General Regimen of Social Security, which is the main reason for the lack of social security contributions from these workers.

Besides, despite express provisions of art. 165, § 5, paragraph III²² of the Constitutional Charter of 1988, and especially in art. 96 of Federal number Law 8.212/91²³, a funding plan for the General

20 *In verbis*: [...] esse dispositivo constitucional não encontrou efetividade mínima na prática. De 1988 até 2008 nenhum governo implementou de fato a determinação constitucional. Somente em 2006, por pressão do Tribunal de Contas e em virtude de disposição expressa na LDO para o ano de 2006, é que passou a integrar o Orçamento Geral da União, em seus anexos, uma tabela denominada ‘demonstrativo de receitas e despesas da União – Seguridade Social.

21 *In verbis*: [...] Assim, verificamos que o regime jurídico da previdência do regime próprio e a do regime geral são diversos. Desse modo, devemos concluir que o sistema de Seguridade Social não abrange a previdência dos regimes próprios dos diversos Estados-membros, Municípios, Distrito Federal e União. Sendo assim, não poderá ser computado como despesa da Seguridade Social o custeio dos benefícios previdenciários dos inativos da União, pois além de atacar a boa hermenêutica dos dispositivos constitucionais citados, ofende a lógica do federalismo cooperativo [...]

22 Article 165, Paragraph 5. The annual budget law shall include: III – the social welfare budget, comprising all direct and indirect administration entities or bodies connected with social security, as well as funds and foundations instituted and maintained by the Government.

23 “The Executive Power shall send to Congress annually, following the Budget Proposal for Social Security actuarial projections related to Social Security, covering a time span of at least 20 (twenty) years, alternative hypotheses regarding demographic variables, economic and

Regimen of Social Security has never been established. Until it is actually enforced, problems of economic nature will surely continue to emerge.

In any event, there must be no social backlash, ensuring a General Regimen of Social Security capable of covering social risks, providing security and satisfaction to the Brazilian workers.

6. CONCLUSIONS

The social security system is designed to protect the social risks to which the whole society is exposed. Risks such as old age, incapacity to work, death among others, provide the basis for the granting of welfare benefits by the Brazilian social security.

Considered relatively new, the Brazilian Social Security system is considered to have started in 1923, with the Eloy Chaves Law, reaching its apex with the Federal Constitution of 1988, which integrated social welfare to the social security system.

The general arrangement of the Brazilian social security system is structured by financial PAYG scheme, which has a high degree of solidarity between generations, a generation is funding another, which increases the risk of budget deficit, since substantial changes in demographic profile of Brazilian population are likely to happen within the following years.

Originated on the concept of private insurance, social security has its foundation in preserving the financial and actuarial balance. Ideally, GRSS should ensure the correspondent protection to the insured individual who contributes monthly, when he or she is suffering from a social risk.

Analysis of important surveys show that Brazilian social security is on the path to budgetary deficit, since there is a significant increase in life expectancy today, opposed to birth rate dwindling. This converges to the understanding that further reforms in the Brazilian social security need to occur, but should respect and protect the vested right to proceed with the worker's social security safety for a moment of social risk.

Brazilian Social Security System has different funding sources. In this sense, the revenue provided directly by workers and their employers currently do not support the current volume of payment of benefits. Within such context, opinions that broadcast unsustainable financial situation of pension systems usually conceal indirect financing sources of Social Security Area which actually have significant value, to the point that such financial data currently helps to balance out Brazilian government's expenditure problems.

relevant institutions. "(free translated from Portuguese).

Although some studies and campaigns wrongfully divulge current budgetary deficit of the social security system, there are still important steps to be taken in order to avoid financial sustainability over time.

In this sense, financial sustainability of Social Security System must converge with the improvement of social development indicators. Actually, the increase of education rates has significant immediate, medium and long-term positive impact on Social Security System budgetary future. It is evident that investment in education guarantees a more financially sustainable future budget to Social Security System, even with the increase in life expectancy and reduced birth rate, since it will strongly reverberate in the improvement of the number of contributors, and their respective contribution capability as well.

7. REFERENCES

- BALERA, Wagner; MUSSI, Cristiane Miziara. *Direito Previdenciário*. 10. ed. Rio de Janeiro: Forense; São Paulo: Método, 2014.
- CALCIOLARI, Ricardo Pires. *O orçamento da seguridade social e a efetividade dos direitos sociais*. Curitiba/PR: Juruá, 2009.
- CASTRO, Carlos Alberto Pereira de; LAZZARI, João Batista. *Manual de Direito Previdenciário*. 12. Ed. Florianópolis: Conceito Editorial, 2010.
- COIMBRA, José dos Reis Feijó. *Direito Previdenciário Brasileiro*. 11. ed., Rio de Janeiro: Edições Trabalhistas, 2001.
- DERZI, Heloisa Hernandez. *Os beneficiários da pensão por morte: regime geral de previdência social*. São Paulo: Lex Editora, 2004, p. 61.
- MUSSI, Cristiane Miziara. A previdência social como política pública de distribuição de rendas e de inclusão social. In: SIQUEIRA, Dirceu; ATIQUÊ, Henry (Orgs.). *Ensaio sobre os direitos fundamentais e inclusão social*. Birigui/SP: Boreal, 2010.
- _____. *A Desmistificação do Regime Previdenciário dos Servidores Públicos*. Revista de Direito Social. Porto Alegre / RS: Notadez, n.38, 2010, p. 93-122.
- OLIVEIRA, Heloisa Maria José de. *Assistência Social: do discurso do estado à prática do serviço social*. 2. ed., rev., Florianópolis: UFSC, 1996.
- PASTOR, Jose Manuel Almansa. *Derecho de la Seguridad Social*. 7. ed., Madrid: Tecnos, 1991.
- SUSSEKIND, Arnaldo. *Previdência Social Brasileira*. Rio de Janeiro: Freitas Bastos, 1955.

LE RÔLE DU BRÉSIL DANS LA FORMATION ET L'INSTITUTION DU MARCHÉ COMMUN DU SUD – MERCOSUR

BRAZIL'S ROLE IN THE FORMATION AND ESTABLISHMENT OF THE COMMON MARKET OF THE SOUTH - MERCOSUR

Fernanda Marcos Kallas

Doctorant en Droit International Public à l'Université Paris Descartes en cotutela avec l'Université Pontífica Católica de Minas Gerais (PUC-Minas), Brésil. Maîtrise en Culture Juridique Européenne et Maîtrise en Politiques Publiques et Développement à l'Université Paris Descartes - France. DESS en Droit de l'Homme par l'Université de Coimbra - Portugal. Avocate inscrite au Bureau de Minas Gerais - Brésil.

Résumé: La mise en place de l'union intégrationniste en Amérique Latine remonte aux années 1950, sous l'égide du fort partenariat Argentino-Brésilien pour faire face aux dangers de la globalisation. Dans cet article, nous procédons à démontrer le rôle joué par Brésil à fin de créer cette intégration colossal enommé: MERCOSUR.

Mots-clés: MERCOSUR - Intégration Économique - Globalisation

Abstract: The implementation of the integrationist union in Latin America in the 1950s, under the strong Argentine-Brazilian partnership to face the dangers of globalization. In this article, we proceed to demonstrate the role played by Brazil in order to create this colossal integration appointed: MERCOSUR.

Keywords: MERCOSUR - Economic Integration - Globalisation

1. INTRODUCTION

L'union entre les pays de l'Amérique latine remonte aux années 1826, ayant été soutenue par les idéaux du leader vénézuélien Simón

Bolívar¹. Ce révolutionnaire aspirait, depuis toujours, à une Amérique unie, libre et indépendante. À cette époque, il a tenté de promouvoir une collaboration dans le continent américain, par le Congrès de Panamá. Les pays participants étaient: le Mexique, la Colombie, l'Équateur, le Venezuela et le Pérou. Mais ses conceptions n'ont pas pu aboutir en une suite favorable.²

Après l'échec de cet événement, la célèbre union intégrationniste a été réalisée, dans les années 1950.³

Suite à l'avènement du phénomène de la globalisation⁴, la tendance internationale était de construire de grandes agglomérations économiques, afin qu'elles soient plus compétitives dans les marchés économiques internationaux. Le principal but visait à fortifier et à promouvoir un commerce à la fois intra-zone et extra-zone.

Usuellement, le rapprochement entre les pays dépend de leur position géographique, en fonction de ça, la plus part d'entre eux étant voisins. Les instituts des blocs économiques sont définis en fonction de leurs objectifs et de leurs besoins, de façon que chaque bloc établisse ses propres normes, conformément à l'évolution, afin d'être stable et crédible vis-à-vis des pays tiers.

Selon D. Puchala,

« l'intégration régionale, dans une analyse en termes dynamiques, est présentée comme un processus de transformation du système au niveau de la politique internationale et qui implique divers changements tant dans la structure que dans le style et l'atmosphère des relations entre les États parties »

1 Simon Bolívar (1783 – 1830), à la fois militaire vénézuélien, il était également en leader politique. Il est considéré en Amérique latine comme un héros, à la fois visionnaire, révolutionnaire et libérateur. Il a conduit la Bolivie, la Colombie, l'Équateur, le Panama, le Pérou et le Venezuela à l'indépendance, et a aidé à lancer les bases idéologiques démocratiques dans la plupart du continent latino-américain.

2 Pour plus d'informations, voir ACCIOLY, Elizabeth. *Mercosul e União Europeia Estrutura Jurídico-Institucional*. Curitiba: Juruá, 2010, p 63.

3 Pour plus de détails sur ce sujet, voir RESENDE, Erica Simone Almeida; MALLMAN, Maria Izabel. *MERCOSUL - 21 anos : Maturidade ou Imaturidade?* Curitiba : Appris, 2013. pp 36-37 ``A ideia de integração na América Latina nasceu no final dos anos 1950. Nasceu como resposta ao desafio do desenvolvimento econômico-social``. La traduction a été réalisée par nous soins : ``L'idée d'intégration en Amérique latine est née à la fin des années 1950. Est née en réponse au défi du développement économique et social``.

4 On entend par Globalisation, le processus économique et social qui établit une intégration entre les pays et les personnes à travers le monde, suite au changement intensif d'informations entre les peuples du monde entier, facilitant les échanges. Selon le sociologue canadien Marshall McLuhan, village global.

Dans cet article, nous allons démontrer que les actions du gouvernement brésilien, concernant la formation et le développement du MERCOSUR ont été primordiales, afin de rapprocher les États sud-Américains.

De plus, nous nous attacherons à décrire les principaux événements qui se sont déroulés jusqu'à présent, ainsi que leur contexte historique, également de grande importance, en vue de mieux comprendre les directions assumées.

Nous commencerons par développer l'approche intégrationniste dans les pays sud américains, avec l'Association Latino-Américaine de Libre Commerce - ALALC, ayant été créée par la signature du traité de Montevideo dans les années 1960⁶. Après passerons nous à d'autres intégrations latino américaines (ALADI - Association Latino-Américaine pour l'Intégration) pour pouvoir arriver au système actuelle, le MERCOSUR.

Toutefois, en raison des nombreuses tentatives infructueuses au cours des dernières années pour tenter de former un bloc économique, le Brésil et l'Argentine ont commencé à renforcer leurs liens, mettant ainsi fin à la rivalité qui régnait entre ces deux pays.⁷

Guidés par l'objectif de fortifier les économies précaire et instable des pays d'Amérique du sud, le Brésil et l'Argentine ont signé un traité avec le Paraguay et l'Uruguay, intitulé MERCOSUR - Marché Commun du Sud. Cette création est toujours en vigueur et représente aujourd'hui une grande force économique pour les pays de la région.

2. ALALC - ASSOCIATION LATINO-AMÉRICAIN DE LIBRE COMMERCE

Les pays qui ont signé l'accord étaient l'Argentine, la Bolivie, le Brésil, le Chili, la Colombie, l'Équateur, le Mexique, le Paraguay, le Pérou, l'Uruguay et le Venezuela. L'objectif de ce traité était de mettre en place un marché commun régional, et prévoyait un délai de 12 ans pour créer et instaurer une zone de libre échange. Malgré l'échec du bloc, l'idée de renforcer l'économie de ses pays membres a été très

5 PUCHALA (D), *Patterns, in west european integration*, Rapport présenté au congrès de la politique américaine, Los Angeles, 1970, p.6.

6 Pour informations sur le contexte du processus d'intégration en Amérique latine, ainsi comme formation et développement du MERCOSUR, voir l'ouvrage : MACHADO, Diego Pereira; DEL'OLMO, Florisbal de Souza. *Direito da Integração, Direito Comunitário, Mercosul e União Europeia*. Salvador: JusPodivm, 2011, 322 p.

7 Pour plus de détails sur l'ALADI, voir l'ouvrage GOMES, Eduardo Biacchi. *Manual de Direito da Integração Regional*. Curitiba: Juruá Editora, 2010, pp 111-124.

appréciée⁸.

Le Traité de Montevideo, signé le 18 février 1960, a institué l'Association Latino-Américaine de Libre-Commerce - ALALC. Le siège social était situé dans cette même ville et le traité a été ratifié par tous les pays d'Amérique du Sud (à l'exception de la Guyane et du Suriname) ainsi que par le Mexique.

Le traité visait notamment l'expansion des marchés et la libéralisation du commerce par le démantèlement des mesures protectionnistes, ainsi que l'élimination des restrictions non tarifaires.⁹

Selon L. O. Baptista,

*« les résultats, au début, ont été bons. Parmi les presque 12.000 concessions octroyées par l'intermédiaire des listes nationales durant les vingt ans qu'aura duré l'ALALC, 74% l'ont été entre 1962 et 1964, 13% entre 1968 et 1969. Mais, il n'y a eu pratiquement aucune nouvelle concession durant les autres années et la croissance de l'ALALC s'est arrêtée. Entre-temps, elle ont eu un effet important sur le commerce régional qui, entre 1962 et 1977, est passé du simple au double, de 7,1% à 14%. Cependant, dès le début des années 70, l'organisation perdait progressivement de son rythme, à tel point que, pour qu'elle ne disparaisse pas, un protocole a été conclu prorogeant pour 8 ans la période de transition prévue par le traité de Montevideo de 1960 (jusqu'au 31 décembre 1980). »*¹⁰

Malheureusement, l'ALALC n'a pas obtenu le succès escompté par les chefs de gouvernements. Vingt ans plus tard, dans une tentative de renouveler les idéaux et de relancer l'intégration, l'ALALC a été remplacée par l'ALADI - Association Latino-Américaine pour l'Intégration (12 août 1980).

En vue de poursuivre leurs efforts pour une Amérique latine plus unie et plus forte, concernant toujours le désir d'assurer leur développement économique et social, les pays membres ont lancé un nouveau programme, cette fois, plus ambitieux.

8 Voir FRANCESCHINI, Luis Fernando ; BARRAL, Welber. (Coords). *Direito Internacional Público & Integração Econômica Regional*. Curitiba : Juruá, 2001, pp 229-232.

9 Pour en savoir plus sur ce sujet: GOMES, Eduardo Bicchí. *Manual de Direito da Integração Regional*. Curitiba: Juruá Editora, 2010. pp 111/124.

10 BAPTISTA, L. O., *Le Mercosul, ses institutions et son ordonnancement juridique*. Paris : CEDIN, 2001. p. 22.

Le fait de ne pas avoir suffisamment développé leur intégration au fil des années, les pays ont pris la décision de créer une nouvelle association, nommée ALADI - Association Latino-Américaine pour l'Intégration, en 1980, en remplacement de l'ALALC, avec des nouveaux objectifs économique et d'autres défis.

Cette nouvelle intégration lancée par les chefs des gouvernements latins, l'ALADI, comportait plusieurs objectifs, dont les plus marquants étaient de promouvoir, de manière harmonieuse et équilibrée, le développement économique et social de la région, afin d'assurer un meilleur niveau de vie aux habitants et de renouveler l'intégration latino-américaine, tout en établissant des dispositions pour le processus de la réalité régionale.¹¹

3. ALADI - ASSOCIATION LATINO-AMÉRICAINNE POUR L'INTÉGRATION

Le deuxième Traité de Montevideo, signé le 12 août 1980 par les mêmes pays¹², a permis à un nouveau système d'intégration de voir le jour, à la suite d'un programme de négociations de la réforme. Telle fut l'origine de l'ALADI cette association espérait surmonter les obstacles qui avaient empêché les traités antérieurs d'obtenir des résultats positifs.

L'ALADI était, effectivement, une amélioration et une actualisation de l'ALALC, cependant, bien plus ambitieuse. Comme l'affirme M. HALPERIN,

« l'intégration économique régionale constitue l'un des principaux moyens pour que les pays d'Amérique latine puissent accélérer leur processus de développement économique et social et assurer un meilleur niveau de vie pour leurs peuples »¹³

En Amérique latine, les années 1980 ont été caractérisées par le processus de démocratisation¹⁴ de la plupart des pays, ainsi que par les crises de la dette extérieure et une hausse inflationniste considérable que des réformes monétaires ont par ailleurs tenté de pailler.

11 Pour plus de détails sur ce sujet, consulter MACHADO, Diego Pereira; DEL'OLMO, Florisbal de Souza. *Direito da Integração, Direito Comunitário, Mercosul e União Europeia*. Salvador: JusPodivm, 2011, pp 65-66.

12 Les pays signataires du deuxième Traité de Montevideo : tous les pays d'Amérique du Sud (à l'exception de la Guyane et du Suriname) ainsi que le Mexique.

13 HALPERIN, M., *Instrumentos básicos de integración económica en América Latina y El Caribe*. Buenos Aires: BID. Intal, 1992, p.5.

14 Les années 80 ont été marquées par la démocratisation des pays de l'Amérique latine, une fois que les régimes dictatoriaux sont tombés.

Néanmoins, l'ALADI a remplacé le traité signé dans les années 1960, (ALALC), et a mis en place un nouveau cadre juridique opérationnel afin de poursuivre le processus d'intégration, ayant été complété par des résolutions adoptées à cette même date par le Conseil des ministres des Affaires étrangères de l'ALALC.

Les deux traités coïncidaient dans leurs objectifs et avaient comme finalité de créer, à long terme, un marché commun latino-américain. Malgré cette continuité, le Traité de Montevideo de 1980 a introduit des changements majeurs dans le processus d'orientation et la conception de son fonctionnement.¹⁵

Parmi ces changements, le programme de libéralisation du commerce multilatéral et ses mécanismes auxiliaires, visant à améliorer une zone de libre-échange, ont été remplacés par une zone de préférences économiques. Cette zone intégrait un ensemble de mécanismes incluant une préférence tarifaire parmi les membres, créant des accords de portée régionale et d'autres de portée partielle. Ces instruments offraient de multiples options opérationnelles aux pays membres, dont la convergence de progression vers des étapes supérieures d'intégration économique.

Par ailleurs, un autre changement majeur réside dans le fait que le caractère essentiellement commercial du Traité de Montevideo de 1960 a laissé la place à trois fonctions de base de la nouvelle association : la promotion et la réglementation du commerce réciproque, la complémentarité économique et le développement des activités de coopération économique, conduisent à l'expansion des marchés.

Un autre point important du Traité signé en 1980 réside dans le fait qu'il établit cinq principes fondamentaux : le pluralisme, la convergence, la flexibilité, un traitement différencié et la multiplicité. Ces principes contrastent avec les caractéristiques de l'unité du programme de libéralisation du commerce, telles que prévues par le Traité de Montevideo de 1960, basées sur les principes de multilatéralisme et de réciprocité.

La diplomatie brésilienne a toujours vu l'intérêt de s'intégrer avec ses pays voisins. En effet, l'influence brésilienne, concernant

¹⁵ L. O. Baptista explique que «le point de départ de ce changement a été la prise de conscience que seuls les pays qui bénéficiaient des possibilités géographiques, politiques et économiques adéquates progresseraient efficacement dans le processus intégrationniste et l'adoption de règles permettant de continuer dans ce sens. (...) L'objectif d'une zone de libre-échange fut maintenu dans le nouveau Traité mais celui-ci visait en premier lieu, sans délais péremptaires, la création d'une zone de préférence. Celle-ci mènerait, au fil du temps, à la constitution d'un marché commun latino-américain, et prendrait en main la défunte ALALC, héritant de certains des accords qui avaient été signés, accords parmi lesquels les accords de compensation des paiements furent les plus significatifs». BAPTISTA, L. O., *Le Mercosul, ses institutions et son ordonnancement juridique*. Paris : CEDIN, 2001. p. 23.

l'expansion commerciale des pays latino-américains est basée sur les idéaux de formation d'un bloc économique puissant, face au contexte commercial des autres pays.

Pour conclure sur la signature de ce nouveau Traité, nous pouvons indiquer que l'ALADI est une institution plus ouverte, car elle octroie une facilité d'adhésion au Traité initial. Cela permet à des pays non-membres de participer aux actions partielles, et à l'association de prendre part à la coopération horizontale entre les pays en développement, en tant qu'institution.

4. HISTORIQUE INTÉGRATIONNISTE DES PAYS LATINS

Les années 1930 ont été considérées, par la plupart des historiens brésiliens, comme une décennie très influente pour le Brésil. Jusqu'à cette époque, le pays s'appuyait sur une économie agricole, avec la production et l'exportation du café. La crise mondiale, connue sous le nom de «crash de 1929», coïncidant avec l'arrivée au pouvoir du Président Getúlio Vargas, a provoqué de grands bouleversements pour le Brésil¹⁶.

Les effets de la crise capitaliste de 1929 ont stimulé le processus de modernisation économique de l'Amérique du Sud, qui a pu, par la suite, bénéficier d'une plus grande intervention de l'État pour surmonter les difficultés et promouvoir le développement.

En conséquence, le Brésil a accéléré son processus d'urbanisation. La bourgeoisie a commencé à participer davantage à la vie politique. Vargas, avec sa politique gouvernementale a favorisé les travailleurs urbains, essentielles à l'économie, et a ainsi lancé le nouveau «moteur» économique du Brésil, l'industrialisation.

Durant son mandat, Vargas a créé le Ministère du Travail, de l'Industrie et du Commerce et a promulgué une série de lois sur le droit du travail. C'est alors qu'une nouvelle époque a commencé pour le peuple brésilien.

Selon Bernard BRET¹⁷,

« les échanges internationaux sont anciens dans l'histoire du Brésil, du fait de son passé colonial. Le Brésil est indépendant depuis 1822, mais conserve depuis longtemps une économie ouverte. Cette tradition d'ouverture prend fin dans les années 1930, qui marquent le début d'une période d'Industrialisation par Substitution aux

16 Pour plus de détail sur l'histoire des présidents au Brésil, voir WINTER, Luis Alexandre Carta. *Crise do Modelo Presidencialista*. Curitiba: Juruá, 2008, pp 43-69.

17 BRET, B., Professeur à l'Université Jean Moulin Lyon 3.

*Importations (ISI). Le Brésil cherche à produire sur place ce qu'auparavant la division internationale du travail l'obligeait à importer grâce aux devises issues de l'exportation de produits bruts. L'industrialisation entraîne une relative fermeture des frontières du pays, afin de protéger les producteurs nationaux alors incapables de soutenir la concurrence ».*¹⁸

Pour bien comprendre cette période, il importe de souligner que les facteurs expliquant le rapprochement du Brésil de ses pays voisins sont liés à la crise du libéralisme et du capitalisme dans les années 1930.

Face à la fragilité de leur modèle économique basé sur les exportations de produits agricoles, les gouvernements des pays de la région ont réalisé qu'il était nécessaire d'établir une relation de coopération mutuelle afin de surmonter les difficultés économiques. À cette époque-la, la région revendiquait son propre modèle de développement, associé au projet d'intégration économique, dans lequel l'Argentine et le Brésil étaient considérés comme des leaders importants au sein du continent sud-américain.

La réouverture du Brésil au monde extérieur date de la moitié des années 1960, avec l'arrivée au pouvoir des militaires. Cette phase durera jusqu'en 1985, année de son retour à la démocratie, comme cela s'est d'ailleurs passé pour les autres pays d'Amérique du Sud.

Cependant, lors des passages entre démocratie et dictature, le Brésil et l'Argentine n'ont cessé de conclure des accords de rapprochement et de renforcer leurs liens économiques.

Selon Elisabeth ACCIOLY,

*« l'origine du MERCOSUR, essentiellement bilatérale, provient de la relation entre le Brésil et l'Argentine, qui, traditionnellement étaient des adversaires, ce qui rappelle, mutatis mutandis, la rivalité qui existait jadis entre la France et l'Allemagne. Ennemis pendant la Seconde Guerre mondiale, ces deux pays se sont unis pour le projet de la Communauté Européenne du Charbon et de l'Acier, (CECA), et, par la suite dans la Communauté Économique Européenne (CEE), dans le but de joindre leurs forces et de faire prospérer cette union ».*¹⁹

18 BRET, B., sur <http://geographie-ville-en-guerre.blogspot.fr/2012/11/le-regard-dun-geographe-sur-les.html>, consulté le 20.04.2014.

19 ACCIOLY, Elisabeth. *Mercosul e União Europeia Estrutura Jurídico-Institucional*. Curitiba:

C'est à la fin des années 1980 que le régime militaire a pris fin et que le néolibéralisme a été instauré. Par la suite, les pays latins ont assisté à la démocratisation de leurs gouvernements, avec l'apparition, dans les années 1990, du libéralisme économique.

Selon Arnaldo WALD,

*« à partir de 1980, en vertu de la globalisation croissante de l'économie mondiale, le Brésil se retrouverait devant un dilemme. Ils s'agissait de choisir entre maintenir une économie fermée, avec une très importante participation de l'État, dominée par un nationalisme exacerbé, ou ouvrir le marché brésilien, qui gardait des dimensions continentales, et de dépasser une certaine xénophobie et un protectionnisme excessif dans le domaine économique ».*²⁰

La collaboration entre l'Argentine et le Brésil, en 1985, a eu pour conséquence la signature de nombreux accords, dont l'un était la création du MERCOSUR.²¹

5. LA GENÈSE DU MERCOSUR - MARCHÉ COMMUN DU SUD

Apparu suite à une évolution de normes et de traités, le MERCOSUR a été mis en place en 1991, grâce à la signature du Traité d'Asunción par les pays membres (Argentine, Brésil, Paraguay, Uruguay, Venezuela).²²

Ce traité constituait un marché commun et prévoyait deux étapes. Durant la première, qui consistait en une intégration progressive,

Juruá, 2010, p 71. Version originale: "A origem do MERCOSUL é essencialmente bilateral; deu-se a partir do relacionamento entre Brasil e Argentina, que, até então, eram tradicionalmente adversários, trazendo à lembrança, guardadas as devidas proporções, a rivalidade alimentada entre França e Alemanha. Inimigas na Segunda Grande Guerra, foram postas lado a lado no projeto da Comunidade Européia do Carvão e do Aço (CECA), e, posteriormente, no da Comunidade Econômica Européia (CEE), conseguindo somar esforços e fazer com que a união prosperasse." Traduction libre de l'auteur.

20 WALD, Arnaldo. *Le Droit Brésilien Hier, Aujourd'hui et Demain*. Paris: Société de Legislation Comparée, 2005, p 355.

21 Pourplus d'info: GOMES, Eduardo Biacchi. *A Globalização Econômica e a Integração no Continente Americano, Desafios para o Estado Brasileiro*. Rio Grande do Sul: Unijui, 2004.

22 Le Venezuela est devenu un membre effectif du Mercosur depuis 2012. Suite à la destitution controversée du Président paraguayen Fernando LUGO, les autres pays membres du Mercosur ont décidé de le suspendre temporairement des actions du bloc et en raison du manque de l'unique pays (le Paraguay) contre l'adhésion du Venezuela, ils ont l'accepté.

les institutions étaient provisoires. Lors de la phase définitive, les principales difficultés de mise en œuvre devaient être résolues (ce qui n'a pas été le cas) et le processus d'intégration devait être consolidé à travers la mise en place de structures définitives. Celles-ci seront créées au moment de la conclusion du Protocole d'Ouro Preto.

L'objectif économique du MERCOSUR est double. Au niveau interne, il s'agit de créer un espace économique intégré, afin de renforcer les économies des pays membres. Autrement dit, il est question d'augmenter le commerce au sein de la région à travers une consolidation du marché. Le second objectif, est d'assoir le marché l'intérieur et ainsi pouvoir s'ouvrir sur le marché extérieur.

Les quatre pays signataires du Traité

*« abandonnent [donc] la logique sectorielle qui prévalait dans les accords précédents et s'obligent mutuellement à respecter un strict programme de libération commerciale, devant aboutir à l'élimination totale des droits de douane et autres restrictions au commerce intra-zone, à coordonner leurs politiques macro-économiques, à adopter un tarif extérieur commun (TEC) face aux pays tiers, et à passer des accords sectoriels pour profiter des économies d'échelle ».*²³

Les principaux objectifs du Traité sont les suivants :²⁴

- *favoriser l'insertion compétitive des quatre pays dans un monde caractérisé par la consolidation de blocs régionaux de commerce, et dans lequel la technologie est cruciale pour le progrès économique et social;*
- *promouvoir des économies d'échelle, ce qui permettrait à chaque pays des gains de productivité;*
- *stimuler les flux commerciaux et d'investissements avec le reste du monde, ainsi que l'ouverture économique régionale;*
- *améliorer les conditions de vie des populations de la région.*

23 DABÈNE, O., *L'intégration régionale en Amérique Latine : Le Mercosur*. Paris : Centre d'études et de recherches internationales, 1995. p 7.

24 Article 1 du Traité d'Asunción.

Quant aux caractéristiques de base du MERCOSUR, ce sont: la libre circulation des biens et services, l'établissement d'un tarif extérieur commun (TEC), l'adoption d'une politique commerciale commune par rapport aux pays tiers, la coordination des positions dans les forums régionaux et internationaux, la coordination des politiques macro-économiques, sectorielles et, enfin, l'harmonisation des lois dans les domaines concernés, afin de renforcer le processus d'intégration.²⁵

Cet accord avait initialement prévu deux étapes pour la mise en œuvre du marché commun du Cône Sud: une première phase provisoire, puis une deuxième, incluant la phase définitive.

La première étape a été réalisée à travers la signature du Traité d'Asunción en 1991, et la seconde phase est entrée en vigueur en 1994, avec la signature du Protocole d'Ouro Preto. Ce protocole est venu s'ajouter au Traité instituant ainsi le bloc économique du Sud. Il importe de souligner que sa mise en œuvre permettait au MERCOSUR d'acquérir une personnalité juridique de droit international.²⁶

Selon L. O. BAPTISTA,

*« la caractéristique du Mercosul est son caractère transitoire. Ainsi avons nous eu droit à une phase provisoire ou transitoire, dont le point de départ [a été] est le Traité d'Asunción [...] qui a culminé avec la signature du Protocole de Ouro Preto. (...) Cet accord international présente des caractéristiques très [spécifique], et un caractère dialectique : c'est un élément de changement et de continuité. Élément de changement parce qu'il crée un nouveau cadre, non seulement économique et commercial, mais également politique; élément de continuité parce qu'il prolonge les efforts intégrationnistes du Brésil et de l'Argentine ainsi que ceux du continent ».*²⁷

L'organisation du MERCOSUR est hautement structurée. Afin de développer le fonctionnement de son système, pour bien comprendre son activité et sa structure institutionnelle, il est nécessaire de connaître l'ensemble de l'organisation.

La première source du bloc économique du Cône Sud, est le Traité d'Asunción, selon lequel les quatre États membres sont soumis

25 Voir Protocole de Ouro Preto.

26 SILVA, Marcos Rector Toledo. *Mercosul e Personalidade Jurídica Internacional: As Relações Externas do Brasil Sub-Regional Pós-Ouro Preto*. Rio de Janeiro: Renovar, 1999. pp 35-47.

27 BAPTISTA, L.O., *Le Mercosul, Ses institutions et son ordonnancement juridique*. Paris : CEDIN-Paris I, 2001.

aux mêmes obligations et aux mêmes droits généraux. Ce traité constitue l'instrument juridique de base du projet d'intégration car il comporte une série d'initiatives destinées à favoriser l'intégration régionale.²⁸

Selon L. O. BAPTISTA,

*« l'objectif, énoncé dès le départ dans le Traité d'Asunción, ne s'est pas limité à la création d'une zone de libre-échange, comme dans le cas de certains de ses prédécesseurs, mais [il] visait la création d'un Marché commun, concept plus ample bien que spécifique à ce cas et qui se [ferail] par étape ».*²⁹

Le caractère transitionnel de ce traité est prévu dans la constitution de sa propre loi, en son article 18, qui spécifie qu'avant le 31 décembre 1994,

*« les États parties devront convoquer une réunion extraordinaire dans l'objectif de déterminer la structure institutionnelle définitive des organes d'administration du Marché Commun, ainsi que leurs fonctions et leur système d'adoption de décisions ».*³⁰

La période de transition a été une étape charnière afin de mettre en place le Protocole d'Ouro Preto, qui aurait lieu dans la phase définitive du MERCOSUR. Cela allait s'avérer remarquable pour le passage à l'union douanière ainsi que pour l'institutionnalisation définitive du MERCOSUR.

La phase provisoire correspond à la période couvrant la signature du Traité d'Asunción jusqu'à la signature du Protocole d'Ouro Preto, fin 1994. La phase définitive, quant à elle, commence avec la signature de ce protocole, conférant au MERCOSUR le statut de personnalité juridique internationale.

Toute intégration économique nécessite une structure pour

28 FARIA, José Angelo Estrella. *O Mercosul: Principios, Finalidade e Alcance do Tratado de Assunção*. Brasília: MRE/SGITE/NAT, 1993. pp 25 et suite.

29 BAPTISTA, L. O., *Le Mercosul, Ses institutions et son ordonnancement juridique*. Paris : CEDIN, 2001. p. 39.

30 La traduction a été faite par nos soins. Version originale du article 18 du Traité d'Asuncion : ``Antes do estabelecimento do Mercado Comum, a 31 de dezembro de 1994, os Estados Partes convocarão uma reunião extraordinária com o objetivo de determinar a estrutura institucional definitiva dos órgãos de administração do Mercado Comum, assim como as atribuições específicas de cada um deles e seu sistema de tomada de decisões`.

bien fonctionner ; il en va de même pour l'intégration économique du Cône Sud. Il importe alors d'avoir une activité normative, afin que cette organisation puisse survivre et fonctionner. L'histoire et la consolidation de cette union ont été ponctuées d'évolutions au niveau des normes et des applications juridiques.

BAPTISTA ajoute,

*« durant le processus de développement du MERCOSUR, a été mis en œuvre le programme de libéralisation, programme impliquant la suppression des tarifs internes et l'établissement d'un tarif extérieur commun, probablement moins élevé que ceux adoptés aujourd'hui par les signataires du Traité d'Asunción, voire même aboli dans certaines cas; les politiques macro-économiques et financières des quatre pays devront également être harmonisées – de cela résultera une plus grande stabilité pour les producteurs, les commerçants, les investisseurs et les travailleurs; enfin, les accords sectoriels devront proliférer afin de compléter ou amplifier la mise en œuvre du MERCOSUR ».*³¹

Il convint de noter que la mise en place du Protocole d'Ouro Preto, grâce auquel MERCOSUR reçoit sa personnalité juridique de droit international, a légèrement changé le système et a également créé de nouveaux organes afin de mieux servir les Pays membres de cette intégration.

Durant sa phase provisoire, l'institution MERCOSUR a mis en place des organes pour un meilleur fonctionnement du système. Elle a également prévu le Conseil du Marché Commun (CMC) et le Groupe du Marché Commun (GMC).

En 1994, avec le Protocole d'Ouro Preto qui a marqué la transition de la phase provisoire vers la phase définitive, l'institution a instauré de nouveaux organes afin de mieux gérer les actions du MERCOSUR, devenu une personnalité juridique de droit international.

Les organes principaux du MERCOSUR sont le Conseil Marché Commun (CMC) et le Groupe Marché Commun (GMC), assistés par la Commission du commerce du MERCOSUR (CCM).

Selon O. Dabène,

« le CMC, le GMC et la CCM sont les trois organes de nature intergouvernementale disposant de capacités

31 BAPTISTA, L. O. op.cit.

*de décision. Le CMC, organe supérieur, conserve la conduite politique du processus d'intégration en vue de la réalisation d'un marché commun. Le GMC, organe exécutif, fait des propositions au CMC et prend des mesures pour mettre en application les décisions du Conseil. La CCM assiste le GMC en veillant au bon fonctionnement de l'union douanière ».*³²

La fonction et la prévision de ces organes sont décrites dans les textes du traité et du protocole:

*« L'article 9 du Traité d'Asunción prévoit l'administration et l'application du présent Traité et des Accords spécifiques et décisions qui sont adoptées dans le cadre juridique, établis durant la période de transition sont à la charge des organes suivants: a) Conseil du Marché Commun; b) Groupe du Marché Commun. »*³³

- L'article 2 du Protocole d'Ouro Preto précise que ce

« Le Conseil du Marché commun, le Groupe du Marché commun et la Commission du commerce du MERCOSUR sont des organes de décision d'ordre intergouvernemental ».

Le Traité d'Asunción montre clairement les fonctions du Conseil et du Groupe Marché Commun, relatives à l'administration et à la fonction de négociation du marché commun du Sud. Avec la mise en place du Protocole d'Ouro Preto, d'autres organes ont été créés afin d'aider et de mieux développer les actions du MERCOSUR.

Le Conseil Marché Commun est l'organe suprême chargé de la gestion politique du processus d'intégration. Dans le Traité d'Asunción, cet organe se limite essentiellement à l'administration et à la négociation du MERCOSUR.

Le CMC a été créé lors de l'entrée en vigueur du Traité, en 1991, par son article 10, et suite la mise en œuvre du Protocole de Ouro

32 DABÈNE, O., *L'intégration régionale en Amérique Latine : Le Mercosur*. Paris : Centre d'études et de recherches internationales, 1995. p 10.

33 La traduction a été effectuée par nos soins, version originale du article 9 du Traité D'Asunción : A administração e execução do presente Tratado e dos Acordos específicos e decisões que se adotem no quadro jurídico que o mesmo estabelece durante o período de transição estarão a cargo dos seguintes órgãos: a) Conselho do Mercado Comum; b) Grupo do Mercado Comum.

Preto, il est devenu en son l'article 3 pour établir la nature juridique du Conseil et stipuler que

*« Le Conseil Marché Commun, organe suprême du MERCOSUR, est chargé de conduire la politique d'intégration et de prendre des décisions afin d'atteindre les objectifs fixés dans le Traité d'Asunción et d'instituer définitivement le Marché Commun ».*³⁴

Le Groupe Marché Commun est l'organe exécutif du MERCOSUR, décrit sur l'article 10 du Protocole d'Ouro Preto, *«Le Groupe Marché commun est l'organe exécutif du MERCOSUR»*.

La Commission de Commerce du Mercosur est chargée de donner l'assistance au GMC, suite à l'application des instruments de politique commerciale commune aux États parties de l'union douanière ainsi comme aux États tiers.

La personnalité juridique acquise par l'intégration économique du Marché commun du Sud a permis d'opérer des changements dans sa structure.

Les Organes auxiliaires sont, le Secrétariat Administratif du Mercosur, les Comités Techniques, la Commission Parlementaire Conjointe, le Forum Consultatif Économique et Social.

Le Secrétariat Administratif du Mercosur (SAM), à l'époque du Traité d'Asunción, était un organe d'archivage et un simple instrument permettant de faciliter les activités des institutions du MERCOSUR. Il était un organe consultatif sans pouvoir de décision.

Néanmoins, avec la mise en place du Protocole d'Ouro Preto, en 1994 et, par conséquent, avec la création d'une organisation internationale, la SAM a été obligée de se transformer en un organe permanent du MERCOSUR. Il comprend la structure institutionnelle du bloc, avec un soutien opérationnel, chargé de fournir des services à d'autres organes du MERCOSUR, comme prévu à l'article 31 du Protocole.³⁵

Les avancées juridiques et institutionnelles ont été réalisées avec l'avènement de la phase définitive du MERCOSUR, et dont l'origine résidait dans la dynamisation du processus et la nécessité d'approfondir davantage la réalisation du marché commun. Par conséquent, le SAM a été réorganisé en vue de le renforcer et de lui conférer une plus grande

³⁴ L'article 3 du Protocole d'Ouro Preto.

³⁵ L'article 31 du Protocole d'Ouro Preto : *«Le MERCOSUR est doté d'un Secrétariat administratif qui est un organe d'appui fonctionnel. Le Secrétariat administratif du MERCOSUR, qui est chargé de fournir des services aux autres organes du MERCOSUR, a son siège à Montevideo.»*

capacité technique et opérationnelle.

Les Comités Techniques sont créés par l'intermédiaire de la Commission du Commerce du MERCOSUR et prévus par l'article 19, IX du Protocole d'Ouro Preto, sa finalité est de conseiller et appuyer les activités de compétence de la Commission du Commerce du MERCOSUR, sans capacité décisionnelle.

La Commission Parlementaire Conjointe a été créée dans la phase provisoire du MERCOSUR, par l'article 24 du Traité d'Asunción. C'est un organe d'assistance, sans subordination à la Commission du marché commun.

Le Forum Consultatif Économique et Social a été introduit dans le cadre de la structure organique du MERCOSUR, par le Protocole d'Ouro Preto, et ses dispositions sont prévues aux articles 28 à 30³⁶. Il s'agit d'un organe de représentation des secteurs économiques et sociaux.

6. L'ÉVOLUTION DE L'INDUSTRIALISATION BRÉSILIENNE ET SON IMPACT SUR LE MERCOSUR

L'histoire du Brésil n'est pas récente, cependant, nous ne pouvons en affirmer de même concernant son passé industriel. L'histoire industrielle du Brésil se caractérise par différentes phases ; elle est aussi un reflet de l'histoire mondiale.

Pendant toute l'époque coloniale, de 1530 à 1822, l'industrialisation du pays n'a pas été la priorité des différents gouvernements. Si le Brésil était basé sur une économie agraire, avec l'exploitation des ressources naturelles, son industrie n'était pas très développée durant cette phase. En effet, le pays était uniquement utilisé comme une "ferme" pour les activités d'extractions, telles que le bois, le sucre, les mines d'or et de diamant.³⁷

Selon l'Institut Euvaldo Lodi – IEL³⁸, les produits industrialisés européens sont apparus au sein du peuple brésilien en 1815, à la fin des guerres napoléoniennes. Ce contact a suscité, au sein de la société émergente brésilienne, le désir d'initier un processus de fabrication.

36 Les articles 28 à 30 du Protocole d'Ouro Preto. Article 28 : «*Le Forum consultatif économique et social, organe représentatif des secteurs économique et social, est composé d'un nombre égal de représentants de chaque État Partie.*» Article 29 : «*Le Forum consultatif économique et social est un organe consultatif qui présente des recommandations au Groupe du Marché commun.*» Article 30 : «*Le Forum consultatif économique et social soumet son règlement intérieur à l'approbation du Groupe du Marché commun.*»

37 Voir les idées de l' Institute Euvaldo Lodi - IEL, sur : <http://www.iel.org.br/portal/data/pages/FF80808127784C1F0127788502B7547C.htm>

38 IEL – Institute Euvaldo Lodi, organisme lié à la Confédération Nationale de l'Industrie Brésilienne.

Après cette période, plusieurs tentatives d'industrialisation du pays ont eu lieu.

L'impulsion décisive pour le réel développement de l'industrie du pays est arrivée avec la Première Guerre mondiale (1914-1918). Cela s'explique par les difficultés rencontrées par les pays européens afin de maintenir le flux des exportations vers le Brésil. Le pays a alors procédé à l'ouverture d'un certain nombre d'industries pour remplacer les produits achetés à l'extérieur.

Il importe de souligner que les exportations du café brésilien ont joué un rôle primordiale dans l'histoire. C'est en effet, grâce aux ressources de ces exportations qu'il a été possible de financer la création de nouvelles entreprises.

Le tableau ci-dessous indique le nombre d'usines et celui des employés au Brésil, entre 1910 et 1920.

Tableau n° 1		
Année	Nombre d'usines	Nombre d'employés
1910	3.998	151.606
1920	13.336	275.512

Source: (IEL – Institut Euvaldo Lodi)

La crise de 1929 a également eu un impact négatif sur le développement du pays, plus particulièrement sur l'exportation du café. Cependant, le Brésil a su poursuivre ses efforts grâce à sa politique de changement et progrès.

La Seconde Guerre Mondiale, est une autre période charnière, notamment à partir de 1939. Cet événement a conduit à une augmentation des usines de fabrication pour remplacer les produits importés. Selon les données de l'IEL³⁹, entre 1940 et 1945, la croissance moyenne de l'industrie brésilienne était de 9,2% par an.

À partir de cette période, le Brésil a connu un fort développement industriel. Le gouvernement a investi dans la construction d'aciéries et de centrales électriques dans tout le pays ; l'une des plus importantes était la «Companhia Siderúrgica Nacional», aciérie construite à Volta

39 IEL - Institute Euvaldo Lodi, voir sur: <http://www.iel.org.br/portal/data/pages/FF80808127784C1F0127788502B7547C.htm>

Redonda, dans l'État de Rio de Janeiro.

Le retour au pouvoir du Président Vargas, en 1953 – il s'agissait de son deuxième mandat, a été marqué par la diffusion d'idées nationalistes qu'il défendait par le biais d'un développement industriel centralisé et des limitations sur les entrées de capitaux étrangers.

Par la suite, avec l'arrivée au pouvoir du président Juscelino Kubitschek en 1956, les idéaux ont changé. Les principaux objectifs du nouveau chef du gouvernement étaient de permettre l'accès au marché aux entreprises étrangères et d'accélérer ainsi, la croissance de l'industrie brésilienne. Il a été à l'origine de la construction de la nouvelle capitale fédérale, Brasília, afin de promouvoir l'intégration du pays, ainsi que son développement interne.

Durant le mandat de Kubitschek (1956-1961), le Brésil a connu une période de développement économique remarquable. Avec son style novateur de gouvernance, il a gagné la confiance du peuple brésilien.

En 1964, les militaires sont arrivés au pouvoir. Entre 1969 et 1973, le Brésil a assisté au soi-disant "miracle économique", en effet l'industrie, du fait de sa croissance rapide, a généré des emplois et de nombreux travailleurs ont commencé à percevoir un salaire. Toutefois, malgré l'élargissement de la distribution des richesses, ces derniers sont restés faibles. L'industrialisation s'est développée principalement dans le sud-est du pays, sur l'axe Rio de Janeiro - São Paulo, qui a connu une immigration massive de populations issues des régions les plus pauvres du pays, en particulier de la région nord-est.

Après cette phase de croissance, l'économie dû faire face, entre 1973 et 1990, à une longue période d'instabilité monétaire et de récession, accompagnée d'une forte inflation, de la stagnation des salaires, de l'augmentation de la dette extérieure et d'une croissance relativement lente.

Dans les années 1980, le gouvernement brésilien a mis en place différents plans économiques visant à maîtriser l'inflation, mais ceux-ci n'ont pas eu de succès, puis que créanciers internationaux (moratoire) n'ont pas pu être remboursés, ce qui a entraîné de graves problèmes économiques qui ont perduré. « La décennie perdue », est l'expression désignant les années 1980.

Le Brésil a connu différents changements de monnaie et plusieurs plans économiques dans le but de contenir la hausse inflationniste, mais sans succès. Cette crise s'est manifestée par une hyperinflation, avec des taux de 2012,6 % en 1989 et de 2851,3 % en 1993, selon l'indice général des prix (IGP-DI) de la Fondation Getúlio Vargas.⁴⁰ Les plans mis en place à cette époque sont le «Plan Cruzado», le «Plan Bresser» et le «Plan Collor».

⁴⁰ Voir les informations complètes sur IPEADATA, <http://www.ipeadata.gov.br/Default.aspx>.

En 1989, après le retour à la démocratie et l'arrivée au pouvoir du Président Fernando Collor, l'économie brésilienne a beaucoup souffert. Avec la politique d'ouverture aux importations provenant des pays industrialisés, de nombreuses industries nationales ont dû fermer leurs portes, ce qui a entraîné une hausse significative du chômage.

La monnaie s'est stabilisée grâce à la mise en place du Plan Real en 1994, pendant le mandat du Président Itamar Franco. Avec la fin de l'inflation et la taxe d'impôt régressif, une amélioration sans précédent des revenus pour les classes inférieures s'est fait ressentir.

Le Ministre des Finances, créateur du Plan Real, Fernando Henrique Cardoso, a ensuite été élu Président de la République. Sa présidence a été caractérisée par le développement de la modernisation et la redistribution des revenus. Durant son mandat, de nombreuses entreprises publiques ont été privatisées et l'industrie a bénéficié d'importants investissements étrangers.

Selon VERCUEIL,

*« la réussite du «Plan Real» a été facilitée par d'autres mesures, de plus longue haleine, qui ont modifié peu à peu le visage de l'économie brésilienne : nombre d'entreprises publiques, considérées comme coûteuses et peu efficaces, ont été privatisées depuis le début des années 1990. Dans le même temps, l'économie nationale a été progressivement ouverte à la concurrence mondiale, tout en restant relativement protégée, en particulier par un niveau élevé des tarifs douaniers. (...) Au milieu des années 1990, l'économie brésilienne est devenue plus efficace réagissant plus rapidement aux changements qui affectent l'économie mondiale que dix ans auparavant ».*⁴¹

En 2003, avec l'arrivée au pouvoir du Président Luis Inácio Lula da Silva, plus connu sous le nom de «Lula», l'économie du Brésil a continué à se développer. Sa politique s'est basée en partie sur la politique économique de son prédécesseur, Cardoso. Tout au long de son mandat, le Brésil s'est énormément développé et a bien réagi face à la crise mondiale de 2008.

Après la création du Marché Commun du Sud et la signature du Traité d'Asunción par l'Argentine, le Brésil, le Paraguay, l'Uruguay et le Venezuela, l'industrie brésilienne s'est transformée.⁴²

41 VERCUEIL, J., *Les Pays Émergents : Brésil, Russie, Inde, Chine*. Paris : Bréal, 2010, p. 77.

42 VERCUEIL, J., *Les Pays Émergents : Brésil, Russie, Inde, Chine*. Paris : Bréal, 2010, p. 78, « les secteurs exportateurs se renforcent [en plus de] l'agroalimentaire, y sont

Selon BRET, le Brésil est la «*locomotive*» du MERCOSUR. Il affirme :

*« Ce rôle de locomotive se voit à partir du degré d'attraction communautaire dans les échanges extérieurs. On constate une augmentation des échanges intra-zones, plus rapide qu'avec les pays tiers. Cela avait été cassé par la crise argentine, mais le pays se ressaisit depuis 2003 (s'il n'y a pas encore de retour aux niveaux antérieurs, la tendance est bonne). L'attraction mercosulienne est asymétrique ».*⁴³

Depuis la naissance du MERCOSUR, le rôle du Brésil, dans le cadre de l'intégration économique, s'est avéré capital, le pays est en effet a été considéré par plusieurs auteurs comme le «*géant du Sud*».

Les premières années du Marché Commun du Sud ont été significatives. Les exportations brésiliennes vers ses partenaires ont considérablement augmenté. Entre 1991 (année de la signature du Traité d'Asunción) et 1993, les exportations sont passées de 2,3 à 5,4 milliards de dollars. En termes de pourcentages, cela représente signifie de 7,3% à 13,9% du total, à un taux considérablement plus élevé que pour les exportations vers le reste du monde. Durant la même période, le Brésil a accumulé des excédents exceptionnels. En 1992, concernant les échanges avec les pays membres du MERCOSUR, le total des importations a atteint 60% de la valeur des exportations, un

inclues les industries de transformation de la filière bois (papier-cellulose), la chimie, la sidérurgie, l'automobile et l'aéronautique. Dans ce dernier secteur, l'entreprise Embraer (Empresa Brasileira de Aeronautica) est une figure de proue : créée en 1969 dans le cadre d'un programme de substitution aux importations, privatisée au début des années 1990, elle cède ensuite 20% de son capital à Dassault Aviation – EADS. Restructurée au début des années 2000, elle devient le quatrième avionneur mondial, compte 12.000 employés et s'affirme durant la décennie comme l'un des principaux exportateurs industriels du Brésil avec une part de marché mondial de près de 50% sur le segment des avions de 30 à 60 places. Autre exemple, le secteur des agrocarburants, développé à la suite du choc pétrolier de 1973, parvient lui aussi à maturité : avec 115 millions d'hectolitres, le Brésil est le premier producteur mondial d'éthanol (carburant obtenu à partir de la canne à sucre) et s'est donné pour objectif d'en porter les exportations à un tiers de la production. Son industrie automobile est capable de produire annuellement 3 millions de véhicules, dont la majorité sont équipés de moteurs flex-fuel, acceptant aussi bien du carburant traditionnel que de l'éthanol ou du diester. Après 2005, le Brésil devient aussi un important exportateur de capitaux, avec 25 milliards de dollars d'IDE sortants en 2006 ».

43 BRET, B., «*L'émergence d'un pôle brésilien dans le continent sudaméricain*», publié sur le site http://www.cafe_cafe-geo.net/article.php3?id_article=809&var_recherche=Bresil, 2006.

déséquilibre difficile à maintenir.⁴⁴

Selon la Revue Brésilienne de Politique Internationale⁴⁵, le commerce intra-bloc a considérablement augmenté dans les années suivant sa formation, atteignant 19143 millions de dollars en 1993. L'expansion du commerce intra-zone s'est poursuivie jusqu'en 1997, année pendant laquelle le total du bloc représentait 41074 millions de dollars, valeur quatre fois plus élevée qu'en 1991.

Les auteurs⁴⁶ de la même revue indique que le MERCOSUR présente trois phases. La première, entre 1991 et 1997, correspond à l'étape de formation durant laquelle le bloc s'est structuré, focalisé notamment sur l'aspect commercial.

La deuxième phase, entre 1998 et 2002, est considérée comme une phase de crise, reflet de l'économie. Tous les pays membres du bloc sont passés par cette phase. D'un point de vue économique, cette période est marquée par l'absence de progrès. En effet, en 1991, le commerce intra-bloc a diminué de 25% par rapport à l'année précédente. Durant les années suivantes, le commerce a connu des hauts et des bas. « *La différence entre 1997, l'année du pic, et 2002, l'année la plus critique, est de US\$ 20 612 millions, ce qui veut dire une baisse de 50,18%* »⁴⁷, explique la Revue Brésilienne de Politique Internationale.

La troisième phase, qui débute en 2003, décrite par les auteurs de la RBPI⁴⁸, nommée «*la revitalisation du MERCOSUR*», car les indicateurs économiques se sont améliorés, signalant une nouvelle phase positive pour l'intégration économique du Cône Sud. La même année, le volume de commerce intra-bloc a augmenté de 25% par rapport à l'année précédente. Signalons également que le commerce entre les pays membres du MERCOSUR et les autres pays du monde s'est développé pendant cette étape, avec une croissance de 14% pendant la première année.

Pour conclure sur ces trois phases, les auteurs de la RBPI ajoutent :

« bien que le Mercosur ait stagné, voire même reculé

44 Pour compléter cette idée, voir : http://www.scielo.br/scielo.php?pid=S0103-40141994000200006&script=sci_arttext, 1994, consulté le 20 avril 2014.

45 Voir Revue Brésilienne de Politique Internationale: *Indicadores e Análise Multidimensional do Processo de Integração do Cone Sul*, 51(2)/2008, RBPI, 2008, p 106.

46 HOFFMANN, A.R., Professeur à l'Institut des Relations Internationales de l'Université PUC à Rio de Janeiro. COUTINHO, M., Docteur en Sciences Politiques à l'Institut Universitaire de Recherche à Rio de Janeiro. KFURI, R., Professeur à l'Institut des Relations Internationales de l'Université PUC à Rio de Janeiro.

47 Voir Revue Brésilienne de Politique Internationale : *Indicadores e Análise Multidimensional do Processo de Integração do Cone Sul*, 51(2)/2008, RBPI, 2008, p 109.

48 RBPI - Revue Brésilienne de Politique Internationale

*dans sa dimension commerciale, en particulier pendant la deuxième phase, les autres domaines tels que le secteur social et le secteur politico-institutionnel n'ont pas connu un tel phénomène ».*⁴⁹

N'oublions pas que, selon les statistiques, entre 2003 et 2007, les exportations du Brésil vers l'Argentine ont augmenté de 35%, contre 23 % de l'Argentine vers le Brésil. En direction du Paraguay, elles ont augmenté de 23%, contre 7% du Paraguay vers le Brésil et de 33% vers l'Uruguay contre 11%. Pour le Paraguay et l'Uruguay, l'action du commerce vers le MERCOSUR n'a pas été aussi significative que pour le Brésil.⁵⁰

Il est certain que le Brésil doit travailler afin de réduire ces disparités sociales. Il doit également consolider son économie régionale pour pouvoir être acteur décisif dans la politique globale du continent sud américain.

7. CONCLUSION

Après une étude détaillée de l'intégration économique des pays du Cône Sud – le MERCOSUR, semble important de souligner le rôle du Brésil comme vecteur majeure et principal de ce bloc. De ce fait, il importe de reconnaître son importance pour les pays latino-américains. Les pays membres ont opéré de grands changements afin d'établir une union leur permettant d'être plus compétitifs et plus performants vis-à-vis du marché mondial.

L'analyse de son aspect institutionnel, de son contexte historique et de tous les éléments que nous avons soulignés, nous permet d'affirmer que le bilan, de façon générale, est positif pour les pays membres.

L'établissement définitif de la démocratie est à inscrire parmi les premières actions les plus importantes à avoir contribué au succès de cette union. Par la suite, les pays ont pu s'insérer en toute sécurité dans l'économie mondiale.

Un autre point important pour les pays membres est le contexte mondial de l'époque, avec l'introduction de la régionalisation commerciale, ayant contribué à la formation du bloc et permis aux pays d'améliorer leur représentativité face au commerce mondial.

En analysant l'histoire de l'Amérique latine, nous pouvons

49 RBPI - Revue Brésilienne de Politique Internationale, n° 51 (2) de 1998, p113-114. La traduction a été effectuée par nos soins: "Ainda que em sua dimensão comercial o MERCOSUL tenha estagnado e mesmo retrocedido, sobretudo no segundo período analisado, o mesmo não ocorreu em outras áreas, tais como a político-institucional e a social.

50 Statistique publiée par la RBPI - Revue Brésilienne de Politique Internationale, n° 51 (2) de 1998, pp 113-114.

montrer que la volonté de la diplomatie de ces pays membres, principalement l'Argentine et le Brésil, est apparue vers les années 1980.

Les premières années du MERCOSUR correspondent à un véritable âge d'or. Le commerce régional a augmenté et le bloc économique a gagné en prestige, notamment grâce aux négociations avec de grands partenaires commerciaux tels que les États-Unis et l'Union Européenne.

Pendant ses quelques vingt ans d'existence, le MERCOSUR s'est montré très efficace sur un certain nombre de points, comme la promotion et l'amélioration de l'action politique institutionnelle et sociale de ses pays membres.

Aujourd'hui, l'intégration économique du Cône Sud a contribué à une union des pays d'Amérique du Sud, avec des pays membres (Argentine, Brésil, Paraguay, Uruguay et Venezuela), auxquels se sont associés la Bolivie, le Chili, la Colombie, l'Équateur et le Pérou.

Le Brésil a occupé une place prépondérante dans l'intégration du Sud. Mais en ce qui concerne le rôle du MERCOSUR dans le cadre de l'économie brésilienne, il s'est avéré très important au début, car l'un des changements fondamentaux a été la rupture de l'isolement commercial vis-à-vis des pays voisins, puisque le Brésil avait maintenu, durant plusieurs années, une politique économique fondée sur la substitution des importations.

La croissance significative du Brésil a été mise en évidence après l'arrivée au pouvoir du Président Lula, en 2003. Aujourd'hui, l'économie du pays figure parmi celles les plus développées du monde, affichant une croissance spectaculaire. Le Brésil fait également partie du BRIC (Brésil, Russie, Inde, Chine), groupe de pays qui se démarque sur la scène mondiale par le développement et la croissance économique.

L'avenir du MERCOSUR demeure aujourd'hui inconnu d'un point de vue commerciale et économique. D'autre par, on constate une période de stagnation lié à une union douanière imparfaite. Cependant l'aspect politico-social est en train de se développer et les résultats pourraient s'avérer extrêmement importants pour les pays membres du MERCOSUR dans les années à venir.

8. BIBLIOGRAPHIE

- ACCIOLY, Elizabeth. *Mercosul e União Europeia Estrutura Jurídico-Institucional*. Curitiba: Juruá, 2010. 268 p.
- ALMEIDA, Paula Wojcikiewicz. *La Difficile Incorporation et Mise en Oeuvre des Normes du Mercosul: Aspects Généraux et Exemple du Brésil*. Paris: LGDJ, 2013, 451p.
- ALMEIDA, Paulo Roberto. *Le Mercosud, un marché commun pour*

l'Amérique du Sud. Paris : l'Harmattan, 2000. 500 p.

América Latina: Globalização e Integração. Belo Horizonte: FIEMG e IBEC – Instituto Brasileiro de Estudos Contemporâneos, 1997, 215 p.

ARAUJO, Nadia de. *Contratos Internacionais : Autonomia da Vontade, Mercosul e Convenções Internacionais*. Rio de Janeiro : Renovar, 1997. 230 p.

BAPTISTA, L.O., *Le Mercosul, ses institutions et son ordonnancement juridique*. Paris : CEDIN-Paris I, 2001.200 p.

BARBOSA, Antonio Rubens. *MERCOSUL e a Integração Regional*. São Paulo: Fundação Memorial da América Latina: Imprensa Oficial do Estado de São Paulo, 2010, 228p.

BASSO, Maristela. (organizador). *Mercosul seus efeitos jurídicos, econômicos e políticos nos Estados Membros*. Porto Alegre: Livraria do Advogado, 1997, 668 p.

BORCHARDT, Klaus-Dieter., *L'ABC Du Droit Communautaire*. Belgica, Communautés Européennes, 2000. 124 p.

BORGES, José Souto Maior. *Curso de Direito Comunitário: Instituições de Direito Comunitário Comparado. União Europeia e Mercosul*. São Paulo: Saraiva, 2009. 698p.

COUFFIGNAL, Georges. *Amérique Latine, Une Amérique latine toujours étonnante*. Paris : La documentation Française, 2012, 208 p.

DABÈNE, O., *L'intégration régionale en Amérique Latine : Le Mercosur*. Paris : Centre d'études et de recherches internationales, 1995.

FARIA, José Angelo Estrella. *O Mercosul: Principios, Finalidade e Alcance do Tratado de Assunção*. Brasília : MRE/SGITE/NAT, 1993.193 p.

FRANCESCHINI, Luis Fernando ; BARRAL, Welber. (Coords). *Direito Internacional Público & Integração Econômica Regional*. Curitiba : Juruá, 2001. 262p.

GAULARD, M. *L'économie du Brésil*. Monts : Bréal, 2011, 128 p.

GOMES, Eduardo Biacchi. *Manual de Direito da Integração Regional*. Curitiba: Juruá Editora, 2010.224 p.

GOMES, Eduardo Biacchi. *A Globalização Econômica e a Integração no Continente Americano, Desafios para o Estado Brasileiro*. Rio Grande do Sul: Unijuí, 2004.134p.

HALPERIN, M., *Instrumentos básicos de integracion económica en América Latina y El Caribe*. Buenos Aires: BID. Intal, 1992.

KELSEN, Hans. *Teoria geral do direito e do estado*. São Paulo: Martins Fontes, 2005, p. 515-556.

KHAVAND, Fereydoun-Ali., *Le nouvel ordre commercial mondial du GATT à l'OMC*. Paris : Nathan, 1995. p. 65.

HORTA TAVARES, Fernando. *Princípios do Direito Comunitário: Autonomia e Princípios*, (ensaio) Belo Horizonte, 2007.

MACHADO, Diego Pereira; DEL'OLMO, Florisbal de Souza. *Direito*

- da Integração, Direito Comunitário, Mercosul e União Europeia*. Salvador: JusPodivm, 2011. 322 p.
- MARQUES, Renato L. R. *Duas Décadas de Mercosul*. São Paulo: Aduaneiras, 2011, 370 p.
- MASSI, Fernando; TERRA, Maria Inés (Coord). *Asimetrías en el Mercosur e Impedimento para el crecimiento*. Montevideo: RedMercosur, 2008. 231 p.
- MEDEIROS, Marcelo de Almeida. *La Gênese Du Mercosud*. Paris: l'Harmattan, 2000, 500p.
- MEZA PINTO, Hugo Eduardo. *Estratégia de Integração Econômica Regional na América Latina, A - O Caso da Comunidade Andina*. Curitiba: Juruá, 2011. 210 p.
- POFFO, Carlos Alejandro. *Integración Productiva del Mercosur*. Buenos Aires: Catálogos, 2012. 144p.
- PREVOST, René. *Normes économiques et déterminations statistiques*. In: Revue économique. Volume 7, n°5, 1956. pp. 833-845.
- RAIMBAULT, Guy. *Le Dictionnaire de l'Union Européenne*. Paris : Ellipses, 2000. 384 p.
- REIS, Oswaldo Dehón Roque. *As Origens do Mercosul : A Construção da Ordem Política no Cone Sul*. Curitiba : Juruá, 2011. 152 p.
- RESENDE, Erica Simone Almeida; MALLMAN, Maria Izabel. *MERCOSUL - 21 anos : Maturidade ou Imaturidade?* Curitiba : Appris, 2013. 369 p.
- RIBEIRO, Elisa de Sousa (Coord.). *Direito do MERCOSUL*. Curitiba : Appris, 2013. 673 p.
- SILVA, Marcos Rector Toledo. *Mercosul e Personalidade Jurídica Internacional: As Relações Externas do Brasil Sub-Regional Pós-Ouro Preto*. Rio de Janeiro: Renovar, 1999. 314 p.
- SUSANI, Nadine., *Le Règlement des Différends dans le Mercosul – Un système de droit international pour une organisation d'intégration*. Paris : l'Harmattan, 2008, 321p.
- VENTURA, Deisy. *Les asymétries entre le Mercosur et l'Union européenne – Les enjeux d'une association interrégionale*. Paris : l'Harmattan, 2003, 501 p.
- VERCUEIL, J., *Les Pays Émergents : Brésil, Russie, Inde, Chine*. Paris : Bréal, 2010, p. 77.
- VIEIRA, Liszt; BORBA, Cintia Reschke de. *Nacional x Global : União Europeia e Mercosul*. Rio de Janeiro : Renovar, 2010. 227 p
- VIEIRA, Luciane Klein. *Interpretação e Aplicação Uniforme do Direito da Integração : União Europeia, Comunidade Andina, Sistema da Integração Centro-Americana e Mercosul*. Curitiba : Juruá, 2013. 168 p.
- WALD, Arnaldo. *Le Droit Brésilien Hier, Aujourd'hui et Demain*. Paris: Société de Legislation Comparée, 2005. 355 p.

WINTER, Luís Alexandre Carta. *Crise do Modelo Presidencialista*. Curitiba: Juruá, 2008. 150 p.

RBPI - Revue Brésilienne de Politique Internationale, n° 51 (2) de 1998.

RBPI - Revue Brésilienne de Politique Internationale : *Indicadores e Análise Multidimensional do Processo de Integração do Cone Sul*, 51(2)/2008, RBPI, 2008.

Traités et Protocoles :

Traité d'Asunción, au Brésil, le Traité d'Asunción a été ratifié par le Congrès National, Décret Législatif n° 197, de 25.09.91 et promulguée pour le Décret n° 350, de 21.11.91.

Protocole de Brasília, signée en 17.12.91 et intériorisée au Brésil à travers le Décret Législatif n° 88, de 01.12.92, et Décret n° 922, de 10.09.93.

Protocole d'Ouro Preto, signée en 17.12.94 et intériorisée au Brésil à travers le Décret Législatif n° 188, de 16.12.95, e Décret n° 1.901, de 09.05.96.

Protocole d'Olivos, signée et intériorisée au Brésil à travers le Décret Législatif n° 712, de 15.10.2003, e Décret n° 4.982, de 09.02.2004.

Sources Internet : (Sites Web consultés)

CEPAL, Commission Économique pour l'Amérique Latine et Caraïbe :
<http://www.eclac.cl>

Site Officiel du MERCOSUR, Marché Commun du Sud :

www.mercosur.int

Aladi - Association Latino-Américaine pour l'Intégration :

www.aladi.org

Centre d'Économie Internationale – Commerce Extérieur et Intégration :

www.cei.gov.ar

Instituto de Estudos Avançados da Universidade de São Paulo: http://www.scielo.br/scielo.php?pid=S010340141994000200006&script=sci_arttext, “O Mercosul e os interesses do Brasil”, écrit par : Paulo Nogueira Batista

IPEADATA :

<http://www.ipeadata.gov.br/Default.aspx>.

IEL - Institute Euvaldo Lodi: <http://www.iel.org.br/portal/data/pages/FF80808127784C1F0127788502B7547C.htm>

EL ESTABLECIMIENTO VIRTUAL Y SU CONDICIÓN DE ESTABLECIMIENTO EMPRESARIAL SECUNDARIO (FILIAL)

*THE VIRTUAL STORE AND ITS STATUS AS A SECONDARY
STORE (OFFICE)*

Rubia Carneiro Neves

Professora de Derecho Empresarial de la Universidade Federal
de Minas Gerais. Doctora en Derecho Comercial por la
Universidade Federal de Minas Gerais.

Ana Caroline Faria Guimarães

Cursa Derecho en la Universidad FUMEC.

Resumen: El presente trabajo analizó la posibilidad de admitirse que un sitio electrónico presente la misma naturaleza jurídica de establecimiento empresarial. En el desarrollo del trabajo, se analizó la exigencia de registro en la Junta Comercial o Notaría de Personas Jurídicas, en el Registro Nacional de Personas Jurídicas (CNPJ), en la Receta Estadual y en la Receta Municipal, conforme sea el tipo de actividad, como condición para el ejercicio regular de la actividad económica, lo que presupone necesariamente la información de la sede del empresario, de la sociedad empresaria, de la sociedad simple o de la empresa individual de responsabilidad limitada. Y partiendo de esa exigencia, se desarrolló el análisis sobre el sitio electrónico que pueda ser considerado autónomo o tratarse de una mera extensión del establecimiento empresarial. Se realizó un breve abordaje sobre internet, el comercio electrónico y la web, de modo que fue presentada una sintética referencia cuanto a la historia del surgimiento de la internet, a las ventajas y desventajas del comercio electrónico, así como sobre el funcionamiento internet y de los sitios electrónicos. Se discurió sobre el concepto y la naturaleza jurídica del establecimiento empresarial, presentando una breve exposición sobre los elementos que integran su composición y se analizó acerca de la posibilidad de encuadrar los sitios electrónicos en la concepción de establecimiento empresarial prevista

en el art. 1.142, del Código Civil de 2002. El trabajo fue desarrollado utilizándose de la vertiente metodológica jurídico-sociológica, pues, examinó en que medida el cambio de comportamiento ocurrida con la celebración de negocios realizados a través internet viene influenciando en la concepción de establecimiento empresarial. Esa metodología fue escogida, pues se pretendió comprender el fenómeno jurídico de los negocios realizados en el ambiente virtual, admitiendo el Derecho como susceptible de adaptación esos cambios. La dogmática también estuvo presente en el desarrollo del trabajo, pues se analizó y se interpretaron dispositivos legales inherentes a la temática del trabajo. De la misma forma, la vertiente teórico-jurídica fue utilizada en la medida en que el trabajo también se apoyó en la revisión bibliográfica para analizar las teorías que explican la naturaleza jurídica del establecimiento empresarial y del establecimiento virtual.

Palabras clave: Sitios electrónicos. Establecimiento empresarial secundario. Establecimiento virtual. Filial.

Abstract: This study examines the possibility of admitting that an electronic web site has the same legal nature as that of a physical store. In the course of developing the study, the requirement to register at the Trade Board or Corporation Registry, in the Corporate Taxpayer's Registry (CNPJ), and with the State and Municipal Internal Revenue are reviewed, in accordance with the type of activity, as a condition for exercising economic activity, which necessarily presupposes information from the main office of the entrepreneur, the business company, simple corporation, or limited liability company. Based on this requirement, a review is made as to whether the electronic web site could be considered as a standalone or treated merely as an extension of the physical store. A brief overview is given with regard to the Internet, e-commerce, and web sites, which is presented as a synthetic reference to the history of the rise of the Internet, the advantages and disadvantages of e-commerce, and how the Internet and electronic web sites work. The study addresses the concept and legal nature of the store, with a brief statement about the elements that make up its composition, and the possibility of fitting electronic sites into the design of a store is examined, as provided for in Art. 1.142 of the 2002 Civil Code. The work draws from methodological-legal-sociological approaches, as it examines the extent to which behavioural change takes place whenever business is conducted over the Internet and how this has influenced the store's design. This methodology has been chosen because the study intends to understand the legal phenomenon of business being transacted in the virtual environment, assuming that the law is capable of adapting to these changes. Dogmatics is also present as the study is

developed, as it is used to examine and interpret legal provisions related to its theme. Similarly, a theoretical and legal approach is applied in that the work is also supported in a review of the literature to analyze theories that explain the legal nature of the physical store and the virtual store.

Keywords: Electronic web sites. Secondary store. Virtual store. Office.

1 INTRODUCCIÓN

El presente trabajo se propuso a analizar sobre la posibilidad de admitirse que un sitio web presente la misma naturaleza jurídica de establecimiento empresarial.

Al iniciar el desarrollo de ese análisis, se verificó a partir del examen de los conceptos internet, comercio electrónico y sitio electrónico (web) y con fundamento en Marco Aurélio Greco que existen tres especies de webs: pasivos, canalizadores de mensajes e inteligentes.

Examinando las características de esas tres especies de webs, así como del funcionamiento internet y del comercio electrónico, se buscó analizar si la web que presente pompa técnica para interaccionar con el usuario y permitir que a través de él sea realizado el comercio electrónico, deba ser considerado un establecimiento autónomo o una extensión del establecimiento empresarial físico.

En el desarrollo del trabajo, se analizó la exigencia de registro en la Junta Comercial o Notaría de Personas Jurídicas, en el Cadastro Nacional de Personas Jurídicas (CNPJ), en la Hacienda Provincial y en la Hacienda Municipal, conforme el tipo de actividad, como condición para el ejercicio regular de la actividad económica, lo que presupone necesariamente la información de la sede del empresario, de la sociedad empresaria, de la sociedad simple o de la empresa individual de responsabilidad limitada. Y partiendo de esa exigencia, se desarrolló el análisis sobre el establecimiento virtual que pueda considerarse autónomo o tratarse de una mera extensión del establecimiento empresarial.

Para desarrollar la reflexión aquí propuesta y responder al problema planteado, se utilizó de la vertiente metodológica jurídico-sociológica, pues, se examinó en qué medida el cambio de comportamiento a partir de la celebración de negocios realizados a través internet ha influenciado en la concepción de establecimiento empresarial. La metodología se justifica por el hecho de pretenderse comprender el fenómeno jurídico de los negocios realizados en el ambiente virtual, admitiéndose el Derecho como susceptible de adaptación a esos cambios.

El análisis dogmático también estuvo presente en el desarrollo del trabajo, pues fueron analizados dispositivos legales inherentes a la temática del trabajo. De la misma forma, la vertiente teórico-jurídica ha sido adoptada en la medida en que el trabajo también se apoyó en la revisión bibliográfica para analizar concepto internet, de web, de comercio electrónico, así como, las teorías que explican la naturaleza jurídica del establecimiento empresarial y del establecimiento virtual.

El trabajo se dividió en tres partes, siendo la primera realizada un breve abordaje sobre internet, el comercio electrónico y la web, de modo que se examinó una sintética referencia en cuanto a la historia del surgimiento internet, a las ventajas y desventajas del comercio electrónico, así como sobre el funcionamiento internet y de los sitios electrónicos; en la segunda parte, se discurrió sobre el concepto y la naturaleza jurídica del establecimiento empresarial, presentando una breve exposición sobre los elementos que integran su composición, sin analizar la divergencia doctrinaria a ese respecto, justamente por no ser el objetivo propuesto en el presente trabajo; y finalmente, en la tercera, se analizó sobre la posibilidad de clasificar los sitios electrónicos en la concepción de establecimiento empresarial prevista en el art. 1.142, del Código Civil de 2002, sin adentrar en el examen de los demás dispositivos del Código brasileño que tratan del establecimiento, como tampoco se analizó la posibilidad de aplicación de esos dispositivos legales a un sitio web, pues en el trabajo se objetivó investigar tan solamente la posibilidad de admitir el sitio web como establecimiento empresarial.

2 INTERNET, WEBS Y COMERCIO ELECTRÓNICO: BREVES CONSIDERACIONES

El presente trabajo busca hacer breves apuntes sobre el surgimiento internet, su concepto y funcionamiento, el comercio electrónico, el concepto y el funcionamiento del sitio web (webs)¹ en la búsqueda de una mejor comprensión del objeto de estudio.

2.1 Internet, mundo virtual y webs

Hubo un tiempo en que las relaciones humanas se limitaban a cortos espacios territoriales, con los pueblos de entonces dedicándose esencialmente a las actividades agrarias. Esa realidad fue siendo paulatinamente alterada en virtud de varios factores, entre ellos, pueden citarse la voluntad por el conocimiento del modo de vida de otras culturas y el desarrollo del comercio como actividad profesional.

¹ Aunque la expresión sitio electrónico sea la expresión correcta para la lengua española, se prefirió adoptar en el trabajo tanto la expresión en español cuanto la expresión en inglesa web.

Anclado a esos factores, los medios de comunicación promovieron la intensificación de las relaciones humanas en locales más distantes, lo que, de hecho, transcurrió de la necesidad de facilitar la relación entre personas situadas en locales geográficamente distantes. Primero advino el telégrafo, después el teléfono, el fax símile, el teléfono celular, hasta que fue desarrollada una red de comunicación, entre ordenadores, que se hizo una red mundial, denominada, internet habiendo promovido una verdadera revolución en el desarrollo de las tecnologías de información y comunicación.

La palabra internet deriva de la expresión en inglés internetwork que significa una interligação entre una red de ordenadores en todo el planeta, habiendo sido creada a partir de la concepción de una red de comunicación establecida entre bases militares norteamericanas durante la Guerra Fría, conocida como ARPANE². Con el final de la Guerra Fría, ese desarrollo dejó de ser un secreto y pasó a ser tratado como una comunidad por los científicos en las universidades de Estados Unidos de América del Norte y posteriormente en universidades de otros países.³

La red internet, en continuo desarrollo, comporta la World Wide Web donde es posible crea, almacenar, recuperar, visitar y transferir diversos tipos de archivos, tales como texto, imagen en movimiento, sonidos multimedia. La Web se hace un sistema de comunicación disponible, vía red mundial internet, que permite la creación y comunicación de diversos registros de información o *mass medi* y donde se tiene comunicación en hipermídia.

Con un sistema inteligente de localización de archivos, la dirección en internet se hizo individualizado, siendo visitado por cualquier persona.⁴

Pero lo qué es World Wide Web (WWW)? No se confunde con internet. Gustavo Cabecilla Corrêa explica WWW como una convergencia de concepciones relativas a la gran red, o sea, es

*el conjunto de patrones y tecnología que
posibilitan la utilización internet por medio de*

2 FLORESS, Cristian. **História da Internet**. Disponible en: <https://sites.google.com/site/historiasobreossitesdebusca/historia-da-internet>. Acceso en: 19/di./2012.

3 FLORESS, Cristian. **História da Internet**. Disponible en: <https://sites.google.com/site/historiasobreossitesdebusca/historia-da-internet>. Acceso en: 19/dic./2012.

4 FLORESS, Cristian. **História da Internet**. Disponible en: <https://sites.google.com/site/historiasobreossitesdebusca/historia-da-internet>. Acceso en: 19/12/2012. En el original: “o conjunto de padrões e tecnologia que possibilitam a utilização da *internet* por meio de programas navegadores, que por sua vez tiram todas as vantagens desse conjunto de padrões e tecnologias pela utilização do hipertexto e suas relações com multimídia, com sons e imagens, proporcionando ao usuário maior facilidade na sua utilização e também a obtenção de melhores resultados”

*programas navegadores, que por su parte quitan todas las ventajas de ese conjunto de patrones y tecnologías por la utilización del hipertexto y sus relaciones con multimedia, con sonidos e imágenes, proporcionando al usuario mayor facilidad en su utilización y también la obtención de mejores resultados.*⁵

Francisco Carlos Malosá Júnior⁶ señala que ese conjunto de patrones y tecnología llamado World Wide Web hizo la “cara” internet más simpática, accesible al usuario común.

Ese conjunto, es decir, la World Wide Web fue difundido inicialmente en las universidades americanas, después el uso del mecanismo ha sido permitido en otras universidades del mundo, hasta que hubo también permiso para que personas comunes visitasen la red de ordenadores, a punto de haber 100 webs en 1975.⁷

En 1991, internet surgió en Brasil, con el advenimiento de la RNP (Red Nacional de Investigación), que era un sistema conectado al MTC (Ministerio de Ciencia y Tecnología).⁸

En 1994, la Embratel lanzó, de forma experimental, el acceso online para ampliar sus ventas en 1995, principalmente, en el área de libros y CDs, siendo pionera el área de librerías: la Librería Cultura.⁹

Hoy, internet se ha presentado con una forma de manifestación de voluntad y de libertad de expresión. Cualquier persona que tiene acceso a ese medio de comunicación y a los conocimientos básicos inherentes a su funcionamiento puede publicar todo tipo de información, reclamación, ideas, expectativas, teorías, frustraciones e ideologías. Como afirma Carlos Alberto Rohrmann “internet es una entidad global: a partir del momento en que una página fue colocada en la red, todo el mundo tiene pleno acceso a ella”.¹⁰

5 CORRÊA, Gustavo Testa. Aspectos jurídicos da *internet*. 2ª. ed. São Paulo: Saraiva, 2002, p. 10 e 11. Apud: MALOSÁ JÚNIOR, Francisco Carlos. **A realidade virtual como elemento transformador de estabelecimento empresarial**. Anales de lo XVII Encontro Nacional do Conpedi. Salvador: Boiteux, Junio/2008. p.1201.

6 MALOSÁ JÚNIOR, Francisco Carlos. **A realidade virtual como elemento transformador de estabelecimento empresarial**. Anales de lo XVII Encontro Nacional do Conpedi. Salvador: Boiteux, Junio/2008. p.1201.

7 FLORESS, Cristian. **História da Internet**. Disponible en: <https://sites.google.com/site/historiasobreositesdebusca/historia-da-internet>. Acceso en: 19/dic./2012.

8 FLORESS, Cristian. **História da Internet**. Disponible en: <https://sites.google.com/site/historiasobreositesdebusca/historia-da-internet>. Acceso en: 19/dic./2012.

9 IKEDA. Quem somos. Disponible en: <<http://www.ikeda.com.br/quem-e-ikeda/>>. Según explicitado por la web de la empresa Ikeda: “Pionera en su segmento, Ikeda desarrolló el primero e-commerce brasileño elaborado para la Librería Cultura.” Acceso en: 24/jun./2012.

10 ROHRMANN, Carlos Alberto. O Direito Comercial Virtual – A Assinatura Digital. **Revista**

La comprobación de este hecho es el gran número de blogs y páginas existentes en medio virtual. Los internautas utilizan internet para publicar sus impresiones y visiones de mundo, sus emociones, novedades, sus desabafos, principalmente en las famosas redes sociales como el Facebook y el Twitter.

Se percibe que el principio de la libertad de expresión¹¹ es el motor de desarrollo internet, además de ser el grande responsable por su crecimiento desde la creación. Más que un derecho, la libertad de expresarse es una proposición elemental y fundamental que sirve de base a la democracia contemporánea en la cual la censura no tiene respaldo moral.

Regis Magalhães Soares de Queiroz explica que en una primera formulación, internet podría ser entendida como un espacio de lugar calificado por no ser físico, pero sí virtual. Reconoce que la Suprema Corte de Estados Unidos afirmó no tratarse de “una entidad física o tangible, pero una enorme red de ordenadores (network) que interliga incontables pequeños grupos de redes de ordenadores (networks) por su parte interconectados. Puede definirse como una red de redes de ordenadores.”¹²

El autor admite la importancia de esa concepción que, inclusive, ha sido adoptada en la definición técnica internet por la alínea el ítem 3, de la Norma 004/95, aprobada pela Portaria n. 148, de 31/5/95, del Ministerio de las Comunicaciones de Brasil: “nombre genérico que designa el conjunto de redes, los medios de transmisión y conmutación, roteadores, equipamientos y protocolos necesarios a la comunicación entre ordenadores, así como el software y los datos contenidos en estos ordenadores.”¹³

Pero, para él, internet es mucho más que una red de ordenadores.

da Faculdade de Direito Milton Campos. Belo Horizonte: Del Rey, 1997. v. 4, p. 33.

11 El principio de la libertad de expresión es un derecho fundamental, protegido por la Constitución, siendo considerado un marco importante para la democracia, no sólo de Brasil, pero de diversos otros países. Puede ser caracterizado como derecho de personalidad, fundamental para la concretización del principio de la dignidad de la persona humana. Ese principio permite la manifestación libre de gana, opiniones, pensamientos e ideas. El artículo 19 de la Declaración Universal de los Derechos Humanos de 1948 lo define como “la libertad para transmitir informaciones e ideas por cualesquier medios independientemente de fronteras”. Además del más, tiene como marco fundamental, el control de la actividad gubernamental y del propio ejercicio del poder, evitando la ocurrencia de la censura, que es la supressão del Estado democrático de derecho.

12 QUEIROZ, Regis Magalhães Soares. **Vedação da concorrência do trepassante do estabelecimento empresarial: seus limites e sua aplicação no espaço real e virtual.** 185 f. Disertación (Máster en Derecho) – Faculdade de Direito, Universidade de São Paulo, São Paulo. 2000. p. 147.

13 Disponible en: <http://legislacao.anatel.gov.br/normas-do-mc/78-portaria-148>. Acceso en: 15/abr./2014.

Regis Magalhães Soares Queiroz considera internet como

*metaterritório – transcendente en relación al territorio físico porque creado virtualmente por medio de maciza interligação de redes de ordenadores esparcidos por el mundo que, por lo tanto, no conocen fronteras físicas –, donde es posible todo tipo de información, por la transferencia de archivos de ordenador para ordenador; utilizando los medios y la infraestructura de comunicación disponibles y de esa forma, el usuario puede relacionarse así como establecer toda suerte de relaciones jurídicas y sociales.*¹⁴

Pierre Lévy explica la noción de virtual, diciendo que

*es virtual toda entidad ‘desterritorializada’, capaz de generar diversas manifestaciones concretas en diferentes momentos y locales determinados, sin, contundo estar ella misma presa a un lugar o tiempo en particular. Para usar un ejemplo fuera de la esfera técnica, una palabra es una entidad virtual. El vocablo ‘árbol’ está siempre siendo pronunciado en un local u otro, en determinado día en una cierta hora. Llamaremos la enunciação de este elemento lexical de ‘actualización’. Pero la palabra en sí, aquella que es pronunciada o actualizada en un cierto lugar, no está en lugar ninguno y no se encuentra a ningún momento en particular (aunque ella no haya existido desde siempre). Repitiendo, aunque no podamos fijarlo en ninguna coordenada espacio-territorial, el virtual es real. Una palabra existe de hecho. El virtual existe sin estar presente*¹⁵

14 QUEIROZ, Regis Magalhães Soares. **Vedação da concorrência do trepassante do estabelecimento empresarial: seus limites e sua aplicação no espaço real e virtual.** 185 f. Dissertação (Máster en Derecho) – Faculdade de Direito, Universidade de São Paulo, São Paulo. 2000. p. 152. En el original: “metaterritório – transcendente em relação ao território físico porque criado virtualmente por meio de maciza interligação de redes de computadores espalhados pelo mundo que, portanto, não conhecem fronteiras físicas –, onde é possível todo tipo de informação, pela transferência de arquivos de computador para computador, utilizando os meios e a infraestrutura de comunicação disponíveis e dessa forma, o usuário pode se relacionar bem como estabelecer toda sorte de relações jurídicas e sociais.”

15 LÉVY, Pierre. **Cibercultura.** São Paulo: Editora 34, 2000, p.47. En el original: “é virtual toda entidade ‘desterritorializada’, capaz de gerar diversas manifestações concretas em diferentes momentos e locais determinados, sem, contundo estar ela mesma presa a um lugar

Según el diccionario Houaiss de la Lengua Portuguesa, el virtual¹⁶ tiene por existencia sólo en potencia o en facultad, no como realidad o con efecto real. Sin embargo, el hecho de no estar en lugar físico no caracteriza su “no existencia”. Así como el hecho de la información o el dato situarse en algún espacio no designável, no le quita la existencia.

Lo que es virtual existe y es real, puede ser desproveído de presencia material, pero existe en potencia, o sea, es revelado por medio de una constante actualización, confiriendo sólo dos posibilidades: ser, o no, realizado. Es también una posibilidad o tendencia presentada por cualquier realidad material en el sentido de modificarse o ser modificada, de tal forma que ella pueda perfazer todas las determinaciones que aún se mantiene sólo virtuales.

El sitio web o web, objeto de investigación de este trabajo, está localizado en ese metaterritório, por tanto virtual, pero es tan real cuanto se estuviera localizado en cualquier lugar físico. También conocido como website es formado por un conjunto de páginas web, es decir, hipertextos generalmente accesibles en internet por el protocolo HTTP (HyperText Transfer Protocol - Protocolo de Transferencia de Hipertexto)¹⁷, siendo que el conjunto de todas las webs públicas existentes compone World Wide Web.

Las páginas de una web son organizadas a partir de un URL (Uniform Resource Locator - Localizador Uniforme de Recursos) básico, donde se pone la página principal, y generalmente residen en el mismo directorio de un servidor. Las páginas son organizadas dentro de la web en una jerarquía en contexto URL, aunque los hiperlinks entre ellas controlen el modo como el lector se aproxima de la estructura global, modo ese que puede tener poca relación con la estructura jerárquica de los archivos de la web.

2.2 Comercio electrónico

Principalmente a través de la utilización de esas webs es que

ou tempo em particular. Para usar um exemplo fora da esfera técnica, uma palavra é uma entidade virtual. O vocábulo ‘árvore’ está sempre sendo pronunciado em um local ou outro, em determinado dia numa certa hora. Chamaremos a enunciação deste elemento lexical de ‘atualização’. Mas a palavra em si, aquela que é pronunciada ou atualizada num certo lugar, não está em lugar nenhum e não se encontra a nenhum momento em particular (ainda que ela não tenha existido desde sempre). Repetindo, ainda que não possamos fixá-lo em nenhuma coordenada espaço-territorial, o virtual é real. Uma palavra existe de fato. O virtual existe sem estar presente.”

16 Houaiss, Antônio. **Diccionario Electrónico Houaiss de la Lengua Portuguesa**. Rio de Janeiro: FL Gama Design Ltda Editora Objetiva, 2009.

17 Eckersley, Peter. **Encrypt the Web with the HTTPS Everywhere Firefox Extension**. Estados Unidos: EFF. 17/06/2010. Apud: Tatsch, Fabiano. Discussão: HTTP. 26/may./ 2011.

se realiza el comercio electrónico o e-commerce. También conocido como comercio virtual, surgió con la evolución internet, con el objetivo de complementar el proceso de ventas y eliminar intermediarios en la actividad de compraventa y venta de mercancías y de prestación de servicios, en aras de auxiliar en la globalización de la economía a través de la realización de asociaciones, negocios y disminución de límites geográficos.

El comercio electrónico no debe confundirse con la definición internet, pues ella representa el medio por lo cual se desarrolla ese comercio. Podemos conceituar el comercio electrónico como el conjunto de transacciones comerciales realizadas por medio de un ordenador,¹⁸ pudiendo abarcar la venta de productos o la prestación de servicios que ocurren a través del medio virtual. La naturaleza del servicio prestado o del bien no es relevante para la definición de comercio electrónico. En este sentido, Fábio Ulhoa Coelho assevera:

*comercio electrónico es la venta de productos (virtuales o físicos) o la prestación de servicios en que la oferta y el contrato son hechos por transmisión y recepción electrónica de datos. El comercio electrónico se realiza en el ambiente de la red mundial de ordenadores.*¹⁹

La Australian Reports and Analysis Centre (AUSTRAC) conceitua comercio electrónico como:

*un término general aplicado al uso del ordenador y tecnologías de las Telecomunicaciones, particularmente en una base inter-empresarial, desde el comercio de bienes y servicios. El Comercio Electrónico usa una variedad de tecnologías tales como EDI, E-mail, transferencia por fax, catálogos electrónicos [...]. La creación y la gerencia de la relación entre compradores y vendedores, facilitada por un medio interactivo y persuasivo.*²⁰

18 Disponible en: http://www.deciso.es.com.br/v29/imprimir_conteudo.php?user=&id_conteudo=108277. Acceso en: 15/abr./2014.

19 COELHO, Fábio Ulhoa. **Curso de direito comercial**. v. 3. São Paulo: Saraiva, 2012. p. 48. En el original: “comércio eletrônico é a venda de produtos (virtuais ou físicos) ou a prestação de serviços em que a oferta e o contrato são feitos por transmissão e recepção eletrônica de dados. O comércio eletrônico realiza-se no ambiente da rede mundial de computadores.”

20 En el original: Um termo geral aplicado ao uso do computador e tecnologias das Telecomunicações, particularmente em uma base inter-empresarial, desde o comércio de bens e serviços. O Comércio Eletrônico usa uma variedade de tecnologias tais como EDI, E-mail,

La Organización Mundial del Comercio (OMC), en programas de trabajo del año de 1998, presentó su definición sobre el comercio electrónico que consiste en la “producción, distribución, propaganda, venta o entrega de bienes y servicios por medios electrónicos”.²¹

En el comercio electrónico, pueden negociarse productos virtuales o físicos. Son virtuales productos como los periódicos electrónicos, los libros digitales, el download de programas, o sea, aquellos colocados a la disposición del adquirente de forma inmaterial, en disponibilidad electrónica, por medio de transmisión de datos para un ordenador. Mientras que los productos físicos, obviamente, son aquellos materializados, tales como televisores, refrigeradores, ordenadores, ropas, entre otros.

Además de productos virtuales y físicos, el medio electrónico permite la contratación de servicios, cuya ejecución también puede ocurrir en medio virtual, como, por ejemplo, el *homebanking*, a través del cual las instituciones financieras colocan a la disposición de sus clientes, a través de sus webs, servicios bancarios como transferencias de valores, pedidos de chequeras, operaciones con tarjeta de crédito, además del pago de gastos y seguimiento de cuentas corrientes, de ahorro o de inversión.

En gran medida, el comercio electrónico mejoró la realización de negocios de las organizaciones empresariales una vez que facilitó el proceso de negociación, aumentando el número de los acuerdos cerrados, haciendo en muchos casos, la venta más rápida, más práctica, además de la perspectiva de reducción de costes con estímulo a la competitividad. Además, incrementó la facilidad de contactos con los clientes, proveedores y distribuidores, lo que de cierta manera propició mejoras en el nivel de comunicación entre la organización empresarial y el mercado consumidor.

Las herramientas del comercio electrónico están en constante perfeccionamiento, pero la compraventa de un producto con pago por medio de tarjeta de crédito o cajero o en cualquiera otro medio digital, ya se caracteriza como un negocio realizado vía medio electrónico, lo que lleva a la conclusión de que el comercio electrónico no creó un nuevo tipo de comercio, sino que aprovechó nuevas tecnologías de la informática y de la comunicación para realizar las tareas tradicionales de compraventas y venta.

Olavo Baptista compara el comercio electrónico con la actividad del mascate que no poseía un establecimiento fijo, cuyos contratos eran

transferência por fax, catálogos eletrônicos [...]. A criação e a gerência do relacionamento entre compradores e vendedores, facilitada por um meio interativo e persuasivo. In: CANELLA, Sergio Eduardo; LEWIS, Sandra Barbon. Breves Anotações sobre o Comércio Eletrônico. Londrina: Scientia Iuris. v. 9, p. 299-316, 2005.

21 Disponible en: <WWW.wto.org>. Acceso en: 12/jun./2012.

orales:

el comercio electrónico es, de cierta forma, lo retorno del mascate. Todos nosotros tenemos el recuerdo de este personaje, frecuente en los tiempos coloniales, aún existente en el inicio del siglo XX, y que visitaba la casa de las personas en la zona rural o en los barrios alejados, llevando mercancías de pequeño porte, e imágenes o muestras de otras que entregaría cuando encomendadas por el comprador interesado. El mascate no tenía establecimiento propio. Iba hasta el comprador, y le ofrecía bienes que, en gran medida, no tenía en stock y adquiría para entregar, cuando encomendados. La especificidad de la actividad comercial del mascate era a de desplazarse delante del consumidor final y ofrecerle, verbalmente, la mercancía, eliminando la necesidad de desplazamientos físicos de este, proponiéndole una variedad de bienes.²²

Son bastante amplios las ventajas del comercio electrónico como: expansión de los negocios, mayor comodidad para el cliente, la red de tiendas estará disponible 24 horas, seguridad y rapidez en el pago de las mercancías, economía de tiempo, posibilidad de descuento mayor en el precio del producto con la consecuente disminución del coste de contratación de vendedores y sin repase de comisiones a los mismos. Igualmente, consigue clientes localizados en regiones geográficamente distantes. No hay necesidad de alquilar una tienda física e invertir en decoración, escaparates, entre otros ítems. Permite aumentar la tasa de lucratividad de la organización empresarial, ofrece bajo tiempo de entrega del producto encargado, posibilita una mejor investigación de precio del producto, rapidez en la divulgación de nuevos productos o promociones, reducción de la mano de obra, comercialización en

22 BAPTISTA, Luiz Olavo. Comércio Eletrônico: Uma Visão do Direito Brasileiro, **Revista da Faculdade de Direito da Universidade de São Paulo**. V.94, São Paulo: Serviço Técnico de Imprensa da Faculdade de Direito da Universidade de São Paulo, 1999. p.85-86. En el original: “o comércio eletrônico é, de certa forma, o retorno do mascate. Todos nós temos a lembrança deste personagem, frequente nos tempos coloniais, ainda existente no início do século XX, e que visitava a casa das pessoas na zona rural ou nos bairros afastados, levando mercadorias de pequeno porte, e imagens ou amostras de outras que entregaria quando encomendadas pelo comprador interessado. O mascate não tinha estabelecimento próprio. Ia até o comprador, e oferecia-lhe bens que, em grande parte, não tinha em estoque e adquiria para entregar, quando encomendados. A especificidade da atividade comercial do mascate era a de se deslocar diante do consumidor final e oferecer-lhe, verbalmente, a mercadoria, eliminando a necessidade de deslocamentos físicos deste, propondo-lhe uma variedade de bens.”

ámbito global, etc.

En suma, todas las exigencias tradicionales de enormes inversiones, gastos fijos, instalaciones físicas, coste de mano de obra, marketing, fondo de comercio, pueden acortarse o simplemente suprimirse.

Entre las desventajas descritas, la falta de seguridad en algunas webs se presenta como una gran traba al buen funcionamiento del comercio electrónico. Muchas veces, la dificultad de identificación real de los responsables por las webs viabiliza la práctica del llamado delito virtual. Sin embargo, el dispuesto en el artículo 2º, II, del Decreto Ley 7.962 de 2013 pasa a obligar que las casas de campo electrónicas o demasiado medios electrónicos utilizados para oferta o conclusión de contrato de consumo, disponibilizem de forma clara y visible, la dirección física y electrónico, y demasiado informaciones necesarias para su localización y contacto. De esa forma, la norma comienza a regularizar las relaciones que envuelven el medio virtual, dificultando la práctica de delitos.

No es el caso de la Apelación Civil, nº 70026683938, proveniente de la comarca de Porto Alegre, juzgada por el Tribunal de Justicia de Rio Grande do Sul; o sea, en ese proceso no hubo problema de identificación del proveedor que actuó en medio electrónico, pero el caso traduce un ejemplo de problema que puede resultar directamente del comercio electrónico. El Tribunal condenó por daño moral la responsable por el suministro que vendió productos por la internet y procedió al lanzamiento del cobro en duplicidad en la tarjeta de crédito de la consumidora:

APELACIÓN CÍVEL. RESPONSABILIDAD CIVIL. COMERCIO ELECTRÓNICO. COMPRAVENTA Y VENTA POR LA INTERNET. ERROR. COBRO DUPLICE EN LA FACTURA DE LA TARJETA DE CRÉDITO. ATENCIÓN ONLINE. DESCASO CON EL CONSUMIDOR. DAÑO MORAL. QUANTUM INDENIZATÓRIO. CRITERIOS. Supera el mero dissabor la situación de los autos en que la autora, al adquirir productos por la internet, hubo lanzado en duplicidad los valores en su tarjeta de crédito. Diversos contactos entre el consumidor y el proveedor sin que la dificultad fuera solucionada. Descaso con el consumidor verificado. Cese del cobro alcanzado sólo mediante acción judicial. Daño moral caracterizado. Valor de la condena fijado de acuerdo con las peculiaridades del caso concreto, especialmente considerando los

*principios de la proporcionalidad y razoabilidad, además de la naturaleza jurídica de la obligación.*²³

Otro caso específico de problema que puede transcurrir del comercio electrónico es lo del siguiente Fallo de la Tercera Turma del STJ, referente a la compraventa y venta de producto hecho por la internet

CIVIL Y COMERCIAL. COMERCIO ELECTRÓNICO. WEB VUELTA PARA LA INTERMEDIACIÓN DE VENTA Y COMPRAVENTA DE PRODUCTOS. VIOLACIÓN DE MARCA. INEXISTENCIA. PRINCIPIO DE LEJANÍA. DE LA MARCA. APLICABILIDAD. NATURALEZA DEL SERVICIO. PROVEDORIA DE CONTENIDO. PREVIA FISCALIZACIÓN DEL ORIGEN DE LOS PRODUCTOS ANUNCIADOS. DESNECESSIDADE. RIESGO NO INHERENTE AL NEGOCIO. CIENCIA DE LA EXISTENCIA DE VIOLACIÓN DE PROPIEDAD INDUSTRIAL. REMOCIÓN INMEDIATA DEL ANUNCIO. DEBER. DISPONIBILIZAÇÃO DE MEIOS PARA IDENTIFICACIÓN DE CADA USUARIO. DEBER. 1. El art. 132, III, de la Ley nº 9.279/96 consagra el principio del exaurimento de la marca, con base en el cual queda el titular de la marca impossibilitado de impedir la circulación (revenda) del producto, inclusive por medios virtuales, después de este haber sido regularmente introducido en el mercado nacional. 2. El servicio de intermediación virtual de venta y compraventa de productos caracteriza una

23 TJRS - 9ª Câ. Cível; ACi nº 70031676919-Porto Alegre-RS; Rel. Des. Tasso Caubi Soares Delabary; j.9/12/2009; m.v. BAASP, 2678/1835-e, de 3.5.2010. En el original: “APELAÇÃO CÍVEL. RESPONSABILIDADE CIVIL. COMÉRCIO ELETRÔNICO. COMPRA E VENDA PELA INTERNET. ERRO. COBRANÇA DUPLICE NA FATURA DO CARTÃO DE CRÉDITO. ATENDIMENTO ON LINE. DESCASO COM O CONSUMIDOR. DANO MORAL. QUANTUM INDENIZATÓRIO. CRITÉRIOS. Supera o mero dissabor a situação dos autos em que a autora, ao adquirir produtos pela internet, teve lançado em duplicidade os valores em seu cartão de crédito. Diversos contatos entre o consumidor e o fornecedor sem que o impasse fosse solucionado. Descaso com o consumidor verificado. Cessaçao da cobrança atingida apenas mediante açao judicial. Dano moral caracterizado. Valor da condenaçaõ fixado de acordo com as peculiaridades do caso concreto, especialmente considerando os princípios da proporcionalidade e razoabilidade, além da natureza jurídica da obrigaçaõ.”

especie del género provedoria de contenido, pues no hay edición, organización u otra forma de gestión de las informaciones relativas a las mercancías insertadas por los usuarios. 3. No se puede imponer a las webs de intermediación de venta y compra la previa fiscalización sobre el origen de todos los productos anunciados, en la medida en que no constituye actividad intrínseca al servicio prestado. 4. No se puede, bajo el pretexto de dificultar la propagación de contenido ilícito u ofensivo en la web, reprimir el derecho de la coletividad a la información. Sopesados los derechos envueltos y el riesgo potencial de violación de cada uno de ellos, el fiel de la balanza debe pender para la garantía de la libertad de información asegurada por el art. 220, § 1º, de la CF/88, sobre todo considerando que internet representa, hoy, importante vehículo comunicacional social de masa. 5. Al ser comunicado de la existencia de oferta de productos con violación de propiedad industrial, debe el intermediador virtual de venta y compra actuar de forma enérgica, removiendo el anuncio de la web inmediatamente, bajo pena de responder solidariamente con el autor directo del daño, en virtud de la omissão practicada. 6. Al ofertar un servicio virtual por medio del cual se posibilita el anuncio para venta de los más variados productos, debe lo intermediador tener el cuidado de propiciar medios para que se pueda identificar cada uno de los usuarios, a fin de que eventuales ilícitos no encalan en el anonimato. Bajo la ótica de la diligencia media que se espera de ese intermediador virtual, debe este adoptar las providencias que, conforme las circunstancias específicas de cada caso, estén a su alcance para la individualização de los usuarios de la web, bajo pena de responsabilización subjetiva por culpa in omittendo. 7. Recurso especial a que se niega provimento.²⁴

24 STJ – 3ª Turma; REsp nº 1383354-São Paulo-SP; Relator (a): Ministra Nancy Andrihgi; data julagmento: 27/08/2013; publicação: 26/09 /2013. En el original: “CIVIL E COMERCIAL. COMÉRCIO ELETRÔNICO. SITE VOLTADO PARA A INTERMEDIACÃO DE VENDA E COMPRA DE PRODUTOS. VIOLAÇÃO DE MARCA. INEXISTÊNCIA. PRINCÍPIO DO EXAURIMENTO DA MARCA. APLICABILIDADE. NATUREZA DO SERVIÇO. PROVIDORIA DE CONTEÚDO. PRÉVIA FISCALIZAÇÃO DA ORIGEM

A continuación, la ementa transcrita, también describe un caso de falta de seguridad al adquirir productos por medios electrónicos

PRESTACIÓN DE SERVICIOS DE COMERCIO ELECTRÓNICO ACCIÓN DE RESTITUCIÓN DE VALOR PAGADO C.C. INDEMNIZACIÓN POR DAÑOS MORALES Y MATERIALES. Empresa que suministra ambiente electrónico e intermediación para negocios de compraventas y venta por la internet. Relación de consumo configurada. Confianza y seguridad en el ambiente suministrado por la empresa que no bastaron para evitar el perjuicio a la autora. Daños morales. Indemnización debida - Acción parcialmente procedente. Sentencia mantenida. Recurso desprovido.²⁵

DOS PRODUTOS ANUNCIADOS. DESNECESSIDADE. RISCO NÃO INERENTE AO NEGÓCIO. CIÊNCIA DA EXISTÊNCIA DE VIOLAÇÃO DE PROPRIEDADE INDUSTRIAL. REMOÇÃO IMEDIATA DO ANÚNCIO. DEVER. DISPONIBILIZAÇÃO DE MEIOS PARA IDENTIFICAÇÃO DE CADA USUÁRIO. DEVER. 1. O art. 132, III, da Lei nº 9.279/96 consagra o princípio do exaurimento da marca, com base no qual fica o titular da marca impossibilitado de impedir a circulação (revenda) do produto, inclusive por meios virtuais, após este haver sido regularmente introduzido no mercado nacional. 2. O serviço de intermediação virtual de venda e compra de produtos caracteriza uma espécie do gênero provedoria de conteúdo, pois não há edição, organização ou qualquer outra forma de gerenciamento das informações relativas às mercadorias inseridas pelos usuários. 3. Não se pode impor aos sites de intermediação de venda e compra a prévia fiscalização sobre a origem de todos os produtos anunciados, na medida em que não constitui atividade intrínseca ao serviço prestado. 4. Não se pode, sob o pretexto de dificultar a propagação de conteúdo ilícito ou ofensivo na web, reprimir o direito da coletividade à informação. Sopesados os direitos envolvidos e o risco potencial de violação de cada um deles, o fiel da balança deve pender para a garantia da liberdade de informação assegurada pelo art. 220, § 1º, da CF/88, sobretudo considerando que a Internet representa, hoje, importante veículo de comunicação social de massa. 5. Ao ser comunicado da existência de oferta de produtos com violação de propriedade industrial, deve o intermediador virtual de venda e compra agir de forma enérgica, removendo o anúncio do site imediatamente, sob pena de responder solidariamente com o autor direto do dano, em virtude da omissão praticada. 6. Ao oferecer um serviço virtual por meio do qual se possibilita o anúncio para venda dos mais variados produtos, deve o intermediador ter o cuidado de propiciar meios para que se possa identificar cada um dos usuários, a fim de que eventuais ilícitos não caiam no anonimato. Sob a ótica da diligência média que se espera desse intermediador virtual, deve este adotar as providências que, conforme as circunstâncias específicas de cada caso, estiverem ao seu alcance para a individualização dos usuários do site, sob pena de responsabilização subjetiva por culpa in omittendo. 7. Recurso especial a que se nega provimento.”

25 TJSP – 35ª Câmara de Direito Privado; APL 0000756-92.2012.8.26.0097-São Paulo-SP; Relator (a): Melo Bueno; data julagmento: 10/06/2013; publicação: 11/06 /2013.

No obstante, la existencia de esas desventajas, la utilización del medio electrónico para la concretización de la venta de productos y la prestación de servicios se incrementa a cada día, y se ha mostrado como una excelente estrategia de realización de negocios.²⁶

Delante de esa realidad, se confirma la máxima según la cual, primero surgen los fenómenos sociales para después crear el Derecho apto a reglamentarlos. En el caso del comercio electrónico, hay una serie de cuestiones jurídicas que merecen examen, entre ellas, la posibilidad de el sitio web ser o no caracterizado como establecimiento empresarial y si las reglas de este instituto pueden aplicarse indistintamente al sitio web.

Antes de concluir sobre tal cuestión, se deberá de presentar el concepto, las características y los elementos del establecimiento empresarial físico para después realizar el análisis comparativo de esos aspectos con los de el sitio web.

Sobre el comercio electrónico es importante hacer una observación sobre el funcionamiento del comercio electrónico cuando tratarse de la relación de consumo, como el caso de las compras hechas por el consumidor a través de la internet. El Código de Defensa del Consumidor, Ley 8.078 de 1990, no hacía ninguna mención específica sobre compraventa y Vanda por medio de la internet. Para sanar ese vacío, fue creado el Decreto Ley 7.962 de 2013, pela presidente Dilma Rousseff, que pasó a reglamentar el Código de Defensa del Consumidor, trayendo las normas para el comercio electrónico.

De entre las importantes determinaciones traídas, esas son las principales

Las tiendas virtuales están obligadas la disponibilizar en local de fácil visualización en su página, todos sus datos, tales como: el nombre empresarial, número de inscripción siendo el CNPJ o CPF para los casos de venta por persona física y dirección de donde está localizada la tienda u oficina de la empresa. También es factor

En el original: “PRESTAÇÃO DE SERVIÇOS DE COMÉRCIO ELETRÔNICO AÇÃO DE RESTITUIÇÃO DE VALOR PAGO C.C. INDENIZAÇÃO POR DANOS MORAIS E MATERIAIS. Empresa que fornece ambiente eletrônico e intermediação para negócios de compra e venda pela internet. Relação de consumo configurada. Confiança e segurança no ambiente fornecido pela empresa que não bastaram para evitar o prejuízo à autora. Danos morais. Indenização devida - Ação parcialmente procedente. Sentença mantida. Recurso desprovido.”

26 Disponible en: <http://www.pbagora.com.br/conteudo.php?id=20120715091332&cat=paraiba&keys=cresce-numero-empresas-vendem-produtos-servicos-pela-internet>. Acceso en: 09/mar./2013.

relevante atentar que la regla aún es ignorada por la mayoría de las tiendas virtuales en el país. La situación aún se agrava cuando hablamos sobre la obligación que la tienda tiene que suministrar todas las características esenciales del producto o del servicio que está ofertando, incluyendo posibles riesgos a la salud que este pueda venir a causar y rango etária permitida para uso. La nueva reglamentación exige que los anuncios discriminem de forma clara el precio, coste del frete o cobro de seguro, así como las condiciones integrales de la oferta constando las modalidades de pago, disponibilidad, plazo para ejecución del servicio o para la entrega del producto. Pasó a ser obligatorio, aunque la empresa presente el contrato de compraventa o de suministro de servicio en el momento en que el cliente hace el pedido, teniendo este contrato que quedar disponible para consulta a cualquier tiempo por el consumidor después de la compraventa. Otra exigencia bastante importante está en la cuestión de la atención al cliente. Con el decreto, las empresas pasan a tener que responder cualquier solicitud del consumidor con una respuesta satisfactoria dentro de hasta 05 días.²⁷

3 ESTABLECIMIENTO EMPRESARIAL: CONCEPTO Y NATURALEZA JURÍDICA

Aún en la época en que prevalecía la teoría de los actos de comercio en Brasil, João Eunápio Borges ya admitía que para el ejercicio del comercio, cualquier emprendedor necesita de capital, trabajo y organización.²⁸ Ineludiblemente el emprendedor de actividades económicas reúne un conjunto de bienes materiales e inmateriales de forma organizada que restó definido por el Código Civil de 2002 como siendo establecimiento.

El art. 1.142, del Código Civil de 2002 de Brasil define establecimiento como todo complejo de bienes organizado, para ejercicio de la empresa, por empresario, o por sociedad empresaria.

Para Rubens Requião, el establecimiento es un bien móvil,

27 Disponible en: <http://philipemcardoso.jusbrasil.com.br/artigos/113493141/conheca-seus-direitos-com-as-novas-normas-de-compra-pela-internet?ref=home> Acceso en: 15/abr./2014.

28 BORGES, João Eunápio. **Curso de Direito Comercial Terrestre**. Rio de Janeiro: Forense, 1971, p.184-185.

incorpóreo, constituido de “un complejo de bienes que no se funden, pero mantiene unitariamente su individualidad propia”. Trasciende a la mera suma de los diversos bienes que lo compone, consistiendo en un sobrevalor (igual más-valía) que aumenta el valor individual atribuido a cada uno de los bienes que el compone.²⁹

Fábio Ulhoa Coelho explica que establecimiento empresarial

*“es el conjunto de bienes que el empresario reúne para explotación de su actividad económica. Comprende los bienes indispensables o útiles al desarrollo de la empresa, como las mercancías en stock, máquinas, vehículos, marca y otras señales distintivas, tecnología etc. Se trata de elemento indisoluble a la empresa. No existe como dar inicio a la explotación de cualquier actividad empresarial, sin la organización de un establecimiento.”*³⁰

El autor hace una analogía entre establecimiento y una biblioteca y explica que en ella, no hay sólo libros agrupados al acaso, pero un conjunto de libros sistemáticamente reunidos, dispuestos organizadamente, con una finalidad – posibilitar el acceso racional a determinado tipo de información. Una biblioteca tiene el valor comercial superior a lo de la simple suma de los precios de los libros que la componen, justamente en razón de ese aspecto, es decir, de esa organización racional de las informaciones contenidas en los libros reunidos.³¹ Así también se puede analizar el establecimiento, pues posee un valor normalmente superior al valor individual de los bienes que lo componen.

Sobre la naturaleza jurídica del establecimiento empresarial, Fábio Ulhoa Coelho destaca tres puntos esenciales, al señalar que (i) el establecimiento empresarial no es sujeto de derecho. El sujeto de derecho es el empresario, titular del establecimiento y este no posee personalidad jurídica; (ii) el segundo aspecto, se refiere a la consideración según la cual el establecimiento empresarial es una cosa; (iii) y el tercero se refiere al hecho de que el establecimiento empresarial

29 REQUIÃO, Rubens. **Curso de Direito Comercial**. São Paulo: Saraiva, 2007. p. 276.

30 COELHO, Fábio Ulhoa. **Curso de direito comercial**. v. 1. São Paulo: Saraiva, 2012, p. 96. En el original: “é o conjunto de bens que o empresário reúne para exploração de sua atividade econômica. Compreende os bens indispensáveis ou úteis ao desenvolvimento da empresa, como as mercadorias em estoque, máquinas, veículos, marca e outros sinais distintivos, tecnologia etc. Trata-se de elemento indissociável à empresa. Não existe como dar início à exploração de qualquer atividade empresarial, sem a organização de um estabelecimento.”

31 COELHO, Fábio Ulhoa. **Manual de Direito Comercial**. 17ª ed. São Paulo: Saraiva, 2006, p. 56.

integra el patrimonio del empresario o de la sociedad empresaria. El establecimiento no puede confundirse con el empresario o la sociedad empresaria (sujeto de derecho), ni con la empresa (actividad económica organizada u organización de factores de producción).³²

El Código Civil brasileño de 2002, en el art. 90, prescribe que “constituye universalidad de hecho la pluralidad de bienes singulares que, pertinentes a la misma persona, tengan destinación unitaria” y en el art. 91, que “constituye universalidad de derecho el complejo de relaciones jurídicas, de una persona, dotadas de valor económico”.

Marcelo M. Bertoldi y Marcia Carla Pereira Ribeiro entienden que el establecimiento es una universalidad de derecho porque pasó a ser definido por el art. 1.142 del Código Civil.³³

En otro contexto, Sérgio Campinho explica que no se puede admitir el establecimiento como una universalidad de derecho porque no tiene su existencia derivada de la ley. “No se constituye, como la herencia y la masa fallida, por ejemplo, por fuerza de ley, pero en razón de la voluntad del empresario.”

Y continúa él, afirmando que

*por tal motivo es que la doctrina ha convergido en la opinión de que el establecimiento empresarial se constituye en una universalidad de hecho (universitas facti). Es un complejo de bienes, cada cual con individualidad propia, con existencia autónoma, pero que, en razón de la simple gana de su titular, se encuentran organizados para la explotación de la empresa, formando, así, una unidad, adquiriendo un valor patrimonial por su todo.*³⁴

Con idéntica opinión, se pronuncia Fran Martins, diciendo que el establecimiento es una universalidad de hecho, “o sea, un conjunto de cosas distintas, con individualidad propia, que se transforman en un

32 *Idem, Ibidem*, p. 99.

33 BERTOLDI, Marcelo M. RIBEIRO, Marcia Carla Pereira. **Curso avançado de Direito Comercial**. 6. ed. rev. atual. São Paulo: Revista dos Tribunais, 2011, p. 98.

34 CAMPINHO, Sérgio. **O direito de empresa à luz do novo Código Civil**. 5. ed. ampl. atual. Rio de Janeiro: Renovar, 2005, p. 300-301. En el original: “por tal motivo é que a doutrina tem convergido na opinião de que o estabelecimento empresarial constitui-se em uma universalidade de fato (universitas facti). É um complexo de bens, cada qual com individualidade própria, com existência autónoma, mas que, em razão da simples vontade de seu titular, encontram-se organizados para a exploração da empresa, formando, assim, uma unidade, adquirindo um valor patrimonial pelo seu todo.”

todo por la voluntad del comerciante.”³⁵

En el mismo sentido es la posición de Alfredo de Assis Gonçalves Neto, para quien establecimiento empresarial tiene la misma naturaleza jurídica de universalidad de hecho. Explica el autor que

*la distinción entre universalidad de hecho y de derecho estaría en que la primera sería una reunión de bienes, como el rebaño y la biblioteca, mientras que la segunda sería un agregado de derechos, como la herencia, la masa falida etc. En la universalidad de hecho el conjunto de cosas singulares, simples o compuestas, resulta de la gana de la persona que les da la destinación común que mejor le aprouver. Ya en la universalidad de derecho, hay un complejo de relaciones de derecho la que la orden jurídica atribuye carácter unitario. Es en ese sentido que se deben comprender los enunciados de los arts. 90 y 91 del Código Civil de 2002. Como conjunto de bienes afectados al ejercicio de la empresa, tal como definido en el art. 1.142 del Código Civil, el establecimiento es una universalidad de hecho.*³⁶

Asumimos la posición teórica de que el establecimiento es una universidad de hecho (*universitas facti*). Y tiene razón Marcelo Andrade Fères al explicar que

*después de la codificación de 2002, no hay espacio para la formación de disidencias. El trato del establecimiento, nítidamente inspirado por el Codice Civile, trillando el camino de la universidad de hecho.*³⁷

35 MARTINS, Fran. **Curso de Direito Comercial**. 30. ed. rev. atual. ampl. Rio de Janeiro: Forense, 2006. p. 414.

36 GONÇALVES NETO, Alfredo de Assis. **Direito de Empresa**. Comentários aos artigos 966 a 1.195 do Código Civil. São Paulo: Revista dos Tribunais, 2007, p. 568. En el original: “a distinção entre universalidade de fato e de direito estaria em que a primeira seria uma reunião de bens, como o rebanho e a biblioteca, ao passo que a segunda seria um agregado de direitos, como a herança, a massa falida etc. Na universalidade de fato o conjunto de coisas singulares, simples ou compostas, resulta da vontade da pessoa que lhes dá a destinação comum que melhor lhe aprouver. Já na universalidade de direito, há um complexo de relações de direito a que a ordem jurídica atribui caráter unitário. É nesse sentido que se devem compreender os enunciados dos arts. 90 e 91 do Código Civil de 2002. Como conjunto de bens afetados ao exercício da empresa, tal como definido no art. 1.142 do Código Civil, o estabelecimento é uma universalidade de fato.”

37 FÉRES, Marcelo Andrade. **Estabelecimento Empresarial: Trespasse e Efeitos**

El artículo 1.143 del Código Civil prevé que puede el establecimiento ser objeto unitario de derechos y de negocios jurídicos, translativos y constitutivos, compatibles con su naturaleza. Pues bien, el establecimiento empresarial como una “cosa” colectiva, puede tener los bienes integrantes vendidos tanto unificadamente, como en el caso del traspase, cuanto aisladamente. Al considerarse como objeto de derecho, puede ser alienado, arrestado, empeñado o hasta decomisado.

El establecimiento empresarial es compuesto por elementos materiales (corpóreos) e inmateriales (incorpóreos). Corpóreos son los bienes que tienen existencia material. Incorpóreos abarcan los bienes que no tienen existencia tangible, no ocupan espacio en el mundo físico, pues son oriundos de la inteligencia o del conocimiento humano.

No obstante, no discutiremos en este trabajo sobre las divergencias doctrinarias sobre los bienes que componen y de los que no componen el establecimiento empresarial, sino que debemos de ofrecer algunos ejemplos de bienes que pueden integrar su composición. Como incorpóreos, pueden citarse el punto comercial, la patente de invención o de modelo de utilidad, el registro del dibujo industrial, la marca, el título de establecimiento y el aviamiento (good will). De bienes corpóreos muebles, son ejemplos: escaparate, vehículo, dinero, títulos, mobiliario, utensilios, equipamientos, materias primas y mercancías. En la categoría de bienes corpóreos, hay los inmuebles, pudiendo ser propiedades, edificios, construcciones y fábricas.

Los contratos no integran el establecimiento empresarial porque no son bienes, como resalta Rubens Requião³⁸. En ese sentido, Marcelo Andrade Fêres concluye que entre los bienes integrantes del establecimiento empresarial no se comprenden deudas, créditos o contratos, pues con acierto, las relaciones jurídicas integran, igualmente, el patrimonio del empresario, en el mismo patamar de los elementos del establecimiento.³⁹

En ese sentido Ricardo Negrão explica que el patrimonio del empresario o de la sociedad empresaria se conforma por un complejo de bienes, derechos y obligaciones, siendo que el establecimiento empresarial es sólo una parte de ese patrimonio empresarial.⁴⁰

Se concluye así que, desde el punto de vista jurídico, establecimiento no se confunde con el patrimonio del empresario,

Obrigacionais. São Paulo: Saraiva, 2007, p.20. En el original: “após a codificação de 2002 , não há espaço para a formação de dissidências. O trato do estabelecimento, nitidamente inspirado pelo Codice Civile, trilhando o caminho da universidade de fato.”

38 REQUIÃO, Rubens. **Curso de Direito Comercial**. São Paulo: Saraiva, 2007, p. 284.

39 FÊRES, Marcelo Andrade. **Estabelecimento Empresarial: Traspasse e Efeitos Obrigacionais**. São Paulo: Saraiva, 2007, p. 21.

40 NEGRÃO, Ricardo. **Manual de Direito Comercial e de Empresa**. São Paulo: Saraiva, 2005, p. 63.

pero consiste en un complejo de bienes organizados para el ejercicio de la actividad empresarial, por tanto, una universalidad de hecho, formada a partir de la reunion de bienes materiales e imateriales, cuya organizacion dependerá de la voluntad del emprendedor.

Una vez fijados el marco teórico y conceptual de establecimiento, se pasará al análisis sobre la posibilidad de admitir el sitio web como un establecimiento empresarial físico.

4 EL SITIO WEB COMO UNA ESPECIE DE ESTABLECIMIENTO EMPRESARIAL SECUNDARIO (FILIAL)

El sitio web o web que hoy se presenta como instrumento vital de la actuación empresarial, utilizado para la promoción del comercio electrónico, tiene naturaleza jurídica de establecimiento empresarial o es una extensión del establecimiento empresarial físico?

En 1988, cuando internet no presentaba el nivel de desarrollo de hoy y no era utilizada para la realización del volumen de comercio electrónico actual, Oscar Barreto Filho⁴¹ ya admitía la posibilidad “el empresario ejercer su actividad sin fijarse en punto algún”.

Esa posibilidad del emprendedor de actividades económicas no fijarse en un inmueble, siempre fue posible con los comerciantes ambulantes. Pero, aún los comerciantes ambulantes, no establecidos en parte alguna, no tienen su establecimiento? Además no guardan y suministran mercancías? En el caso del emprendedor que ejerce la actividad empresarial primordialmente a través de el sitio web, las mercancías guardadas, el ordenador y el programa de ordenador, ambos utilizados para gestionar la web, son bienes que integran, en verdad, el establecimiento físico que se presenta como principal, y el sitio web es el establecimiento virtual, secundario en relación al físico, es decir, una filial de la matriz.

Tiene razón João Eunápio Borges⁴², al admitir que todo y cualquier emprendedor de actividad económica organizada para la producción de bienes, comercialización de bienes o la prestación de servicios, siempre tienen un establecimiento, aunque no fijado en parte física alguna (inmóvil), pues ineludiblemente hará uso de capital y trabajo. Aunque la iniciativa sea estructurada sin la presencia de una tienda física, necesitará de un ordenador, de uno o más programas de ordenador, de un servidor de internet, etc. Pero es preciso admitir

41 BARRETO FILHO, Oscar. **Teoria do Estabelecimento Comercial**. São Paulo: Max Limonad, 1988, p.142.

42 BORGES, João Eunápio. **Curso de Direito Comercial Terrestre**. Rio de Janeiro: Forense, 1971, p.184-185.

que estos bienes pertenezcan al establecimiento físico principal, la matriz, que se considera distinto de aquella organización de la web, un verdadero establecimiento virtual.

Se sabe que internet está proporcionando una verdadera revolución en la economía y en el comercio y que como un metaterritorio, desconoce las fronteras físicas, llega a cualquier lugar donde haya un ordenador conectado y por eso el empresario se relaciona con gran número de potenciales consumidores.⁴³

Con uso del sitio web, se hace más fácil ejercer la actividad empresarial sin un establecimiento físico, pues aún sin estar presente en un espacio físico, el emprendedor contará con “las puertas abiertas” vía internet.

En 2000, Regis Magalhães Soares de Queiroz afirmó que

la revolución del comercio electrónico puede, en un futuro próximo, hacer el establecimiento empresarial muy diferente de lo que él es hoy, por lo menos en ciertas actividades y para algunos productos. Basta que pensemos en los servicios prestados online, como las páginas especializadas en búsqueda, en comparación de precios, etc. O en las empresas especializadas en venta de productos directamente por la Red, tales como programas de ordenador vía download. En breve, estarán disponibles películas para download, etc. En esas hipótesis, como el producto es digital, puede ser dispensable cualquier estructura física de almacenamiento, administración, etc. Por eso, el establecimiento puede acabar transmigrando totalmente del mundo físico para metaterritorio virtual, modificando completamente el concepto de establecimiento empresarial. Basta imaginar que la administración puede ser hecha electrónicamente, el cobro y la entrega ídem, los depósitos de la facturación en los bancos también, etc. Además de eso, la burocracia fiscal ruma rápidamente para la virtualização e imaginamos que, en breve, será posible mantener toda la escritura fiscal y contábil en la propia Internet, el pago de tributos podrá ser realizado por la Red, etc. El propio ordenador

43 QUEIROZ, Regis Magalhães Soares. **Vedação da concorrência do trepassante do estabelecimento empresarial: seus limites e sua aplicação no espaço real e virtual.** 185 f. Disertación (Máster en Derecho) – Faculdade de Direito, Universidade de São Paulo, São Paulo. 2000. p. 153.

que hospeda la página puede no pertenecer a la empresa, pues el hospedaje de la web (el llamado host) puede ser terceirizada, etc.⁴⁴

Pasados 13 años desde que fueron hechas esas afirmativas, débese preguntar ¿las prospecciones proyectadas por el autor ya se concretizaron?

En 2000, él admitió que no habría posibilidad de implantación del establecimiento de modo 100% virtual, aún en la hipótesis de productos y servicios que fuesen suministrados y prestados directamente vía Red. El autor informa que en aquel año de 2000, un establecimiento 100% virtual era un guión de ciencia ficción, pero que la tecnología necesaria ya estaba prácticamente disponible, faltando sólo la “informatización de la burocracia fiscal y administrativa, la diseminación del comercio electrónico y de los sistemas seguros para la transferencia de datos (criptografía, firmas electrónicas, etc.) y la adquisición de confianza por parte del público consumidor.”⁴⁵

Pues, ya se está viviendo esa era. Esa tecnología ya fue implantada, sin embargo, aún perdura la duda, el emprendedor puede establecerse sin fijarse en un local físico?

Está tramitando a pasos lentos en la Cámara baja de las

44 QUEIROZ, Regis Magalhães Soares. **Vedação da concorrência do trepassante do estabelecimento empresarial: seus limites e sua aplicação no espaço real e virtual.** 185 f. Disertación (Máster en Derecho) – Faculdade de Direito, Universidade de São Paulo, São Paulo. 2000. p. 153-154. En el original: “a revolução do comércio eletrônico pode, em um futuro próximo, tornar o estabelecimento empresarial muito diferente do que ele é hoje, pelo menos em certas atividades e para alguns produtos. Basta pensarmos nos serviços prestados *on line*, como as páginas especializadas em busca, em comparação de preços, etc. Ou nas empresas especializadas em venda de produtos diretamente pela Rede, tais como programas de computador via download. Em breve, estarão disponíveis filmes para download, etc. Nessas hipóteses, como o produto é digital, pode ser dispensável qualquer estrutura física de armazenamento, administração, etc. Por isso, o estabelecimento pode acabar transmigando totalmente do mundo físico para metaterritório virtual, modificando completamente o conceito de estabelecimento empresarial. Basta imaginar que a administração pode ser feita eletronicamente, a cobrança e a entrega *idem*, os depósitos do faturamento nos bancos também, etc. Além disso, a burocracia fiscal ruma rapidamente para a virtualização e imaginamos que, em breve, será possível manter toda a escritura fiscal e contábil na própria Internet, o pagamento de tributos poderá ser realizado pela Rede, etc. O próprio computador que hospeda a página pode não pertencer à empresa, pois a hospedagem do *site* (o chamado *host*) pode ser terceirizada, etc.”

45 QUEIROZ, Regis Magalhães Soares. **Vedação da concorrência do trepassante do estabelecimento empresarial: seus limites e sua aplicação no espaço real e virtual.** 185 f. Disertación (Máster en Derecho) – Faculdade de Direito, Universidade de São Paulo, São Paulo. 2000. p. 156.

españolas, el Proyecto de Ley n. 1.589/99 ⁴⁶ que pretende exigir la indicación del establecimiento empresarial físico para la constitución del establecimiento virtual. Si fuera aprobado este proyecto, Regis Magalhães Soares de Queiroz explica que

tal vez no sea posible la creación de una empresa exclusivamente establecida de manera virtual, pues la alínea “b” del art. 4º, determina que la oferta de contratación electrónica debe informar la dirección física del establecimiento, dando a entender que esa modalidad sea necesaria para el comercio electrónico, lo que no deja de ser un factor de atraso en el desarrollo de la actividad comercial en internet, aunque su objetivo sea, claramente, lo de garantizar los derechos del consumidor, lo que podría ser contorneado, p. p.ej., con un eficiente sistema de seguros.”⁴⁷

Pero independientemente de la aprobación de este proyecto, de momento, en Brasil para crear un sitio web que ofrezca productos o servicios, se exige el suministro de la dirección física del establecimiento, pues es obligatoria la indicación de la sede del empresario individual, de la sociedad empresaria, de la sociedad simple o de la empresa individual de responsabilidad limitada,⁴⁸ quienes serán los titulares de el sitio web. Pero la sede indicada pertenencia al establecimiento físico, es decir, el establecimiento principal, la matriz. El sitio web se constituye, por tanto, según la legislación brasileña como la filial.

Esa realidad aún necesita de reglamentación, pues los órganos competentes no registran el establecimiento virtual como filial, pero ni por eso podemos dejar de admitirles como un verdadero establecimiento; ya que él se presenta como un conjunto de bienes debidamente

46 Apensados: [PL 104/2011](#) (4); [PL 2367/2011](#) ; [PL 3200/2012](#) ; [PL 4189/2012](#) ; [PL 4509/2012](#).

47 QUEIROZ, Regis Magalhães Soares. **Vedação da concorrência do trepassante do estabelecimento empresarial: seus limites e sua aplicação no espaço real e virtual**. 185 f. Disertación (Máster en Derecho) – Faculdade de Direito, Universidade de São Paulo, São Paulo. 2000. p. 156. En el original: “talvez não seja possível a criação de uma empresa exclusivamente estabelecida de maneira virtual, pois a alínea “b” do art. 4º, determina que a oferta de contratação eletrônica deve informar o endereço físico do estabelecimento, dando a entender que essa modalidade seja necessária para o comércio eletrônico, o que não deixa de ser um fator de atraso no desenvolvimento da atividade comercial na Internet, ainda que seu objetivo seja, claramente, o de garantir os direitos do consumidor, o que poderia ser contornado, p. ex., com um eficiente sistema de seguros.”

48 Para crear una casa de campo electrónica, según las informaciones dadas pelo guía de administración de casas de campo del gobierno electrónico, es necesario para la formación de la estructura mínima que el creador indique una dirección física. Disponible en: <http://epwg.governoeletronico.gov.br/guia-administracao>. Acceso en: 15/abr./2014.

organizados para el ejercicio de la actividad empresarial.

Además, en Brasil se están haciendo las gestiones necesarias para crear esa reglamentación, véase como ejemplo la Propuesta de Enmienda a la Constitución para alterar las reglas de tributación del ICMS para el comercio electrónico en el país, que ha sido aprobada en julio de 2012 por el Senado Federal.⁴⁹ Por tanto, se trata de un cambio de paradigma que reconoce la autonomía del establecimiento virtual. Una vez que el ICMS es uno de los impuestos que poseen alícuotas más elevadas en el país, y está siendo concentrado en los países de origen, como ejemplo, el Estado de São Paulo concentra cerca de 40 % de las compras electrónicas del país.⁵⁰ El cambio tributario pretendida por la Enmienda Constitucional es que esa alícuota pueda ser más bien distribuida entre los Estados, de forma que el lugar de destino quede con la mayor parte del ICMS de las transacciones comerciales. La preocupación con la mejor reglamentación de esos tributos desrespeto al hecho de que las compras y ventas realizada por la internet están creciendo muy los últimos tiempos, significando que el comercio electrónico comienza a ser reconocido como un instrumento comercial importante y autónomo en Brasil, y consecuentemente el establecimiento virtual, que está directamente conectado al comercio electrónico. Ese cambio está demostrando que el establecimiento virtual, así como el comercio virtual, son independientes del comercio físico, necesitando así, de una reglamentación específica, ese es la comprensión.

El hecho de que, para suministrar productos o servicios vía internet, el empresario, la sociedad empresaria y la empresa individual de responsabilidad limitada deban estar regularmente registrados en la Junta Comercial, y la sociedad simple, para ejercer actividades de arte, ciencia, literatura y profesión intelectual sin organizar elemento de empresa, deba estar regularmente registrada en la Notaría de Personas Jurídicas, en los términos del art. 45, 967, 985 y 1.150 del Código Civil de 2002, no inviabiliza la consideración del establecimiento virtual como un verdadero establecimiento empresarial, por cuanto asume la posición de filial.

Explicando mejor, la condición de filial se da porque independientemente de tratarse de empresario individual, sociedad empresaria o simple o empresa individual de responsabilidad limitada, para que la empresa esté regular y consecuentemente pueda arcar con sus impuestos es necesario que esté debidamente registrada, sea en la Junta Comercial o en el Cartório de Personas Jurídicas. Y es condición

49 Disponible en: http://www.istoedinheiro.com.br/noticias/89209_SENADO+APROVA+NOVA+TRIBUTACAO+PARA+COMERCIO+ELETRONICO. Acceso en: 13/02/2013.

50 Disponible en: <http://convergenciadigital.uol.com.br/cgi/cgilua.exe/sys/start.htm?infoid=32871&sid=5#.U0823FVdVkQ>. Acceso en: 15/04/2014.

indispensable para ese registro la disponibilidad de una dirección física de la empresa. Ora, si el establecimiento virtual debe ser solamente virtual, la imprescindibilidad de la dirección no irá descaracterizar su condición de virtual e inmediatamente de establecimiento empresarial también? No! Si asumir su condición de filial. El establecimiento virtual no dejará de ser un establecimiento empresarial, pues llena los requisitos para tanto, sin embargo será una filial, para que pueda existir. Y es importante hacer claro que filiales son independientes entre sí.

Como los emprendedores realizarán la venta de mercancías o prestación de servicios por medio internet, ellos practicarán actividades generadoras de tributos, cuya recaudación necesariamente requiere la inscripción en el Registro Nacional de Personas Jurídicas – CNPJ, en la Hacienda provincial y en la Hacienda municipal, conforme el tipo de actividad.

Para realizar el registro en la Junta Comercial o en la Notaría de Personas Jurídicas, en el CNPJ, en la Hacienda provincial y en la Hacienda municipal, y en otros órganos, el emprendedor deberá indicar un domicilio, es decir, la sede del empresario individual, de la sociedad empresaria o simple y de la empresa individual de responsabilidad limitada. Pero la indicación de esta sede en los registros mencionados no significa que el sitio web pueda considerarse como un bien integrante del establecimiento empresarial físico.

El sitio web no se confunde con la sede indicada por el emprendedor a efectos de registro en la Junta Comercial, inscripción en el CNPJ y en las Haciendas Provincial y Municipal. El emprendedor suministra la dirección física sólo para atender a exigencia legal, pero tal circunstancia no permite concluir que el establecimiento virtual se considera como una extensión de la dirección física documentalmente indicada. Al contrario, en muchos casos, el establecimiento virtual es lo que “de hecho” existe, resumiéndose el físico al local, muchas veces a la propia residencia del negociante, donde se encuentra el ordenador y toda la parte incorpórea, también virtual, para visitar internet.

Según Maria Antonieta Lynch de Moares

web es una especie de casa virtual de una persona, empresa o institución. Técnicamente, web es un grupo de documentos HTML relacionados y archivados asociados que residen en un servidor. Web corresponde a conjunto de instrucciones ejecutadas por un ordenador que exhibe, en la tela de quien lo visita, determinadas informaciones, imágenes etc., así como, en ciertas hipótesis, permite que el ‘visitante’ coseche o suministre datos, solicite providencias, recoja mayores

Tarcisio Teixeira explica que “en internet, la localización virtual es dada por un nombre de dominio, que, muchas veces, se expresa por la misma nomenclatura del título del establecimiento (físico) o por la nomenclatura de la marca.” Y continúa él, diciendo que “es por la web que la actividad del empresario activo en el comercio electrónico – pasa a ser difundida y desarrollada, pues es allí que sus clientes pueden hacer compras.”⁵²

Marco Aurélio Greco divide las webs en tres categorías: (i) pasivos – que se limitan a reproducir imágenes o mensajes; es un mero vehículo de divulgación; (ii) canalizadores de mensajes – aceptan pedidos de compras de determinados bienes o servicios; (iii) inteligentes que no sólo reciben solicitudes, pero tienen condiciones técnicas de realizar operaciones más complejas, de interaccionar con el usuario.⁵³

La doctrina nacional analizada se divide cuanto a la autonomía del sitio web y una parte lo reconoce como establecimiento empresarial y otra como una extensión del establecimiento empresarial físico.

Admitiendo que el sitio web siempre posea una función atrelada al establecimiento físico, Thomas Henrique Junqueira de Andrade Pereira se manifiesta contra la posibilidad de web ser confundida con establecimiento empresarial o recibir la misma cualificación que este. Para él

*la web nada más es que un elemento inmaterial que compone el establecimiento, siendo que lo confundís con el establecimiento en sí sería error tan grave cuanto la antigua confusión entre “establecimiento” y “casa comercial”.*⁵⁴

51 MORAES, Maria Antonieta Lynch de. Possibilidade da caracterização do site na noção de estabelecimento comercial na Lei Complementar 87/96. **Revista de Direito Privado**. v. 9. Enero/Marzo 2002, p. 204. En el original: “*site* é uma espécie de casa virtual de uma pessoa, empresa ou instituição. Tecnicamente, *site* é um grupo de documentos HTML relacionados e arquivados associados que residem em um servidor. *Site* corresponde a conjunto de instruções executadas por um computador que exhibe, na tela de quem o acessa, determinadas informações, imagens etc., bem como, em certas hipóteses, permite que o ‘visitante’ colha ou forneça dados, solicite providências, busque maiores esclarecimentos etc.”

52 TEIXEIRA, Tarcisio. Estabelecimento empresarial virtual: regime jurídico. **Revista de Direito Mercantil**. n. 50. v.157. jan./mar./2011. p.28.

53 GRECO, Marco Aurélio. Estabelecimento tributário e sites na internet. In: Newton De Lucca e Adalberto Simão Filho (coords.). *Direito e Internet – aspectos jurídicos relevantes*. 2.ed. p. pp.341-342. Apud TEIXEIRA, Tarcisio. Estabelecimento empresarial virtual: regime jurídico. **Revista de Direito Mercantil**. n. 50. v.157. Enero/Marzo/2011. p. 29.

54 PEREIRA, Thomaz Henrique Junqueira de Andrade. Conceito de Estabelecimento Virtual. **Revista de Direito Empresarial**. Curitiba: Juruá, n. 9, Enero/Junio 2008, p. 226. En el

Thomas Henrique Junqueira de Andrade Pereira defiende la idea según la cual, el sitio web nace y permanece atrelado a un establecimiento físico, formando parte de este y que, por tanto, no hay una separación entre ellos.

Aldemario Araujo Castro también se manifiesta contrario a la posibilidad de admitir el sitio web como un establecimiento empresarial. Partiendo de la definición de establecimiento como un local, contenida en el §3º, del art. 11, de la Ley Complementar n. 87, de 13 de septiembre de 1996⁵⁵, el autor analiza las acepciones de la palabra local, y concluye no haber cualquier obstáculo a la comprensión de que la web fuera admitida como un local. Reconociendo que los aspectos de la definición legal no ofrecen mayores dificultades, concluye aún no considerarse que las webs actualmente existentes puedan necesariamente reputarse como establecimientos virtuales.

Para él, sería preciso la edición de toda una legislación regulando las peculiaridades de los establecimientos virtuales, los aspectos relacionados con el registro fiscal, procedimientos de fiscalización, solución de eventuales conflictos competencial, entre otros.⁵⁶

Debemos considerar que aunque el análisis de Aldemario Araujo Castro haya sido realizada en 2000, la Ley Complementaria n. 87 por él examinada aún está en vigor, lo que lleva a concluir como válidas las conclusiones por él apuntadas, o sea, para considerarse el sitio web como establecimiento depende de reglamentación en relación a su registro como filial en los órganos competentes.

Pero la ausencia de esa reglamentación no impide concluir que el sitio web que funcione como establecimiento virtual pueda considerarse como establecimiento empresarial, pues a través de él se reúnen bienes para el ejercicio de la actividad empresarial de venta de mercancías o de prestación de servicios.

Antonia Espíndola Longoni Klee también es contraria a la idea

original: “o *site* nada mais é que um elemento imaterial que compõe o estabelecimento, sendo que confundi-lo com o estabelecimento em si seria erro tão grave quanto a antiga confusão entre ‘estabelecimento’ e ‘casa comercial’”.

55 Ley Complementar n. 87/96. “Art. 11. (...) § 3º Para efecto de esta Ley Complementar, establecimiento es el local, privado o público, edificado o no, propio o de tercero, donde personas físicas o jurídicas ejerzan sus actividades en carácter temporal o permanente, así como donde se encuentren almacenadas mercancías, observado, aún, el siguiente: I - en la imposibilidad de determinación del establecimiento, se considera como tal el local en que haya sido efectuada la operación o prestación, encontrada la mercancía o constatada la prestación; II - es autónomo cada establecimiento del mismo titular; III - se considera también establecimiento autónomo el vehículo usado en el comercio ambulante y en la captura de pescado; IV - responden por el crédito tributario todos los establecimientos del mismo titular.”

56 CASTRO, Aldemario Araujo. **Os meios eletrônicos e a tributação**. 25/11/2000. Disponible en: <http://www.aldemario.adv.br/meios.htm>. Acceso en: 09/mar./2013.

de sitio web como establecimiento, pues según ella

la web es un elemento imaterial que compone el establecimiento, no se puede lo confundís con el establecimiento en sí. Lo que es virtual es el medio de acceso y no el establecimiento. Eso es, “la imaterialidade insita al establecimiento virtual no se refiere a los bienes componentes, pero a la accesibilidad”. El establecimiento virtual desborda el espacio aéreo y voluble del ambiente internet operado por la web para alcanzar el propio establecimiento físico que genera toda la empresariedad expresa en el ámbito de la web. Es decir, la empresa en el mundo post moderno es más que la web en internet, que es su representación digital. La explotación económica de la web será objeto principal de los proveedores en el mundo post moderno que, en el mundo físico, estará debidamente materializada para poder alcanzar su fin social. La idea de que la web es la representación de una empresa en el mundo físico es sostenida por el hecho de que, si consideráramos el establecimiento íntegramente virtual, él acabaría esbarrando en las dificultades propias de la forma de alimentación de la web. Si por un lado él funciona y existe en el mundo virtual debidamente nominado a través de su dirección electrónica, no es menos verdad que su existencia está condicionada a los actos de gestión y administración de sus gerentes, controladores, directores, que deberán, en el mundo físico, que se organicen para la actividad empresarial en ambiente físico para desarrollar sus actividades en internet. Es decir, en el mundo físico deberá haber la creación de la empresa que dará soporte a las transacciones con el fin de recoger su regularidad. El establecimiento empresarial estará constituido en el mundo físico y no en el ambiente virtual.⁵⁷

57 KLEE, Antonia Espíndola Longoni. O diálogo das fontes nos contratos pela Internet. Do vínculo contratual ao conceito de estabelecimento empresarial virtual e a proteção do consumidor. **Revista de Direito do Consumidor**. v. 77, 2011. p. 134-135. En el original: “o site é um elemento imaterial que compõe o estabelecimento, não se pode confundi-lo com o estabelecimento em si. O que é virtual é o meio de acesso e não o estabelecimento. Isso é, “a imaterialidade insita ao estabelecimento virtual não se refere aos bens componentes, mas à acessibilidade”. O estabelecimento virtual extravasa o espaço aéreo e volúvel do ambiente da Internet operado pelo site para atingir o próprio estabelecimento físico que gera toda a empresariedade expressa no âmbito do site. Isto é, a empresa no mundo pós-

Y continúa ella, diciendo que el sitio web es una representación del establecimiento empresarial constituido en el mundo físico. Antonia Espíndola Longoni Klee entiende que el local de donde el empresario comanda y supervisa las operaciones de la web será el local incorporado al establecimiento empresarial sobre lo cual recaerán todas las reglas jurídicas.

Hay que discordarse de tal punto de vista, en la medida en que se admite que puede haber una organización empresarial que solamente mencione una dirección física en el registro realizado ante la Junta Comercial, CNPJ, Haciendas Provincial y Municipal y otros órganos porque el ordenamiento jurídico así lo exige.

No es posible constituir regularmente una unidad empresarial sin dirección física, y razonable se muestra tal exigencia, pues es necesario saber donde físicamente encontrar el titular del establecimiento virtual para responsabilizarlo por eventuales daños y deudas originarios de la empresa, pero eso no significa que el sitio web no se consubstancie en un establecimiento empresarial. Tanto es así que el sitio web puede ser objeto de traspase. Tarcísio Teixeira concuerda con esa posibilidad al explicar que

cuando el empresario usar exclusivamente la web como forma de colocar sus productos o servicios en el mercado, el establecimiento virtual podría ser objeto de traspase, por ejemplo, en el caso de Amazon. Si fuera el caso, podría vender sólo el nombre de dominio – dirección virtual – juntamente con la marca (lo que probablemente tiene de más valioso), sin, necesariamente, vender los equipamientos que le dan soporte.⁵⁸

moderno é mais do que o *site* na Internet, que é a sua representação digital. A exploração econômica do *site* será objeto principal dos fornecedores no mundo pós-moderno que, no mundo físico, estará devidamente materializada para poder atingir o seu fim social. A ideia de que o *site* é a representação de uma empresa no mundo físico é sustentada pelo fato de que, se considerássemos o estabelecimento integralmente virtual, ele acabaria esbarrando nas dificuldades próprias da forma de alimentação do *site*. Se por um lado ele funciona e existe no mundo virtual devidamente nominado através de seu endereço eletrônico, não é menos verdade que a sua existência está condicionada aos atos de gestão e administração de seus gerentes, controladores, diretores, que deverão, no mundo físico, organizarem-se para a atividade empresarial em ambiente físico para desenvolver suas atividades na Internet. Isto é, no mundo físico deverá haver a criação da empresa que dará suporte às transações com o fim de buscar a sua regularidade. O estabelecimento empresarial estará constituído no mundo físico e não no ambiente virtual.”

58 TEIXEIRA, Tarcísio. Estabelecimento empresarial virtual: regime jurídico. **Revista de Direito Mercantil**, n. 50, v. 157. Enero/Marzo/2011, p. 31. En el original: “quando o empresário usar exclusivamente o *site* como forma de colocar seus produtos ou serviços no mercado, o estabelecimento virtual poderia ser objeto de trespasse, por exemplo, no caso da

Además, es preciso reconocer que el proveedor de productos o servicios puede constituir una matriz y varias filias, todos ellos físicos. El establecimiento físico principal, y los varios otros establecimientos físicos secundarios (filiales, agencias o sucursales) son independientes entre sí y todos reunidos integran el patrimonio empresarial. Claro que los secundarios dependen de la existencia del establecimiento principal para que también existieran, pero no dejan de encuadrarse como establecimiento empresarial en los términos de la definición legal prevista en el art. 1.142, del Código Civil de 2002 por el hecho de haber esa dependencia.

El mismo raciocinio puede desarrollarse con relación al sitio web, que puede depender de actos de gestión y administración practicados en un lugar físico, pero tal circunstancia no le retira la condición de complejo de bienes reunidos para el ejercicio de la actividad empresarial. Los establecimientos empresariales secundarios también dependen de la práctica de actos de gestión y administración realizados en el establecimiento principal.

En ese sentido, es la opinión de Tarcísio Teixeira al examinar la tercera especie de web presentada por Marco Aurélio Greco. Para él, las webs del tipo pasivo y del tipo canalizador de mensajes no pueden ser consideradas establecimientos empresariales propiamente dichas. Pero la web inteligente es admitida por él como un establecimiento empresarial, pues “guarda semejanza con las funciones del establecimiento físico, lo que permite el desarrollo de la actividad empresarial, en especial vender sus productos y servicios a la clientela.”⁵⁹

De igual manera señala Maria Antonieta Lynch de Moraes, para quién “ni todo web se reviste de las características de un establecimiento empresarial.”⁶⁰ Y para ella, tanto la web canalizadora de mensaje cuanto la inteligente son susceptibles de clasificarse como establecimientos empresariales virtuales.⁶¹

Kleber Luiz Zanchim admite que la web posea la misma naturaleza jurídica del establecimiento físico, sólo diferenciándose en relación a aspectos relativos a la forma de acceso en que se insertan:

Amazon. Se fosse o caso, poderia vender apenas o nome de domínio – endereço virtual –, juntamente com a marca (o que provavelmente tem de mais valioso), sem, necessariamente, vender os equipamentos que lhe dão suporte).”

59 TEIXEIRA, Tarcísio. Estabelecimento empresarial virtual: regime jurídico. **Revista de Direito Mercantil**, n. 50, v.157. Enero/Marzo/2011, p. 29-30.

60 MORAES, Maria Antonieta Lynch de. Possibilidade da caracterização do site na noção de estabelecimento comercial na Lei Complementar 87/96. **Revista de Direito Privado**, v. 9. Enero/mar/ 2002.p. 210.

61 MORAES, Maria Antonieta Lynch de. Possibilidade da caracterização do site na noção de estabelecimento comercial na Lei Complementar 87/96. **Revista de Direito Privado**, v. 9. Enero/Marzo/2002.p. 211.

*el establecimiento empresarial es ‘todo complejo de bienes organizado, para el ejercicio de la empresa, por el empresario o por la sociedad empresaria’, así, el establecimiento comercial virtual es compuesto por este complejo de bienes, aunque inmateriales en su mayoría, difiriéndose del establecimiento tradicional por la imaterialidad ínsita a la su accesibilidad, pues mientras aquel es accesible por medio del desplazamiento en el espacio, este se hace por un click. Así, son ambos (el establecimiento virtual y el establecimiento físico) una única realidad jurídica, poseyendo idéntica naturaleza jurídica, y encuadrándose en la misma categoría de establecimiento comercial del art. 1.142 del Código Civil brasileño, difiriendo, sólo, en algunos aspectos secundarios que se presentan propios de los medios en que se insertan.*⁶²

En el mismo sentido, se encuentra la posición de Fábio Ulhoa Coelho. Para él, la única distinción entre el establecimiento físico y el virtual se refiere a la forma de acceso de los consumidores y adquirentes interesados en los productos, servicios o virtualidades que el empresario ofrece al mercado.⁶³ Para él

el tipo de acceso al establecimiento empresarial define la clasificación de este. Cuando hecho por desplazamiento en el espacio, es físico; cuando por transmisión y recepción electrónica de datos, virtual. Hay aspectos comunes a los dos tipos de establecimiento, como el fondo de empresa, pero hay derechos referentes al establecimiento físico que no existen relativamente al virtual, como lo de

62 ZANCHIM, Kleber Luiz. A forma dos negócios jurídicos no direito das sucessões. **Revista de Direito Privado**. São Paulo: Ed. Revista dos Tribunais, 2008. En el original: “o estabelecimento empresarial é ‘todo complexo de bens organizado, para o exercício da empresa, pelo empresário ou pela sociedade empresária’, assim, o estabelecimento comercial virtual é composto por este complexo de bens, ainda que imateriais em sua maioria, diferindo-se do estabelecimento tradicional pela imaterialidade ínsita à sua acessibilidade, pois enquanto aquele é acessível por meio do deslocamento no espaço, este se faz por um *click*. Assim, são ambos (o estabelecimento virtual e o estabelecimento físico) uma única realidade jurídica, possuindo idêntica natureza jurídica, e enquadrando-se na mesma categoria de estabelecimento comercial do art. 1.142 do Código Civil brasileiro, diferindo, apenas, em alguns aspectos secundários que se apresentam próprios dos meios em que se inserem.”

63 COELHO, Fábio Ulhoa. **Curso de direito comercial**. v. 3. São Paulo: Saraiva, 2012. p. 50.

*renovación compulsória de la locación.*⁶⁴

Para él, la imaterialidade inherente al establecimiento virtual no se refiere a los bienes componentes que son materiales o no en cualquier establecimiento, físico o virtual. La imaterialidade del establecimiento virtual se refiere a la accesibilidad. Por la forma de acceso ser inmaterial, el autor concluye que no es posible admitir la existencia de punto comercial y el derecho a la renovación compulsória del contrato de alquiler, en virtud de la explotación del punto.⁶⁵

También es de la misma opinión, Marlon Tomazette, que reconoce en el establecimiento virtual o digital, un verdadero establecimiento empresarial, solamente no se aplican a él las reglas de este a aquel, en lo que se refiere al punto y a la acción renovatória.

El empresario al practicar la actividad empresarial por medio del sitio web, no crea una irrealdade, un campo de ficción, imaginario o fantasioso, por realizarla en medio incorpóreo o sin territorio físico.

Están de acuerdo Fábio Ulhoa Coelho y con Marlon Tomazette cuando admiten el sitio web como establecimiento empresarial, suscetíveis de reglamentación por las mismas normas relativas al establecimiento físico.

Pero, es preciso discordar de los referidos autores cuando afirman que los bienes materiales forman parte del establecimiento virtual. Por el raciocinio desarrollado en el presente trabajo, siendo internet un metaterritório y no siendo posible constituir establecimiento virtual sin constituir un establecimiento físico (aunque muy simple), no se puede admitir que los bienes materiales formarán parte del establecimiento virtual, lo que por su parte, no tiene el propósito de descaracterizarlos como un verdadero establecimiento empresarial.

De ese modo, se concluye que el sitio web se considera como establecimiento empresarial, situado en el espacio cibernético. Aunque carezca de presencia tangible, es real y existe de hecho, lo que se demuestra por las actividades del empresario, quien pacta una infinitud de negocios jurídicos tan reales cuanto eficaces a través del complejo de bienes que produce efectos sociales, económicos y jurídicos en dimensión material.

64 COELHO, Fábio Ulhoa. **Curso de direito comercial**. v. 3. São Paulo: Saraiva, 2012. p.50. En el original: “o tipo de acesso ao estabelecimento empresarial define a classificação deste. Quando feito por deslocamento no espaço, é físico; quando por transmissão e recepção eletrônica de dados, virtual. Há aspectos comuns aos dois tipos de estabelecimento, como o fundo de empresa, mas há direitos referentes ao estabelecimento físico que não existem relativamente ao virtual, como o de renovação compulsória da locação.”

65 COELHO, Fábio Ulhoa. **Curso de direito comercial**. v. 3. São Paulo: Saraiva, 2012. p. 50-51.

5 CONCLUSIÓN

En el desarrollo de este trabajo, se verificó la posibilidad de concebir internet como un espacio calificado por no ser físico, como una enorme red de ordenadores y aún como un metaterritorio que trasciende el territorio físico donde es posible ser disponibilizada todo tipo de información, que inclusive permite la realización de incontables negocios jurídicos que presuponen el concepto de comercio electrónico.

Partiendo de esa concepción del internet como metaterritorio y de la teoría que admite el establecimiento empresarial como una universalidad de hecho, sin dejar de analizar las condiciones legales exigidas para el ejercicio regular de la actividad económica, en especial, la empresarial, se concluyó que el sitio web – cuando creado para el ejercicio de la actividad de compraventa y venta de mercancías o la prestación de servicios o las dos actividades – presenta las mismas características del establecimiento empresarial reglamentado por el art. 1.142 y siguientes del Código Civil de 2002.

Se llegó a tal conclusión porque se estimó que él, aunque virtual, es una universalidad de hecho, que consiste en una reunión de bienes especialmente organizados por el empresario o por la sociedad empresaria para el ejercicio de la actividad empresarial.

El hecho de haber – para montar una web – la necesidad de informar la sede del empresario o de la sociedad empresaria en el registro realizado ante la Junta Comercial, en la inscripción ante el CNPJ, la Receta Provincial y la Municipal, no aleja la autonomía del sitio web, no le retira la condición de establecimiento empresarial.

Se verificó, es verdad, que hay necesidad de alteración legislativa que permita el registro del establecimiento virtual como un establecimiento secundario, es decir, como una filial, pero fue filtrado también que el ordenamiento jurídico brasileño está en vías de recoger ese ajuste legal, y un buen ejemplo es la Propuesta de Enmienda a la Constitución que altera las reglas de tributación del ICMS para el comercio electrónico en el país, para admitir que la mayor parte del impuesto sea pagada a la unidad federativa donde es entregue la mercancía.

El sitio web depende de la existencia de la sede tanto cuanto las filiales físicas dependen de la existencia de la matriz y el hecho de él ser tan real cuanto a aquellas, reuniendo los bienes necesarios para el ejercicio de la empresa, posibilita quitar la conclusión de que se consubstancia en un establecimiento secundario en relación a la matriz, o sea, el sitio web o establecimiento virtual es una filial.

6 REFERENCIAS

- BAPTISTA, Luiz Olavo. Comércio Eletrônico: Uma Visão do Direito Brasileiro, **Revista da Faculdade de Direito da Universidade de São Paulo**. V.94, São Paulo: Serviço Técnico de Imprensa da Faculdade de Direito da Universidade de São Paulo, 1999.
- BARRETO FILHO, Oscar. **Teoria do Estabelecimento Comercial**. São Paulo: Max Limonad, 1988.
- BERTOLDI, Marcelo M. RIBEIRO, Marcia Carla Pereira. **Curso avançado de Direito Comercial**. 6. ed. rev. atual. São Paulo: Revista dos Tribunais, 2011.
- BORGES, João Eunápio. **Curso de Direito Comercial Terrestre**. Rio de Janeiro: Forense, 1971.
- CAMPINHO, Sérgio. **O direito de empresa à luz do novo Código Civil**. 5. ed. ampl. atual. Rio de Janeiro: Renovar, 2005.
- CANELLA, Sergio Eduardo; LEWIS, Sandra Barbon. Breves anotações sobre o comércio eletrônico. v. 9. Londrina: Scientia Iuris, 2005.
- CASTRO, Aldemario Araujo. **Os meios eletrônicos e a tributação**. Disponible en: <http://www.aldemario.adv.br/meios.htm>. Acceso en: 09/03/2013.
- COELHO, Fábio Ulhoa. **Manual de Direito Comercial**. 17ª ed. São Paulo: Saraiva, 2006.
- _____. **Curso de direito comercial**. v. 1. São Paulo: Saraiva, 2012.
- _____. **Curso de direito comercial**. v. 3. São Paulo: Saraiva, 2012.
- FÊRES, Marcelo Andrade. **Estabelecimento Empresarial: Trespasse e Efeitos Obrigacionais**. São Paulo: Saraiva, 2007.
- FLORESS, Cristian. **História da Internet**. Disponível em: <https://sites.google.com/site/historiasobreossitesdebusca/historia-da-internet>. Acceso em: 19/12/2012.
- GONÇALVES NETO, Alfredo de Assis. **Direito de Empresa**. Comentários aos artigos 966 a 1.195 do Código Civil. São Paulo: Revista dos Tribunais, 2007.
- HOUAISS, Antônio. **Dicionário Eletrônico Houaiss da Língua Portuguesa**. Rio de Janeiro: FL Gama Design Ltda Editora Objetiva, 2009.
- IKEDA. Quem somos. Disponible en: <http://www.ikeda.com.br/quem-e-ikeda/>. Acceso en: 24/jun./2012.
- KLEE, Antonia Espíndola Longoni. O diálogo das fontes nos contratos pela Internet. Do vínculo contratual ao conceito de estabelecimento empresarial virtual e a proteção do consumidor. **Revista de Direito do Consumidor**. v. 77. 2011, p. 134-135.
- LÉVY, Pierre. **Cibercultura**. São Paulo: Editora 34, 2000.

- MALOSÁ JÚNIOR, Francisco Carlos. **A realidade virtual como elemento transformador de estabelecimento empresarial**. Anales de lo XVII Encontro Nacional do Conpedi. Salvador: Boiteux, Junio/2008. p.1194-1213.
- MARTINS, Fran. **Curso de Direito Comercial**. 30. ed. rev. atual. ampl. Rio de Janeiro: Forense, 2006. p. 414.
- MORAES, Maria Antonieta Lynch de. Possibilidade da caracterização do site na noção de estabelecimento comercial na Lei Complementar 87/96. **Revista de Direito Privado**. v. 9. Enero/Marzo 2002.p. 204.
- NEGRÃO, Ricardo. **Manual de Direito Comercial e de Empresa**. São Paulo: Saraiva, 2005.
- PEREIRA, Thomaz Henrique Junqueira de Andrade. Conceito de Estabelecimento Virtual. **Revista de Direito Empresarial**. Curitiba: Juruá, n. 9, Enero/Junio2008.
- QUEIROZ, Regis Magalhães Soares. **Vedação da concorrência do trepassante do estabelecimento empresarial: seus limites e sua aplicação no espaço real e virtual**. 185 f. Dissertação (Mestrado em Direito) – Faculdade de Direito, Universidade de São Paulo, São Paulo. 2000.
- REQUIÃO, Rubens. **Curso de Direito Comercial**. São Paulo: Saraiva, 2007.
- ROHRMANN, Carlos Alberto. O Direito Comercial Virtual – A Assinatura Digital. **Revista da Faculdade de Direito Milton Campos**. Belo Horizonte: Del Rey, v.4, 1997.p. 35-51.
- TATSCH, Fabiano. Discussão: HTTP. Disponible en: http://pt.wikipedia.org/wiki/Usu%C3%A1rio:Fabiano_Tatsch/Arquivo_3 Acceso en: 26 de febrero de 2013.
- TEIXEIRA, Tarcisio. Estabelecimento empresarial virtual: regime jurídico. **Revista de Direito Mercantil**. n. 50. v.157. Enero/Marzo 2011. p.27-33.
- ZANCHIM, Kleber Luiz. A forma dos negócios jurídicos no direito das sucessões. **Revista de Direito Privado**. São Paulo: Revista dos Tribunais, v. 35, Julio/Septiembre 2008.

LECTURES AND CONFERENCES

VÖLKERRECHT AUS BRASILIANISCHER SICHT (ODER MIT BRASILIANISCHEM AKZENT) – *ZWISCHEN UNIVERSALISMUS UND REGIONALISMUS*¹

Paulo Borba Casella

Professor für Völkerrecht und Vizedekan der Juristischen
Fakultät der Bundesuniversität von São Paulo.

Zusammenfassung: Der Artikel ist ein kurzer Bericht einer Vorlesung, die am 04. Juni 2012 an der Humboldt-Universität zu Berlin gehalten wurde.

Schlagwörter: Völkerrecht – Brasilien – Universalismus – Regionalismus.

Abstract: The article is a brief report of a conference held on 04 June 2012 at the Humboldt-Universität zu Berlin.

Keywords: Public International Law – Brazil – Universalism – Regionalism.

die Macht der Tradition nämlich die alte und feste Zucht, der sicher gewordene Takt von solcher Stärke, dass es das Absterben der alten Geschlechter überdauert und unaufhörlich neue Menschen und Daseinsströme aus der Tiefe in seiner Bann zieht.

O. SPENGLER (1923)²

Quoique l'on en pense la carrière professorale n'est pas de celles qui assurent une parfaite sérénité d'âme. Parce que le cadre dans lequel elle se déroule demeure inchangé, parce que les programmes varient peu, parce que le cours magistral s'insère dans une immuable cérémonie, on croit que cet appareil des rites et des

¹ Übersetzung und Überarbeitung: Danielle Campos und Sandra Mahler.

² SPENGLER, Oswald. *Der Untergang des Abendlandes*: Umrisse eine Morphologie der Weltgeschichte. Düsseldorf: Albatroz, 2007. Seite 976.

traditions constitue une carapace qui rend le professeur imperméable aux curiosités et aux inquiétudes de son temps.

G. BURDEAU (1970)³

1. DER „FALL BRASILIEN“ – DAS LAND, DAS AUS DEM VÖLKERRECHT ENTSTANDEN IST

Zwischen der Entdeckung Amerikas im Jahr 1492 durch Cristóvão COLOMBO und der Entdeckung Brasiliens im Jahr 1500 durch Pedro Álvares CABRAL, ist die päpstliche *Bulla* erlassen und der bilaterale Vertrag von Tordesillas abgeschlossen worden. Dies kennzeichnet den Übergang des Völkerrechtes des mittelalterlichen Systems zum Völkerrecht des modernen zwischenstaatlichen Systems. Beide Ereignisse wurden von Papst ALEXANDER VI. [BORGIA] anerkannt und als legitim bezeichnet, was auf ein klares neues Denken im 16. Jahrhundert hindeutet. Ein Jahr nach dem Erlassen der päpstlichen *Bulla* haben die Kronen von Portugal und Spanien einen bilateralen Vertrag unterzeichnet, wodurch die Aufteilung Südamerikas und Asiens in Einflusszonen und Kolonien etabliert wurde.

Zwischen 1580 und 1640 wurden Portugal und Spanien von einer gemeinsamen spanischen Krone regiert, was die Verbreitung der Portugiesisch sprechenden Bevölkerung im Hinterland Südamerikas ermöglichte.

1750 wurde der Vertrag von Madrid unterzeichnet und das *uti possidetis* als Kriterium für die Regelung der Grenzen zwischen dem spanischen und dem portugiesischen Herrschaftsbereich in Amerika instituiert. Von großer Bedeutung war in diesem Zusammenhang der Beitrag von Alexandre de GUSMÃO, ein brasilianischer Diplomat, der Portugal bei den Verhandlungen um den Vertrag von Madrid half und als die verantwortliche Person dafür angesehen wird, dass das brasilianische Herrschaftsgebiet heute mehr als doppelt so groß ist wie im 15. Jahrhundert.

Zwischen 1851 und 1909 konnten die Auseinandersetzungen um die Grenzen zwischen dem Kaiserreich Brasilien (1822-1889)⁴ — und

3 BURDEAU, G. *Sur un enseignement impossible*. In: Mélanges offerts à Mr. le Doyen TROTABAS. Paris: L.G.D.J., 1970, Seiten 41-50. Seite 41: “le drame, ce n’est pas seulement celui dont la jeunesse a toujours aimé colorer ses défis ou ses rebellions. C’est ainsi celui des hommes qu’on appelle, d’un terme dont aujourd’hui l’ambiguïté est évidente, ses maîtres. [...] Il est facile alors de s’insurger contre cette fossilisation et de dénoncer, en termes tantôt voilés et tantôt agressifs, l’incompréhension des maîtres.”

4 Im Jahr 1889 wurde die erste brasilianische Republik gegründet.

seinen Nachbarstaaten friedlich geregelt werden. In diesem Zeitraum fanden sämtliche unklare Grenzstreitigkeiten, die sich vom Süden – (mit Argentinien) bis in den Norden (mit Guyana, früher Britisch-Guayana und Französisch-Guayana) erstreckten, eine dauerhafte Lösung.

In Hochseegebieten wurden die Unsicherheiten über die Grenzen erst 1982 durch das Seerechtsübereinkommen der Vereinten Nationen beendet, welches das 200 Seemeilen große Küstengewässer konsolidierte. Allerdings wurde dieses Übereinkommen Anfang der siebziger Jahre von einem brasilianischen Gesetz antizipiert. Dieses Gesetz hat sogar eine größere Schelfplattform - den sogenannten „Blauen Amazonas“ – anerkannt. Dieses erweiterte Küstengewässer entspricht heute einer zusätzlichen Hälfte des brasilianischen Herrschaftsgebietes, in dem sich die Exploration der Erdöllagerstätten, die tief unter einer dicken Salzsicht unter dem Meeresboden liegen, als bedeutender Wirtschaftsfaktor für das Land in naher Zukunft darstellt.

Brasilien wurde erstmal ein Staat und später dann eine richtige Nation. Dies wird deutlich, wenn man z. B. die frühere Stellung des Landes bei den Außenbeziehungen betrachtet. Erst im Jahr 1822 hat sich das brasilianische Reich von Portugal unabhängig erklärt, allerdings hat das Land schon seit 1815, als es noch Vereinigtes Königreich von Portugal, Brasilien und den Algarven (*Reino Unido de Portugal, Brasil e Algarve*) war, am Wiener Kongress teilgenommen.

Die durch ein nationales Gesetz vom 11. August 1827 vorgesehene Gründung der Rechtshochschulen von São Paulo und Olinda stellte eine wichtige Wende dar⁵. Bereits ein Jahr nach dem Inkrafttreten des Gründungsgesetzes wurden beide Hochschulen eröffnet. In Brasilien wurde das Rechtsstudium Anfang März 1828 am Lehrstuhl für Kirchenrecht, Diplomatisches Recht und Völkerrecht (*Direito Eclesiástico, Diplomático e das Gentes*) der Hochschule von São Paulo eingeführt. Professor José Maria AVELLAR BROTERO - ein gebürtiger Portugiese, der *iuris doctor* von Coimbra war und erst 1833 in Brasilien eingebürgert wurde – war der erste ordentliche Rechtsprofessor des Landes und für diese wichtige Vorlesung zuständig. Er hat im Jahr 1829 das Lehrbuch „Princípios de Direito Natural“ (Prinzipien des Naturrechtes) veröffentlicht, welches heutzutage als das erste im Lande verfasste Werk im Bereich des Völkerrechts gilt⁶, drei Jahre vor der Veröffentlichung des Lehrbuchs „Elementos de Derecho de Gentes“ (Grundzüge des Völkerrechts) von Andrés BELLO im Jahr 1832. Das Werk von Brotero ist nach einer Kontroverse, die Rückwirkungen im Parlament hatte, aus den Lehrstühlen der Juristischen Fakultät entfernt

⁵ Die Rechtshochschule von São Paulo wurde im März 1828 gegründet, die von Olinda (später nach Recife verlegt) im Mai 1828.

⁶ BROTERO, José Maria Avellar. *Princípios de direito natural*. Rio de Janeiro: Typographia Imperial Nacional, 1829.

worden. Brotero hat aber später, nämlich im Jahr 1836, noch ein Werk veröffentlicht, die „Questões sobre presas marítimas“⁷.

Am Anfang von „Questões sobre presas marítimas“ widmet AVELLAR BROTERO den Lesern sein Werk (“aos leitores”) und behauptet, dass seine Methode objektiv sei und von subjektiven Betrachtungsweisen absieht⁸. In den folgenden Kapiteln analysiert der

7 BROTERO, José Maria de Avellar. *Questões sobre presas marítimas*: oferecidas ao cidadão Rafael Tobias de AGUIAR pelo autor J. M. A. BROTERO. São Paulo: Typographia de Costa Silveira, 1836: “Com a proteção de V. Exa. me animo a fazer publicar uma pequena obra com o título – Questões sobre presas marítimas – fruto de algum trabalho, e que julgo servirá para dar algumas idéias àqueles que tem de julgar e defender objetos tão interessantes. / A benevolência de V.E. relevará a falta de estilo, e os erros da doutrina; doutrina assaz espinhosa e bem pouco conhecida entre nós. Não tendo eu ao meu alcance senão os meus próprios livros, heide por força cair em omissões.” In der zweiten Ausgabe (1863) BROTERO, José Maria de Avellar. *Questões sobre presas marítimas*: segunda edição augmentada. São Paulo: Typographia - imparcial – de J. R. de Azevedo Marques, 1863., hielt im Vorwort fest: “Conheço que este meu trabalho é imperfeito, e muito sinto que nesta segunda edição ficasse com tantos erros, resta-me a esperança que os homens competentes hão de ter indulgência com tais defeitos, e só censurar a doutrina e nesta parte peço-lhes severidade, pois pedir considerações seria ter em pouco a ciência e o meu dever. / Este livro não é uma obra de teorias ou doutrinas especulativas; é um compêndio de fatos e princípios do Direito Marítimo admitido pelas nações civilizadas. / Da primeira edição suprimi tudo quanto me pareceu fora da matéria, aumentei porém muita doutrina que faltava. / Cito os escritores, de que tenho notícia, que publicaram suas obras depois da minha primeira edição – 1836. / Nesta segunda edição procurei ser útil aos meus Escolares, no estudo do Direito das Gentes, e não olhei, nem me lembrei, que o meu trabalho pudesse ser estimado pela elegância e pureza de linguagem”.

8 BROTERO, José Maria de Avellar. *Questões sobre presas marítimas*: oferecidas ao cidadão Rafael Tobias de AGUIAR pelo autor J. M. A. BROTERO. São Paulo: Typographia de Costa Silveira, 1836: “eu vou tratar de – direito positivo – e por isso o meu desejo e obrigação é mostrar-vos quais os *tratados, manifestos e mais peças diplomáticas*, que existem sobre o presente objeto; quais as *leis, regulamentos e determinações* das Nações sobre o seu direito – *marítimo particular* : quais as *decisões dos tribunais* das Nações influentes, e quais seus *usos e costumes* que formam o Direito das gentes tácito ou voluntário. Eu procuro seguir o método ensinado por KLÜBER – *dogmático-histórico* – esclarecendo as matérias com *fatos, com acontecimentos reais*. Recorro ao Direito das gentes *absoluto*, quando o caso é *duvidoso*, ou quando sobre ele não *concordam* as convenções e os usos. Desprezo as opiniões dos antigos escritores (aqueles que tive ao meu alcance), que só se fundam no Direito romano ou seguem opiniões particulares, filhas ou da *localidade*, ou do *partido*”. Und weiter: “Muitas vezes, na confusão dos pareceres dos JJ. entre si contraditórios eu me animo a dar a minha opinião. A legislação pátria é citada nos lugares competentes. Muito desejava alegar os julgamentos dos nossos tribunais, mas não estava ao meu alcance poder satisfazer o meu desejo. / Eu conheço que o meu trabalho está bem longe da perfeição e conheço que ele está muito longe de poder conseguir o seu fim : conheço e confesso que não tive à mão nem a legislação das Nações do norte da Europa, nem muitos bons autores que têm tratado desta matéria, e que eu devia consultar; mas minha consciência está convencida de que esta minha pequena obra sempre há de prestar alguma utilidade aos meus escolares, e ao público. Julgo que a matéria é muito interessante, e que por esta razão o governo, e os sábios, não me deixarão continuar a transmitir

Autor wichtige Aspekte des Seerechts und nach einer objektiven Ansicht des internationalen Rechtes bezeichnet er z. B. die *Beschlagnahme von Schiffen vor einer offiziellen Kriegserklärung* als ungerecht⁹. Zu diesem spezifischen Thema scheint sich der jetzige Stand der Außenpolitik kaum geändert zu haben¹⁰.

Die lokale Geschichte der Hochschule auf dem *Largo de São Francisco* weist klare Ähnlichkeiten mit der nationalen Geschichte Brasiliens auf. Neun Bundespräsidenten haben an der Juristischen Fakultät studiert. Darüber hinaus haben mehr als vierzig Ministerpräsidenten des Bundeslandes São Paulo (das allein 40 Mio. Einwohner hat und für den Großteil des brasilianischen Bruttoinlandsproduktes verantwortlich ist), sowie über sechzig Richter des Brasilianischen Obersten Bundesgerichts (*Supremo Tribunal Federal*) und einige Staatsminister des Militärregimes (1964-1985) ihren Abschluss an der Universität von São Paulo gemacht. Die Fakultät sollte nicht nur als

na aula minhas opiniões à mocidade, uma vez que elas sejam falsas. O governo me advertirá e os sábios me esclarecerão, com suas luzes, por meio da imprensa”.

9 BROTERO, José Maria de Avellar. *Questões sobre presas marítimas*: segunda edição aumentada. São Paulo: Typographia - imparcial – de J. R. de Azevedo Marques, 1863. Seiten 7-8: “se é legal a presa feita antes da declaração, decreto e manifesto de guerra?” Auf die Frage antwortet BROTERO: “É uma das questões bem controvertidas pelos jurisconsultos que tratam deste assunto : – entre si disputam eles a primazia; e todos se fundam em fatos praticados pelas Nações, e dos quais querem deduzir a sua regra de Direito marítimo. Nós seguimos a opinião daqueles que adotam a afirmativa, não só porque nos parece mais conforme aos princípios de Direito das gentes absoluto, como também por estarmos convencidos, que a *prática constante das Nações* tem admitido como um princípio certo, *que a presa feita antes da declaração de guerra é ilegal*”. Und Seiten 8 f.: “Não negamos os fatos em que se fundam os nossos adversários, antes reconhecemos que na história marítima de quase todas as Nações acham-se guerras principiadas por meio de presas antes de declaração, e em BYNKERSHOEK vem em resumo algumas delas citadas”. Brotero zitiert “BYNKERSHOEK, *Tratado das leis de guerra* (edição de Filadélfia), Seite 15 f.” und in derselben Ausgabe aus dem Jahr 1863: “Veja-se F. de CUSSY, *Phases et Causes célèbres du Droit maritime des Nations*, L. 1, tit. 3, par. 4, L. 2, cap. 11”.

10 BROTERO, José Maria de Avellar. *Questões sobre presas marítimas*: segunda edição aumentada. São Paulo: Typographia - imparcial – de J. R. de Azevedo Marques, 1863. Seite 9: “As Nações reconhecem o odioso de tal procedimento, e sempre procuram defender-se com falsas razões, fazendo recair em seus adversários a causa das hostilidades”. Ein verschiedener Text in der Ausgabe aus dem Jahr 1836, Seite 5 f.: “mas em regra de direito, abusos não formam lei, e tais exemplos das Nações também não a podem formar, visto que elas mesmas reconhecem o odioso e ilegal de tal procedimento, defendendo-se com pretextos de uma falsa necessidade, ou procurando provar que sua adversária já tinha iniciado as hostilidades, e que portanto não era necessária a declaração; asserção reconhecida entre todas as Nações, *princípio este verdadeiro e que nós confessamos*: mas na história só o achamos aplicado a pretextos, que servem para escurecer a verdade, e muitas vezes sem o menor fundamento. (...) Contudo, a mesma Inglaterra não se atreve a negar o princípio da necessidade da declaração de guerra, para a legalidade da presa, e só sim estabelece como princípio seu – o *direito de reciprocidade*.”

eine Rechthochschule (*escola de direito*), sondern auch als eine Schule für Staatsregierung (*escola de governo*) anerkannt werden.

Zurück kommend zu dem Panorama der brasilianischen Völkerrechtstheorie im 19. Jahrhundert, bezeichnete Antonio Pereira PINTO 1864¹¹ die friedliche Lösung von Streitfällen zwischen Ländern mit erheblichen Machtunterschieden als Zweck des Völkerrechts¹².

In seiner vierbändigen „Sammlung der brasilianischen Praxis im Völkerrecht“ von 1864 stellte Pinto schon fest, dass selbst wenn Brasilien, im Vergleich zu europäischen Mächten, trotz internationaler Verträge, (oder sogar wegen der internationalen Verträge) nicht sehr erfolgreich sei, wäre es immer noch wesentlich im internationalen

11 PINTO, A Pereira. *Apontamentos para o direito internacional*. Brasília: Ministério da Justiça/UnB, 1980. Seiten 1-2: “é lícito todavia ponderar que, achando-se esparsos os tratados que temos celebrado com diferentes potências estrangeiras e outros inéditos, a reunião deles em um só corpo, acompanhada de sucintas apreciações históricas, como o fizemos, da transcrição de documentos hoje raros, e da legislação peculiar às convenções mais importantes, deve, sem controvérsia, aproveitar àqueles que intentarem escrever o direito internacional brasileiro. E assaz compensados seremos dos labores desta tarefa, se para a edificação daquele grandioso edifício servir de pequeno seixo o nosso insignificante trabalho.”

12 PINTO, A Pereira. *Apontamentos para o direito internacional*. Brasília: Ministério da Justiça/UnB, 1980. Seiten 3-4: “a jurisprudência que se encaminha a estabelecer a confraternidade entre os povos do universo, ligando-os pelos nós do comércio, das indústrias e da propagação de todos os conhecimentos úteis, que tem por alvo realizar a solução das desavenças entre as nações pelos meios da discussão ilustrada e calma, é uma das mais belas conquistas da inteligência humana”. Und weiter: “E, se infelizmente essa jurisprudência não tem atingido toda a perfeição de que é suscetível, se o orgulho das grandes potências impele-as ainda a lançar mão dos remédios violentos para extorquirem dos povos fracos concessões humilhantes e vantajosas somente à sua avidez, se contra nosso próprio país têm sido cometidas enormes vexações por um dos estados mais poderosos da Europa, *apezar* dos tratados, ou *por causa* dos tratados, se em geral o Império não tem auferido grandes lucros com a celebração dos contratos internacionais, tais fatos nem abalam a doutrina que deixamos expendida, nem por motivo deles devemos confiar menos em que uma reação se há de ir operando, entre as nações cultas, ou para referearem os ímpetus belicosos de seus governos, apontando-lhes a trilha da discussão diplomática como oportuno e exclusivo recurso, para terminar as dissidências que acaso apareçam com estranhos países, ou para aconselhar-lhes que nos tratados com os estados de ordem menos importante guardem sempre a devida reciprocidade, não lhes impondo pactos leoninos que trazem ordinariamente em si o germen de futuras contestações.”. Und noch: “Radicado, pois, esse pendor que se vai manifestando entre os países cultos para desenlaçarem pacificamente, pelos meios diplomáticos, e não pela espada do mais forte, as dissenções que surgem entre os povos e apertadas as suas relações de mútuo comércio e alianças pelo desenvolvimento do vapor e da eletricidade, não longínquos horizontes se devassam ao olho do observador perspicaz, nos quais se enxerga a lisonjeira época de uma tão perfeita e recíproca uniformidade de interesses internacionais, que não poderá ser violada, ainda pelos estados poderosos, sem total detrimento de sua prosperidade e grandeza. / E, pois, a aproximação dessa lisonjeira situação deve ser fervorosamente almejada por todos os homens generosos, por todos os estadistas e filantropos.”

System tätig zu sein.

Die Dichotomie zwischen Universalismus und Regionalismus hat sich an der brasilianischen Außenpolitik in mehreren Fällen herausgestellt. Beispiel davon ist die Absage der Einladung zum Kongress von Lima (1877-78) zur Kodifikation des Internationalen Privatrechts. Die höfliche Ablehnung wurde von der folgenden Fragestellung begleitet: warum sollte Brasilien auf der regionalen Ebene das thematisieren, was gerade weltweit schon verhandelt worden war – z.B. in Europa. Die erwähnte Frage ist heutzutage gewissermaßen immer noch zu erkennen an der intensiven Tätigkeit des Landes in regionalen Initiativen – z.B. im MERCOSUR – aber auch als „Global Player“ – z.B. auf der Ebene der BRICS-Staaten.

Die Initiativen bei den Panamerikanischen Kongressen – ab Ende des 19. Jahrhunderts – und die entsprechenden Kodifikationen des Internationalen Privatrechts und des Völkerrechts sind neben den späteren Interamerikanischen Verträgen (ab 1948) weitere Beispiele der brasilianischen Performance auf der regionalen Ebene. Die Mitgliedschaft in der OAS – Organisation Amerikanischer Staaten – und die völkerrechtlich relevante Anerkennung der Gerichtsbarkeit des interamerikanischen Gerichtshofs für Menschenrechte¹³ sind sehr konsolidiert. Zwei neue Fälle - *Guerrilha do Araguaia* und *Belo Monte* - deuten auf eine Änderung der Lage hin¹⁴.

Der Aufbau eines weltweit geltenden postmodernen Völkerrechtssystems erfolgt schon seit Jahrzehnten – so meine These in „*Grundzüge des postmodernen Völkerrechts*“ (2008)¹⁵ – wobei hier eine genaue Unterscheidung zwischen Völkerrecht und internationalen Beziehungen klar betont werden soll¹⁶.

13 Der Gerichtshof wurde 1969 auf Grundlage der Amerikanischen Menschenrechtskonvention (AMRK), gegründet, diese trat aber erst Anfang der 90er Jahren in Brasilien in Kraft.

14 KOSKENNIEMI, Martti. *The gentle civilizer of Nations: the rise and fall of international law 1870-1960*. Cambridge: University Press, 2001. notiert den Zustand der Entwicklung und wie waren damaligen Eigenschaften des Völkerrechts, und vergleicht die Lage, Deutschland, Frankreich, England und wie es sich außerhalb Europa zeigte, folgend Carl SCHMITT, Hans MORGENTHAU und die Bedeutung der Änderungen des Völkerrechts für die Außenbeziehungen in den Vereinigten Staaten.

15 So CASELLA, Paulo Borba. *Fundamentos do direito internacional pós-moderno*. São Paulo: Quartier Latin, 2008: ‘direito e relações internacionais: coexistência pacífica?’, Seiten 889-972.

16 MAROTTARANGEL, V.. *Introdução aos princípios do direito internacional contemporâneo de A. A. CANÇADO TRINDADE*. In: TRINDADE, Antonio Augusto Cançado. *Princípios do direito internacional contemporâneo*. Brasília: Ed. UnB, 1981, Seiten v-xiv, cit. p. vii, verteilt in vier historischen Schritte die Rechtslehre in Brasilien: “que refletem, preponderantemente, eventos básicos de períodos históricos sucessivos” (...) “Em verdade, a simples menção das balizas que marcam o início e o fim de cada etapa, nos sugere a profundidade das transformações por que tem passado as condições sociais e políticas da sociedade contemporânea, em que o

direito internacional – como todo direito – se assenta (...) das obras publicadas no Brasil, nessa quarta e última etapa, algumas poderiam a ela naturalmente pertencer por simples circunstância de ordem cronológica. Tal não ocorre com o livro que me cabe a honra de proemiar, porquanto ele significa uma resposta sensível e vital a indagações essenciais que marcam a presença do direito das gentes em nossos dias. Situa-se ele, por sinal, no centro de convergência de três termos inseridos no título com que se denomina e se apresenta ao público: *Princípios do direito internacional contemporâneo*. O primeiro desses termos distingue a obra por mencionar *princípios*, aos quais ela deseja cingir-se, já que o seu escopo não consiste em expor a sistemática diversificada, abrangente e complexa do direito das gentes mas as diretrizes de temas nucleares e vitais, desdobrados em partes, quatro ao todo: fontes, responsabilidade dos estados, competências das organizações internacionais, e, finalmente, posição internacional dos particulares. O segundo desses termos concerne ao próprio direito internacional cujas origens remontam, pelo menos em sua feição moderna, à época da descoberta do novo mundo, mas cujas estruturas e lineamentos sofrem o influxo das transformações sociais, a influência do progresso tecnológico e científico, o vigoroso condicionamento dos fatores políticos, econômicos, culturais. Trata-se, pois, a rigor do *international law*, segundo a terminologia dos países de *common law*, do qual se exclui necessariamente o direito internacional privado, *conflict of laws*. Precisamente em razão do impacto dessas transformações, o terceiro dos termos inseridos no título consiste no qualificativo de contemporâneo, outorgado a esse direito internacional, que se deseja entrever, difundir e analisar à luz dos eventos da década de oitenta, considerado na perspectiva dos momentos decisivos da sociedade global de que todos participamos como membros, mais expectadores que protagonistas.”. Der Autor behauptet noch, dass zwischen der Unabhängigkeit Brasiliens und der Konferenz des Haages im Jahr 1907 “o ensino do direito das gentes (segundo então era denominado) se iniciou com a instalação dos cursos jurídicos entre nós (...) Os professores que primeiro lecionaram matérias próprias a esse direito na Academia de São Paulo foram AVELAR BROTERO e AMARAL GURGEL que alternadamente o regiam. Coube àquele escrever a primeira obra de direito internacional público no Brasil: *Questões sobre presas marítimas*, editada em 1836, em São Paulo, que surgiu, como se verifica, apenas quatro anos depois da edição dos *Princípios de derecho das gentes*, da autoria de Andrés BELLO, obra marcante na bibliografia latino-americana”. Er zitiert noch Lafayette Rodrigues PEREIRA und den Barão do RIO BRANCO, Seite v f.: “Prioridade do ensino em Olinda coube a Lourenço José RIBEIRO e Pedro Autran da MATTA E ALBUQUERQUE. Deste último, que prelecionou em Pernambuco, por mais de cinco décadas, é a autoria dos *Elementos do direito das gentes* segundo a doutrina dos escritores modernos, editado em 1851. Com o escopo de completá-lo e atualizá-lo subseqüentemente, dois outros cursos se publicaram no Recife, também da lavra de docentes da mesma escola: as *Preleções de direito internacional*, de Antonio de Vasconcellos Menezes de DRUMMOND, e as *Lições elementares do direito das gentes*, de João Silveira de SOUZA, datadas de 1867 e 1889, respectivamente. Foram também editados na segunda metade do século passado os *Elementos de direito internacional marítimo*, de Carlos Vidal de Oliveira FREITAS, e os *Apontamentos para o direito internacional*, ou coleção completa dos tratados celebrados pelo Brasil, de Antonio Pereira PINTO, repositório, em quatro volumes, de documentos de relevância, nas relações exteriores de nosso país. Todas as publicações do século passado estão como que a preparar o advento da obra marcante do primeiro período, os *Princípios de direito internacional*, de Lafayette Rodrigues PEREIRA, obra em dois tomos, publicada em 1902. Jurista de escol, no plano da teoria e da prática, avulta como se sabe, na última etapa do primeiro período, a prolongar-se no segundo, o Barão do RIO BRANCO.” V. MAROTTA RANGEL (cit., 1980, Seite vi): “teve ampla repercussão entre nós e estimulou estudos em profundidade do direito internacional (...) a começar pelos realizados

LITERATURVERZEICHNIS.

- BROTERO, José Maria Avellar. *Princípios de direito natural*. Rio de Janeiro: Typographia Imperial Nacional, 1829.
- BROTERO, José Maria de Avellar. *Questões sobre presas marítimas: oferecidas ao cidadão Rafael Tobias de AGUIAR pelo autor J. M. A. BROTERO*. São Paulo: Typographia de Costa Silveira, 1836.
- BROTERO, José Maria de Avellar. *Questões sobre presas marítimas: segunda edição augmentada*. São Paulo: Typographia - imparcial – de J. R. de Azevedo Marques, 1863.
- BURDEAU, G. *Sur un enseignement impossible*. In: *Mélanges offerts à Mr. le Doyen TROTABAS*. Paris: L.G.D.J., 1970, pp. 41-50.
- BYNKERSHOEK. *Tratado das leis de guerra*. Filadélfia, 1863.
- CASELLA, Paulo Borba. *Fundamentos do direito internacional pós-moderno*. São Paulo: Quartier Latin, 2008.
- CUSSY, F. de. *Phases et Causes célèbres du Droit maritime des Nations*. Leipzig: Brockhaus, 1856.

pelo próprio chefe da delegação brasileira à Conferência, Ruy BARBOSA, e continuados com os Elementos de direito internacional, de autoria de Manuel Augusto de Sá VIANA e a Evolução do direito internacional, de João CABRAL, que vieram à lume em 1908, no Rio de Janeiro. Em 1911 Eptácio PESSOA divulgou o seu Projeto de código de direito internacional público, no Rio de Janeiro. Do mesmo ano e da mesma cidade é o Direito internacional público (com segunda edição em 1939) de Clóvis BEVILAQUA.”. V. MAROTTA RANGEL (cit., 1980, Seite vi): “durante a terceira etapa se editaram exposições sistemáticas (...) como as de Raul PEDERNEIRAS, Direito internacional compendiado (1931) e de Braz de Souza ARRUDA, Estrutura do direito internacional (1938), sobressaindo-se o Tratado de direito internacional público, em três tomos, de Hildebrando ACCIOLY, editado entre 1933 e 1935 (com segunda edição em 1956). Em 1936 publicaram-se no Rio de Janeiro, Gênese e evolução da neutralidade e Natureza jurídica do mar, de autoria, respectivamente de Linneu de Albuquerque MELLO e Breno Machado Vieira CAVALCANTI. Embora dedicado ao direito internacional privado, Haroldo VALLADÃO analisou temas de internacional público, a que deu desenvolvimento na etapa ulterior.”. MAROTTA RANGEL, V.. *Public international law: the last five decades*. In: DOLINGER, Jacob DOLINGER; ROSENN, Keith. *A panorama of Brazilian Law*. Miami/Rio: Univ. of Miami North-South Center/Ed. Esplanada, 1992, Seiten 287-308, cit. Seite 290, während des Krieges “The profound abnormality of war period adversely affected the production of scholarly studies” und dazu MAROTTA RANGEL, V.. *Introdução aos princípios do direito internacional contemporâneo de A. A. CANÇADO TRINDADE*. In: TRINDADE, Antonio Augusto Cançado. *Princípios do direito internacional contemporâneo*. Brasília: Ed. UnB, 1981, Seite vii: “desde o último conflito armado mundial, o direito das gentes, sem perder o sentido natural de continuidade no tempo e de sorte a refletir o rumo e o espírito das mudanças por que tem passado a comunidade internacional, ampliou extraordinariamente o seu âmbito de competência *ratione materiae* (...) O desenvolvimento dos estudos do direito internacional público, em nosso país, tem estado a acompanhar-lhe as vicissitudes de transformação e relevância crescente, como atestam os trabalhos de docência, de pesquisa e de orientação conduzidos por eminentes juristas, que hoje o cultivam, com segurança e descortino, nas diversas cátedras e departamentos das universidades brasileiras, assim como na diplomacia.”

KOSKENNIEMI, Martti. *The gentle civilizer of Nations: the rise and fall of international law 1870-1960*. Cambridge: University Press, 2001.

MAROTTA RANGEL, V.. *Introdução aos princípios do direito internacional contemporâneo de A. A. CANÇADO TRINDADE*. In: TRINDADE, Antonio Augusto Cançado. *Princípios do direito internacional contemporâneo*. Brasília: Ed. UnB, 1981.

MAROTTA RANGEL, V.. *Public international law: the last five decades*. In: DOLINGER, Jacob DOLINGER; ROSENN, Keith. *A panorama of Brazilian Law*. Miami/Rio: Univ. of Miami North-South Center/Ed. Esplanada, 1992.

PINTO, A Pereira. *Apontamentos para o direito internacional*. Brasília: Ministério da Justiça/UnB, 1980.

SPENGLER , Oswald. *Der Untergang des Abendlandes: Umriss einer Morphologie der Weltgeschichte*. Düsseldorf : Albatroz, 2007.

PBL

Online
October, 2014

Print issue
October, 2014

PBL

Year 2 | Number 2 | 2014

www.panoramaofbrazilianlaw.com

ISSN 1075-1343 (print)

ISSN 2318-1516 (online)

Year 2, No 2, 2014