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

PANORAMA OF BRAZILIAN LAW

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

Year 3 | Numbers 3-4 | 2015

PBL

Panorama of Brazilian Law

Panor. Braz. law
Year 3, Nos 3-4, 2015

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

www.panoramaofbrazilianlaw.com

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

Year 3, Nos 3-4, 2015

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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 UFRRJ 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 covering several brands of Brazilian law. In 2014, the second issue published 18 articles, which proves that this initiative was not only feasible but strategically necessary. In this year of 2015 the ever first legendary 1992 issue of Panorama of Brazilian Law became avaiable online. On top of that, this third volume of Panorama of Brazilian Law features 17 articles covering several branches of the Brazilian legal order.

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 third edition, papers written in English, French, German, Italian, Spanish and Swedish were able to submission. Papers in English and French 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 4 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, October 2015.

Raphael Carvalho de Vasconcelos
Bruno Rodrigues de Almeida

Panor. Braz. law - Year 3 - Numbers 3 and 4 - 2015 - pp. 9 - 37.
ISSN 1075-1343 (print)
ISSN 2318-1516 (online)
DOI: http://dx.doi.org/10.17768/pbl.a3.n3-4.p9

LA CONDITION DE L'ÉTRANGER DANS LA CONSTITUTION BRÉSILIENNE DE 1988

THE STATUS OF ALIENS IN THE 1988 BRAZILIAN CONSTITUTION

Carmen Tiburcio

Professeur de Droit International Privé de l'Université de l'État de Rio de Janeiro – UERJ. Maître et Docteur en Droit International par la Faculté de Droit de l'Université de Virginia, aux États Unis. L'auteur veut remercier la collaboration de Lucas Hermeto pour les recherches et l´aide avec la traduction concernant cet article bien que Jérémie Forquin pour l´aide avec sa révision.

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Résumé: Cet article examine le traitement de la condition juridique des étrangers à la lumière de la Constitution brésilienne, ainsi que la discipline historique de la matière dans les Chartes constitutionnelles antérieures. Le travail aussi compare la législation en vigueur avec les conventions internationales existantes et avec des principes de droit international, afin de déterminer dans quelle mesure notre Charte actuelle est en conformité avec le droit international.

Mots-clés: Condition juridique des étrangers au Brésil - Droits de l'homme - Chartes constitutionneles brésiliennes

Abstract: This article examines the treatment of aliens under the Brazilian Constitution, as well as under former Constitutions. This article also compares the Brazilian legislation in force with international treaties and principles of international law, aiming at establishing the extent to which our Constitution is in accordance with international law.

Keywords: Legal status of aliens in Brazil - Human rights - Brazilian Constitutions

1. Introduction

L'objectif de cet article sera d´examiner le traitement des droits des étrangers à la lumière de la Constitution brésilienne, ainsi que la discipline historique de la matière dans les Chartes constitutionnelles

antérieures. À la fin de ce travail, ces dispositions seront comparées avec les conventions internationales existantes et avec des principes de droit international, afin de déterminer dans quelle mesure notre Charte actuelle est en conformité avec le droit international[1].

2. Le concept d' « étranger »

Au fil des siècles, la définition d' « étranger » a subi diverses influences : dans l'Antiquité, l'étranger était celui qui n'appartenait pas à la religion de la ville; dans le Moyen Age, le facteur religieux était encore plus remarquable; à partir de l'Age Moderne, spécialement après la Révolution Française, l'étranger passe à être défini en sens négatif : celui qui n'est pas citoyen[2].

Actuellement, l'étranger est celui qui n'est pas considéré, par les lois d'un État quelconque, comme son national. Chaque pays détermine unilatéralement, conformément à ses lois, ceux qui sont ses nationaux. Étant donné qu'il n'y a pas d'uniformité entre les lois qui traitent de la nationalité dans les différents pays, le phénomène de l'apatridie peut avoir lieu lorsqu'un individu n'est considéré national d'aucun État; il sera par conséquent considéré étranger n'importe où il se trouve. La définition d'étranger, donc, est faite par exclusion.

Dans aucune Constitution, loi, règlement ou n'importe quelle disposition normative brésilienne n'est défini ce qu'est l' « étranger ». La doctrine et la pratique ont créé une définition *a contrario sensu* à partir du concept de national. Toute personne qui n'est pas nationale brésilienne est considérée un étranger[3].

Le Brésil ne prévoit pas de différentes catégories d'étrangers[4] ; ils sont tous groupés sous la rubrique de « ceux qui n'ont pas la nationalité brésilienne ». La seule exception concerne les nationaux portugais, qui

1 Sur la condition juridique de l'étranger au Brésil sous l'optique du Droit International, v. Carmen Tiburcio, *Nationality and the Status of Aliens in the 1988 Brazilian Constitution*. In : Jacob Dolinger et Keith S. Rosenn, *A Panorama of Brazilian Law* 267 (1992).

2 Pour la reconstruction historique plus detaillée de cette trajectoire, v. Carmen Tiburcio, *The human rights of aliens under international and comparative law* 23-24 (2001).

3 M. Fraga, *O novo Estatuto do Estrangeiro Comentado* 1 (1985) ; *34e Enciclopédia Saraiva do Direito 170 ;* A. Dardeau de Carvalho, *Situação Jurídica do Estrangeiro no Brasil* 9 *(1976)*; J. Afonso da Silva, *Curso de Direito Constitucional Positivo* 335 (2005), Carmen Tiburcio, *A nacionalidade à luz do direito internacional brasileiro*. In Carmen Tiburcio e Luís Roberto Barroso, *Direito constitutional internacional* 245 e ss (2013).

4 Contrairement à ce qui se passe au Royaume-Uni, le Brésil n'a pas de différentes catégories d'individus qui reçoivent la protection de l'État. Depuis l'Acte de Nationalité Britanique de 1981, qui entra en viguer le 1er janvier 1983, l'« étranger » signifie une personne qui n'est pas citoyenne du *Commonwealth*, *British protected person* (personne protégée par les britaniques), et de la République de l'Irlande. V. I MacDonald, *Immigration Law and Practice in the UK* 1 (2e éd. 1987).

jouissent d'une condition spéciale dû à un traité entre le Brésil et le Portugal garantissant la réciprocité de droits aux brésiliens au Portugal[5]. Selon ce traité, les nationaux du Portugal sont assimilés aux brésiliens naturalisés et seulement l'accès à quelques postes officiels qui sont constitutionnellement exclusifs des brésiliens naturels leur est refusé[6]. Il faut noter que les nationaux d'autres pays peuvent aussi recevoir des droits spéciaux au Brésil par la voie d'un traité, sans que cela n´affecte leur condition d'étranger[7].

Il faut observer que le Brésil a, par contre, deux classes de nationaux : ceux qui ont acquis leur nationalité par la naissance (naturels) et ceux qui l'ont acquis par la voie de la naturalisation (naturalisés).

3. Droits statutaires des étrangers

Les États ont toujours réglementé la situation des étrangers sur leur territoire. En général, leur entrée a toujours été soumise à une série de conditions imposées par les États, en raison de soucis concernant la souveraineté et les intérêts nationaux. Une fois admise la présence de l'étranger sur leur territoire, il fallait toutefois que des droits leurs soient reconnus. Avec le droit humanitaire, il a fallu aussi reconnaître un minimum de droits même aux étrangers qui ne sont pas en situation régulière. Et le commerce international exige aussi que même les étrangers qui ne sont pas sur le territoire national puissent jouir de certains droits, tel que le droit à la propriété privée et à l'accès à la justice.

À la fin du XIXe et au début du XXe siècle, les pays latino-américains, tout en essayant d´encourager l'immigration et les investissements, promirent aux étrangers l'égalité de traitement vis-à-vis des nationaux, les mêmes droits civils et économiques leur étant garantis. Cette égalité absolue fut toutefois critiquée par une partie de la doctrine, qui la considérait purement théorique et sans importance pratique[8], vu que la loi pouvait créer des distinctions entre nationaux et étrangers.

5 Traité de l'Amitié, Coopération et Consulte, entre la République Fédérative du Brésil et la République Portugaise, qui fut incorporé en droit interne par le Decret nº 3.927/2001. Le Brésil et le Portugal ont un lien historique, car le Brésil était une colonie portugaise. V. Moura Ramos, *O Novo Direito Português da Nacionalidade.* In : *Homenagem ao Prof. Antonio Arruda Ferrer Correia* 662, nº 379 (1986). V. aussi Moura Ramos, *La Double Nationalité D'après le Droit Portugais* 59. In : *Boletim da Faculdade de Direito de Coimbra* 203 (1983). Des pays avec une expérience de passée commun aussi peuvent aussi avoir ce type de traitement spécial, tel que le Danemark et l'Islande (Constitution du Royaume de la Danemark de 1953, article 87).

6 Traité d'Amitié, Coopération et Consulte, entre la République Fédérative du Brésil et la République Portugaise, article 14 ; Constitution Fédéral de 1988 (CF), article 12, §§ 1er et 3e.

7 Par exemple, les nationaux de certains pays paient des impôts plus réduits au Brésil en vertu des traités en vigueur entre le Brésil et ces pays.

8 Edwin Borchard, *The Minimus Standard of the Treatment of Aliens.* In : *American Society of International Law – Proceedings* 56, 56 (1939).

Hormis l'Amérique Latine, cette doctrine n´a pas été reçue avec enthousiasme[9]. L'idée que les étrangers devraient être traités selon un standard minimum international a prévalut. Cette dernière théorie affirme que le droit international a établi un ensemble de droits qui devraient être garantis par tous les pays civilisés sur leur territoire.

Il faut souligner qu'à l'époque où cette doctrine fut créée, il y a eu des difficultés pour l'appliquer, une fois que l'exacte définition du contenu de cet ensemble de droits était imprécise et il n'y avait aucun groupe de droits qui était considéré comme tel. Actuellement, cette difficulté de déterminer des standards internationaux a été significativement réduite, une fois que tout droit de l'homme garantit dans un document international de grande acceptation fait nécessairement partie de cet ensemble[10], dont le contenu devient donc plus clair avec le développement du droit humanitaire.

Dans le champ du droit positif brésilien, le pouvoir de légiférer en relation à l'immigration et à l'extradition est exclusif du Congrès National[11]. La première législation qui traitait de la situation des étrangers au Brésil fut un décret de 1820 qui interdisait leur entrée au Brésil sans la possession d'un passeport[12]. La Constitution Impérial de 1824 ne contenait que très peu de dispositifs concernant la matière, en établissant seulement que toute personne ne pouvait demeurer ou quitter le pays selon les règlements de police [13]. Il n'y avait aucun dispositif spécifique concernant les étrangers, et le chapitre consacré aux droits individuels ne se référait qu'aux citoyens, différemment de ce qu'on a fait dans les Constitutions postérieures[14].

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9 Alwyn V. Freeman, *Recents Aspects of the Calvo Doctrine and the Challenge to International Law,* affirme en termes incisifs : « *In the guise of liberalism, it reasserts the ancient theory of the unbridled sovereignty, that « states are responsible only to themselfs » leyt us make no mistake about it : there is nothing progressive, humanitarian, or altruistic in the philosophy inspiring this resolution. Its exclusive aim is to free an interested state from restrains imposed by international law upon conduct which would otherwise produce a pecuniary liability to its sister nations. He far-reaching implications of this doctrine are so sinister and so deplorate thta it should be resisted by the profession with every means as it command ».*

10 Cet entendement fut premièrement soutenu par F. V. Garcia Amador dans son travail sur la Responsabilité de l'État pour la Comission de Droit International de l'ONU (Sixth Report on International Responsibility – a/cn.4/134 and Add. 1).

11 CF, article 22, XV, qui a réproduit les dispositifs des Constitutions antérieures.

12 Décret du 2 décembre 1820. En fait, puisque le Brésil n'a acquis son indépendence que le 7 septembre de 1822, ledit décret était un acte colonial.

13 Constitution de 1824, article 179, 6 : « *l'inviolabilité des droits civils et politiques des citoyens brésiliens, qui a comme base la liberté, la sécurité individuelle et la propriété, est garantie par la Constitution de l'Impère. ».*

14 Le titre VIII de la Constitution Impériale s'appellait *« des dispositions générales et garanties des droits civils et politiques des citoyens brésiliens »* et plusieres alíneas de l'article 179, qui consacrait l'inviolabilité des droits civils et politiques, se référaient à des droits exclusifs des

En 1889, en vertu de la Proclamation de la République, tous les étrangers présents au Brésil le 15 novembre 1889 furent automatiquement naturalisés[15]. L'obligation d'entrer au pays avec un passeport fut aussi abrogée en 1890[16] et cette règle fut expressément prévue par la Constitution Républicaine de 1891[17]. En plus, le texte de 1891 étendit aux étrangers résidents les droits individuels garantis par la Constitution : les droits à la vie, à la sécurité personnelle et à la propriété[18], ce qui a été suivi par toutes les Chartes constitutionnelles suivantes.

La Constitution de 1934 introduisit le système des quotas pour contrôler l'entrée d'étrangers, en établissant des limites au nombre de nationaux de chaque pays étranger compte tenu de la moyenne de ressortissants de chacun qui avait immigré dans les 50 ans antérieurs[19]. La Charte supprima aussi l'exigence de résidence au pays pour que l'étranger obtienne les garanties constitutionnellement prévues.

Le système de quotas fut maintenu dans la Constitution de 1937. Dû aux tensions mondiales, la sécurité nationale était considérée d'extrême importance et la législation était imprégnée d'un fort sentiment de nationalisme et de crainte de ce qui était étranger. En 1938, le Conseil d'Immigration et Colonisation fut créée pour régler l'immigration d'étrangers vers le Brésil conformément au système de quotas. Il faut noter que ce système ne fut jamais entièrement observé, car beaucoup d'étrangers entraient dans le pays en excédant les quotas permis. Des permissions pour cela étaient données par la législation ordinaire. Enfin, en 1945 fut promulguée une législation contenant des

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citoyens, ce qui excluait les étrangers.

15 Décret nº 58-A/1889.

16 Décret n° 212/1890.

17 Article 72, § 10 : *« La Constitution assure aux brésiliens et étrangers résidents au Pays l'inviolabilité des droits concernant la liberté, la sécurité individuelle et la propriété dans les termes suivants : § 10 – En temps de paix toute personne peut entrer dans le territoire national ou en sortir avec sa fortune et ses biens, quand et de la manière qui lui convient, indépendamment de passeport ».* Le requisitoire du passeport fut rétablit dans l'Amendement de 1926 à la Constitution de 1891 : *« Article 72. La Constitution assure aux brésiliens et étrangers résidents au Pays l'inviolabilité des droits concernant la liberté, la sécurité individuelle et la propriété, dans les termes suivants : §10 – En temps de paix toute personne peut entrer au territoire national ou en sortir avec sa fortune et ses biens. ».*

18 Constitution de 1891, article 72.

19 Constitution de 1934, article 121, § 6º : *« La loi promouvra l'aide de la protection et établira les conditions de travail, dans la ville et dans la campagne, compte tenu de la protection sociale du travailleur et les intérêts économiques du Pays. §6º - L'entrée d'immigrants dans le territoire national subira les restrictions nécessaires à la garantie de l'intégration ethnique et de la capacité physique et civile de l'immigrant, le courant migratoire de chaque pays ne pouvant pas, toutefois, excéder, annuellement, la limite de deux pour cent sur le nombre total des respectifs nationaux fixés au Brésil au cours des dernières cinquante années ».*

règles concernant les étrangers au Brésil[20].

Le système de quotas a été éliminé par la Constitution de 1946, dont le texte affirmait que l'entrée et l'installation d'étrangers devraient être établies par la loi. Elle prévoyait aussi la création d'une agence pour superviser des questions d'immigration[21]. Nonobstant ce commandement constitutionnel, cette agence n'a été créée que neuf ans après, lorsque l'Institut National d'Immigration et Colonisation a été fondé.

Les Constitutions de 1967 et de 1969 ont maintenu le droit des étrangers d'entrer au pays, pourvu que les conditions établies par la législation ordinaire soient remplies[22]. Elles ont aussi réitéré qu'aux étrangers résidents devraient être garantis les mêmes droits fondamentaux que ceux qui l'étaient pour les nationaux[23]. Tous les aspects importants concernant l'entrée et le séjour d'étrangers, ainsi que l'ensemble de leurs droits dans le pays, furent établis par un décret exécutif connu comme « Le Statut de l'Étranger[24]». Ce statut demeura en vigueur jusqu'à 1980, quand le Congrès National Brésilien a approuvé une nouvelle Loi d'Immigration[25]. Cette loi, aussi connue comme « Statut de l'Étranger », qui a créé le Conseil National d'Immigration pour coordonner les politiques et actions concernant l'immigration, fut très critiquée par des activistes des droit de l'homme, leaders de l'opposition et par l'Église Catholique, parce qu'elle réduisait significativement le droit de l'étranger de demeurer au pays et les défenses disponibles contre l'expulsion. Ces critiques ont entrainé un amendement constitutionnel promulgué en 1981 qui

20 Decret-loi n° 7.967/1945, abrogé par la Loi n° 6.815/1980.

21 Constitution de 1946, article 162 : *« La sélection, l'entrée, la distribution et la fixation d'immigrants seront soumises, dans la forme de la loi, aux exigences de l'intérêt national. Paragraphe Unique – Un organe fédéral sera chargé d'orienter ces services et de les coordonner avec ceux de la naturalisation et de la colonisation, devant dans les cas de cette dernière considérer les nationaux. ».*

22 Constitution de 1967, article 150, § 26 : *« La Constitution assure aux brésiliens et aux étrangers résidents au Pays l'inviolabilité des droits concernant la vie, la liberté la sécurité et la propriété, dans les termes suivants : § 26 – En temps de paix, toute personne pourra entrer avec ses biens dans le territoire national, y démeurer ou en sortir, tout en respectant les prescriptions de la loi ».* Constitution de 1969, article 153, § 26 : *« La Constitution assurera aux brésiliens et aux étrangers résidents au Pays l'inviolabilité des droits concernant la vie, la liberté, la sécurité et la propriété, dans les termes suivants : § 26 – En temps de paix, toute personne pourra enter avec ses biens dans le territoire national, y démeurer ou en sortir, tout en respectant les prescriptions de la loi ».*

23 Constitution de 1967, article 150; Constitution de 1969, article 153.

24 Decret nº 941/1969. Celle fut la première fois que le Brésil a promulgué une législation qui peut être appelée de « Statut de l'Étranger », car elle incorporait la plupart des législations qui traitait du sujet.

25 Loi n° 6.815/1980.

a rétabli certaines protections légales aux étrangers dans l'esprit de la tradition légale brésilienne[26].

4. Entrée et séjour

D'un côté, le droit du national d'entrer dans le pays de sa nationalité est en même temps un droit individuel et une garantie de l'État d'accueil. De l'autre côté, puisque seulement les nationaux ont le droit inconditionnel d'entrer et de résider dans leur pays, les étrangers peuvent avoir leur entrée refusée. Tous les États souverains exercent un degré de contrôle sur la migration d'étrangers vers leur territoire. La question de quelles limitations sont imposées au pouvoir des États de contrôler l'immigration est assez discutée.

La vision traditionnelle, c'est que le droit international n'impose pas de restrictions sur le pouvoir de l'État de contrôler l'immigration. Cette position est illustrée par la décision de la Cour Suprême des États-Unis de 1892 qui suit :

> *It is an accepted maxim in international law, that every sovereign nation has the power, as inherent in sovereignty and esssential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.*[27]

Le langage utilisé par la Cour Suprême dans ce cas ne laisse pas de doute quant à l'affirmation qu'il n'y a pas, en droit international, de limites pour le pouvoir de l'État en matière de contrôle de l'immigration. En 1889, dans le célèbre cas impliquant des chinois, connu comme « *Chinese Exclusion Case* », la Cour Suprême Américaine réitéra cette position, en établissant « *that the governement of the United States, through the action of the legislative departement, can exclude aliens from its territory is a proposition which we do not think open to controversy* ».[28] La Cour Suprême alla encore plus loin, en établissant une claire connexion entre le pouvoir d'immigration et la souveraineté nationale, selon les termes suivants :

> *The power of exclusion of foreigners being an incident of sovereignty belonging to the governement of the United States, as a part of those sovereign powers delegates by Constitution, the right to its*

26 Loi n° 6.964/1981.

27 *Nishimura Ekiu v. United States*, 142 US 651 (1892).

28 *Chae Chan Ping v. US*, 130 US 581 (1889).

> *exercise at any time when, in the judgement of the governement, the interests of the country require it, cannot be granted away or restrained on behalf of any one.*[29]

Cette vision traditionnelle est aussi contenue dans l'article 1er de la Convention de la Havane sur la Condition des Étrangers de 1928[30], qui détermine que les États ont le droit d'établir, par la voie de la législation, les conditions générales d'entrée et de séjour d'étrangers dans leur territoire[31].

Plus récemment, la notion que les États ont le pouvoir illimité d'exclure les étrangers a été questionnée. Il a été soutenu que, sous certaines circonstances, l'État aurait en principe le devoir exceptionnel d'admettre des étrangers, comme dans le cas de résidents permanents, qui ont une expectative légitime d'être réadmis, ou dans les cas de diplomates et de victimes de calamités naturelles (force majeure)[32]. En plus, la norme établissant le non-refoulement[33] (qui détermine que

29 *Chae Chan Ping v. US*, 130 US 581 (1889).

30 Incorporée en droit interne, au Brésil, par le Decret n° 18.956/1929.

31 Article 1er : *« Les États ont le droit d'établir, par moyen des lois, les conditions d'entrée et de résidence des étrangers dans leur territoire ».* Les pays l'ayant ratifiée sont : L'Argentine, La Bolivie, Le Brésil, Le Chili, La Colombie, La Costa Rica, Cuba, L'Équateur, Les États-Unis, Le Guatemala, Haiti, Le Honduras, Le Mexique, Le Nicaragua, Le Panama, Le Pérou, La République Dominicaine, Le Salvador, L'Uruguai et Le Venezuela ».

32 R. Plender, *International Migration Law* 159 (1988).

33 Flávia Piovesan, *O direito de asilo e a proteção internacional dos refugiados*. In: Nádia de Araújo e Guilherme Assis de Almeida (Coord.), *O Direito Internacional dos Refugiados Brasileiros* 53-4 (2001) : *« le principe du non-refoulement doit être compris aujourd'hui d'une manière plus ample, tout en transcendant les restreints contours conférés par les articles 1er et 33 de la Convention sur le Statut des Réfugiés de 1951. Cet étude défend, ainsi, la nécessité de réduire le domaine du pouvoir discrétionnaire de l'État, afin que des droits universalement assurés soient efectivement respectés. Il convient de dire : au droit de solliciter asile et d'en jouir, énoncé dans la Déclaration Universelle, doit correspondre le devoir de l'État de concéder l'asile. En adoptant la perspective de la protection des droits de l'homme, il est fondamental consolider la théorie de la responsabilité juridique de l'État en ce qui concerne la matière, nonobstant les résistances et les dificultés » (« O princípio do non-refoulement deve ser hoje compreendido de forma mais ampla, transcendendo os restritos contornos conferidos pelos artigos 1° e 33 da Convenção sobre o Estatuto dos Refugiados de 1951. Este estudo defende, assim, a necessidade de reduzir o domínio da discricionariedade do Estado, a fim de que direitos universalmente assegurados sejam efetivamente implementados. Vale dizer, ao direito de solicitar asilo e dele gozar, enunciado na Declaração Universal, há de corresponder o dever do Estado de conceder asilo. Adotando-se a perspectiva da proteção dos direitos humanos, faz-se fundamental consolidar a teoria da responsabilidade jurídica do Estado no tocante à matéria, não obstante todas as resistências e dificuldades »*). Dans le même sens, Thamy Pogrebinschi, *O direito de asilo e a Constituinte de 1987-88***.** In: Nádia de Araújo e Guilherme Assis de Almeida (Coord.), *O Direito Internacional dos Refugiados Brasileiros* 341 (2001).

l'étranger ne peut pas être remis à un pays où il risque d´être persécuté) pour les réfugiés est souvent citée comme une règle générale de droit international, ayant des effets au-delà de la Convention des Réfugiés[34]. Outre ces règles spécifiques, il y en a d'autres de caractère plus général qui imposent certaines limites à un contrôle étatique sur l'immigration, telles que les règles interdisant la discrimination[35], le traitement inhumain et dégradant, le traitement arbitraire, ainsi que les règles établissant le droit à la vie familiale[36].

Enfin, alors que, d'un côté, le droit international garantit aux États la liberté pour établir des règles en ce qui concerne l'immigration, de l'autre, il garantit aux individus certains droits, qui éventuellement peuvent limiter le pouvoir étatique de contrôler l'entrée et l'expulsion d'étrangers.

A. Le contrôle d'immigration au Brésil

Le contrôle brésilien d'immigration est un procédé composé de deux étapes : premièrement, l'émission d'un visa et, deuxièmement, le contrôle de l'entrée. Ainsi, avant d'émettre le visa, le Consulat brésilien à l'étranger analyse si le requérant remplit tous les conditions du Statut de l'Étranger[37] et ses règlements, spécialement en relation à son âge[38], à ses conditions de santé[39] et aux éventuelles condamnations pénales qui peuvent lui avoir été imposées à l'étranger[40]. Le Consulat vérifie aussi si la présence de l'étranger au Brésil contrarie l'ordre public ou les intérêts brésiliens[41]. Au moment de l'entrée, les étrangers sont

34 G. Goodwin-Gill, *International Law and the Movement of Persons Between States* 137 (1978); G. Goodwin-Gill, *The Refugee in International Law* 69 (1983). À la préface du premier livre, l'auteur a écrit : *« The central thesis of this work is the competence clearly limited and confined by established and emergent rules and standards of international law »*.

35 Il convient de rappeler que l'État ne peut pas discriminer une nationalité, race ou réligion spécifique, ou nier l'entrée, *e. g.*, aux femmes, sans aucune justification raisonable, dès que cela heurterait la règle de droit international interdisant la discrimination. Carmen Tiburcio, *The Human Rights of Aliens under International and Comparative Law* 216 (2001).

36 Oppenheim enfatisa quelques-uns de ces points : *« Although a State may exercise its right of expulsion according to discretion, it must not abuse its right by proceeding in an arbitrary manner » (« Bien qu'un État puisse exercer son droit d'exlpulsion de manière discrétionnaire, il ne faut pas abuser de son droit en procédant de manière arbitraire ».)*. L. Oppenheim, *International Law* 691 (1955).

37 Loi nº 6.815/1980, modifié par la Loi nº 6964/1981 (Statut de l'Étranger).

38 Aucun étranger mineur de dix-huit ans n'aura droit au visa pour entrer dans le pays s'il voyage seule, sans la compagnie d'un responsable ou sans autorisation due. Statut de l'Étranger, article 7, I.

39 Statut de l'Étranger, article 7, V.

40 Statut de l'Étranger, article 7, IV.

41 Statut de l'Étranger, article 7, II.

réexaminés pour qu'il soit garanti qu'il n'y ait pas eu de changement de circonstances qui fassent que son admission devienne indésirable[42]. L'émission du visa ne donne pas à l'étranger la garantie d'entrée au pays, car celle-ci peut encore lui être refusée[43].

B. Types de Visa

La condition générale d'entrée au Brésil, c'est que l'étranger possède un passeport et un visa d'entrée[44]. Les Consulats Brésiliens émettent sept types de visa[45] : (1) le visa de transit, qui permet à l'étranger un passage par le territoire national[46] ; (2) le visa de touriste, valable pour un séjour de trois mois[47] ; (3) le visa temporaire, pour un séjour limité[48] ; (4) le visa permanent, pour un étranger qui veut y demeurer d´une façon permanente[49] ; (5) le visa de courtoisie ; (6) le visa officiel ; et (7) le visa diplomatique[50]. Ces deux derniers sont des types de visas émis par le Ministre des Relations Extérieurs aux représentants de gouvernements étrangers, aux membres d'organisations internationales, aux diplomates étrangers et à leurs familles. Théoriquement, le visa ne peut être sollicité qu'à l'étranger. Des exceptions à cette règle, toutefois, sont admises en ce qui concerne la conversion de visas[51]. La législation brésilienne exige aussi que les étrangers s´enregistrent au pays pour recevoir leur carte d'identité[52].

42 Statut de l'Étranger, article 22.

43 La Constitution de 1988 répète un dispositif consacré par la tradition du droit brésilien garantissant aux étrangers la liberté d'entrer et de quitter le pays, pourvu que les conditions établies dans la législation ordinaire soient remplies (article 5, XV). V. aussi Statut de l Étranger, article 26.

44 Il y a une exception législative quant aux nationaux de pays voisins, qui ont la permission pour entrer au Brésil en portant seulement leur carte d'identité. Statut de l Étranger, article 21.

45 Statut de l'Étranger, article 4.

46 Le Brésil n'exige pas de visa à ceux qui passent par le territoire national (transit) en route vers un autre pays, sauf si une escale est faite au Brésil. Statut de l'Étranger, article 8, § 2.

47 Les étrangers n'ont pas besoin de visa de touriste s'ils sont nationaux d´un pays ayant un accord de réciprocité avec le Brésil. Statut de l'Étranger, article 10.

48 Ce visa, émis pour une durée variable, est utilisé par des « hommes d'affaires », journalistes, étudiants, artistes et tous qui ont une mission au Brésil pendant une durée de temps limitée. Statut de l'Étranger, articles 13 et 14.

49 Ce visa est en général concédé aux étrangers qui veulent s'instaler au pays pour des raisons familiales ou pour travailler dans des régions où leurs services sont particulièrement nécessaires.

50 Statut de l'Étranger, article 19 : « Le Ministère des Rélations Extérieures définira les cas de concession, prorrogation ou dispense des visas diplomatiques, officiel ou de courtoisie ».

51 Les étrangers qui reçoivent certains types de visa temporaires, diplomatiques ou officiels ont la permission pour les transformer au Brésil en visa temporaire ou permanent. Statut de l'Étranger, articles 37 et 39.

52 Le registre n'est obligatoire que pour ceux qui sont entrés dans le pays comme résidents

5. Abrogation de la permission de séjour et de résidence

Les États ont le droit d'expulser de leur territoire les étrangers indésirables. Comme limite à cette prérogative, le droit international détermine que l'expulsion[53] doit être permise par la législation et doit être fondée sur une décision en conformité avec la loi[54]. Des obligations sont aussi imposées aux États quant à la manière d'effectuer l'expulsion, la cruauté étant interdite et l'avis avec une antécédence raisonnable étant obligatoire, par exemple[55].

L'extradition[56] et la déportation sont d'autres mesures que l'État peut prendre pour contraindre des étrangers à quitter leur pays de résidence. Les deux divergent de l'expulsion parce que dans celle-ci il y a l'utilisation d'un pouvoir discrétionnaire, alors que dans les deux autres le critère est plus objectif[57]. La déportation[58] en général se tient

permanents, résidents temporaires ou réfugiés. Statut de l Étranger, article. 30.

53 Selon la définition de Celso de Albuquerque Mello (*Direito Internacional Público 619, vol 2 1979)*, *« l'expulsion est l'acte politique-administratif qui oblige l'étranger à quitter le territoire national, dans lequel il ne peut pas retourner » («* expulsão é o ato político-administrativo que obriga o estrangeiro a sair do território nacional, ao qual não pode mais voltar *»*). José Afonso da Silva (*Curso de Direito Constitucional Positivo* 342, 2005) la définit comme *« un moyen coactif pour rétirer l'étranger du territoire national pour un délit, une infraction ou des actes qui le font devenir incovénient » (« um modo coativo de retirar o estrangeiro do território nacional por delito ou infração ou atos que o tornem inconveniente »)*. Jacob Dolinger (*Direito Internacional Privado : Parte Geral 126, 2014)* positionne cet institut comme *« le procédé par laquelle un pays expulse de son territoire un étranger résident, en raison d'un crime pratiquée ou d'un comportement nocif pour les intérêts nationaux, le retour au pays duquel il a été expulsé lui étant interdit (« o processo pelo qual um país expele de seu território estrangeiro residente, em razão de crime ali praticado ou de comportamento nocivo aos interesses nacionais, ficando-lhe vedado o retorno ao país donde foi expulso ».)*.

54 Goodwin-Gill, *International Law and the Movement of Persons Between States* 263 (1978), qui cite Whiteman e Hackworth.

55 Dans l'Affaire *Dillon,* de 1928, devant la *Mexico-US General Comission,* le Commissionnaire Nielsen a observé que le droit souverain à l'expulsion n'était pas nié aux États-Unis, mais la plainte était fondée sur la manière de l'expulsion. Dans l'Affaire *Gourrier* (1868), un national américain expulsé du Mexique a reçu une indemnisation, bien que le procédé d'expulsion ait été fait conformement à la loi, en raison de l´inutile cruauté de l'acte. V. Goodwin-Gill, *International Law and the Movement of Persons Between States* 276-77 (1978).

56 *Sur ce sujet, v. Carmen Tiburcio, Extradição no Brasil : análise à luz da jurisprudência e do direito comparado*. In: Carmen Tiburcio e Luís Roberto Barroso, *Direito constitucional internacional* 321 e ss (2013).

57 V. Carlos Mário da Silva Velloso, *O Direito Internacional e o Supremo Tribunal Federal 6-7*. In: *Revista de Direito Administrativo*, v. 229, jul.-set./2002.

58 José Afonso da Silva (*Curso de Direito Constitucional Positivo* 342, 2005) définit la déportation comme *« la sortie compulsoire de l'étranger. Elle se fonde sur le fait que l'étranger entre ou demeure irrégulièrement dans le territoire national* (article 5, XV) » (« *saída compulsória do estrangeiro. Fundamenta-se no fato de o estrangeiro entrar ou*

lorsqu'un individu entre illégalement au pays ou dépasse la période permis par le visa ; l'extradition[59] concerne le procédé de remise d'un individu, accusé ou condamné pénalement dans un État autre que celui de sa résidence, à une autre juridiction, compétente pour connaître de l'infraction qui est réputée commise par lui. En plus, l'étranger peut retourner au pays après avoir été déporté, à condition qu'il ait régularisé sa situation, alors que l'extradition présuppose la pratique d'une infraction pénale, ce qui met l'individu dans la condition de malfaiteur. Il faut souligner qu'il y a des États qui admettent l'extradition de leurs nationaux. En raison de cela, des instruments de protection aux droits de l'homme ne font pas référence à des garanties concernant l'extradition et la déportation, mais le font quant à l'expulsion[60]. Toutefois, cela ne

permanecer irregularmente no território nacional.»). José Francisco Rezek, Ministre en retrait du STF (*Direito Internacional Público: Curso elementar* 187, 2002) définit l'institut comme *« une forme d'exclusion, du territoire national, de l'étranger qui s'y trouve après une entrée irrégulière – en général clandestine -, ou dont le séjour est devenu irregulier – presque toujours par l'excès de délai, ou par exercice de travail rémunéré dans le cas du touriste* (*« uma forma de exclusão, do território nacional, daquele estrangeiro que aqui se encontre após uma entrada irregular – geralmente clandestina –, ou cuja estada tenha-se tornado irregular – quase sempre por excesso de prazo, ou por exercício de trabalho remunerado, no caso do turista* ». Jacob Dolinger (*Direito Internacional Privado : Parte Geral 126-127, 2014*, de son côté, définit la déportation comme *« le procédé de dévolution de l'étranger qui y arrive ou demeure irrégulièrement vers le pays de sa nationalité ou de sa provenance. Alors que dans l'expulsion le retrait se fait à cause d'une pratique ayant eu lieu après l'arrivée et la fixation de l'étranger au territoire du pays, la déportation trouve son origine exclusivement de son entrée ou séjour irrégulièrs dans le pays »* (*« o processo de devolução de estrangeiro que aqui chega ou permanece irregularmente para o país de sua nacionalidade ou de sua procedência. Enquanto na expulsão, a remoção se dá por prática ocorrida após a chegada e a fixação do estrangeiro no território do país, a deportação se origina exclusivamente de sua entrada ou estada irregular no país. »*).

59 José Francisco Rezek (*Direito Internacional Público: Curso elementar* 189, 2002) définit l'extradiction comme *« la remise, par un État à un autre, à la demande de celui-ci, de l'individu qui, en son territoire doit répondre à un procès pénal ou à y accomplir une peine »* (*« a entrega, por um Estado a outro, e a pedido deste, de indivíduo que em seu território deva responder a processo penal ou cumprir pena* »). Celso de A. Mello (*Direito Internacional Público* 601, v. 2, 1979) affirme qu'il s'agit de *« l'acte par le biais duquel un individu est remis par un État à un autre, qui soit compétent afin d´ instruir un procès contre lui ou de le punir » (« o ato por meio do qual um indivíduo é entregue por um Estado a outro, que seja competente a fim de processá-lo e puni-lo »)*. De son côté, Jacob Dolinger (*Direito Internacional Privado : Parte Geral 126, 2014*) l´a définit comme *« le procédé par lequel un État accorde la demande d'un autre État, en lui remettant la personne poursuivie au pays sollicitant pour un crime puni dans la législation des deux pays, les nationaux du pays sollicité ne pouvant pas, en règle générale, être extradés ». (« o processo pelo qual um Estado atende ao pedido de outro Estado, remetendo-lhe pessoa processada no país solicitante por crime punido na legislação de ambos os países, não se extraditando, via de regra, nacional do país solicitado. »)*.

60 Nonobstant le fait que certaines garanties, telles que le droit à la vie, à l'intégrité physique

se passe pas avec le Brésil, dont la Constitution interdit expressément l'extradition de nationaux, ainsi que d'étrangers accusés d'avoir commis un crime politique ou d´opinion[61].

En règle générale, une décision administrative ou judiciaire n'est pas suffisante pour que la permission pour l'étranger de demeurer au pays soit abrogée, la sortie forcée des permanents exige un procès administratif ou judiciaire préalable. La permission pour demeurer au pays finit automatiquement lorsque le visa s'expire sans rénovation. Après cette date, la permanence de l'étranger au pays devient illégale.

Le séjour d'un étranger au Brésil ne peut être interrompu involontairement que par les procédures de déportation, d'expulsion et d'extradition[62]. La déportation et l'expulsion sont des procédés administratifs, alors que l'extradition est un procédé judiciaire. L'acte de déporter implique l'éloignement d'un individu du pays, soit en raison de son entrée illégale, soit en raison de l'expiration du visa, soit par la désobéissance d'un dispositif du Statut de l'Étranger (par exemple, travailler sans permission[63]). L'expulsion se fonde sur des raisons différentes de celles qui sont nécessaires pour donner lieu à la déportation et exige une enquête préalable du Ministre de la Justice[64] dans laquelle sont garantis à l'étranger le droit de la défense[65]. Comparées avec celles aux États-Unis, les bases pour l'expulsion au Brésil sont assez générales : comportement qui contrarie l'ordre politique ou social, la moralité et la tranquillité, ou l'économie populaire[66].

Puisque la loi brésilienne a toujours essayé de préserver l'unité familiale, un étranger qui a une famille stable au Brésil en général ne peut en être expulsé, car la règle au Brésil c'est que la famille a le droit de demeurer unie[67]. Le Statut de l'Étranger, actuellement, interdit

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et à la vie familiale, sont aussi tûtelées dans le contexte de l'extradiction.

61 Constitution de 1988, article 5, LI et LII : « Tous sont égaux devant la loi, sans distinction de n'importe quelle nature que ce soit, aux brésiliens et aux étrangers résidant au pays étant garantie l'inviolabilité du droit à la vie, à la liberté, à l'égalité, à la sécurité et à la propriété, dans les termes suivants : LI – aucun brésilien ne sera extradé, sauf le naturalisé, en cas de crime commum, pratiqué avant la naturalisation, ou de participation prouvé à un trafic illicite de stupéfiants et drogues semblables, dans la forme de la loi ; LII – l'extradition de l'étranger ne sera pas accordée en cas de crime politique ou d'opinion ».

62 *V.* Gilmar Mendes, *Direito de Nacionalidade e Regime Jurídico do Estrangeiro 13*. In: *Direito Público*, n° 14, out.-dez./2006.

63 Statut de l'Étranger, article 57 § 1º.

64 Statut de l'Étranger, article 70.

65 STF, *DJU* 29 nov. 1996, HC 73.940/SP, Rel. Min. Maurício Corrêa.

66 Statut de l'Étranger, article 65. Il y a aussi d'autres bases pour l'expulsion, telles que la fraude lors de l'entrée au pays ou le refus de le quitter après l'expiration du visa. Dans les cas où la déportation n'est pas possible, l'expulsion peut avoir lieu en raison de vagabondage ou de l'inobservance d'un dispositif du Statut de l'Étranger.

67 Jacob Dolinger, *Das Limitações ao Poder de Expulsar Estrangeiros*. In: *Estudos em*

l'expulsion d'un étranger marié avec un national brésilien il y a plus de cinq ans[68] ou qui a la garde d'enfants brésiliens qui dépendent financièrement de lui[69]. Le STJ a récemment flexibilisé cette règle et n´exige plus la dépendance financière[70].

Tout étranger a le droit de questionner devant les tribunaux brésiliens la validité de toute action qui peut résulter de sa sortie forcée du pays, que ce soit par l'expulsion ou par la déportation[71]. Le remède juridique disponible est l'*habeas corpus* et il s'adresse au pouvoir judiciaire, vu que le Brésil adopte le système d'unicité de juridiction. Toutefois, il est très commun que l'individu revendique son droit de demeurer au Brésil par le biais d'un *mandat de sécurité* (*« mandado de segurança »*). Dans ce cas, le Suprême Tribunal Fédéral (STF), qui a la compétence originale pour connaître de ces demandes[72], décide souvent par la conversion du mandat de sécurité en *habeas corpus*[73].

La demande d'extradition est jugée uniquement par le STF[74] et elle doit être fondée sur un traité d'extradition entre le Brésil et l'État requérant ou sur une promesse de réciprocité[75]. La décision du STF en relation à la demande d'extradition est définitive et ne peut pas faire l´objet d´un recours. En plus, la question de liens familiaux dans le pays n'a pas d'interférence en matière d'extradition[76].

Les étrangers peuvent quitter le Brésil volontairement à

Homenagem ao Professor Haroldo Valladão (1983).

68 La condition de la période minimum de 5 ans de mariage a été introduite pour éviter des mariages frauduleux.

69 Statut de l´Étranger, aticle 75. V. aussi Compilation de jurisprudence n° 1 du STF (approuvée em Session Pleine le 13/12/1963) : *« Est interdite l'expulsion d'un étranger marié avec une brésilienne, ou qui a un enfant brésilien, dépendant de l'économie paternelle. ».*

70 STJ, *DJU* 23.avril.2010, HC 141642/DF, Rel Min. Benedito Gonçalves.

71 Constitution de 1988, article 5, XXXV.

72 Constitution de 1988, article 102, I, d.

73 STF, *DJU* 1° mar. 1996, HC 72.082/RJ, Rel. Min. Francisco Rezek: *« ... le moyen procédural adéquat pour contester le décret d'expulsion est l'Habeas Copus. Ainsi s'est fondée la juisprudence du Suprême [Tribunal Fédéral], soit parce que la personne expulsée est en détention, soit parce qu'il s'agit du remède le plus rapide. » (« ...o meio processual adequado para se impugnar decreto expulsório é o Habeas Corpus. Assim se firmou a jurisprudência do Supremo, seja porque o expulsando via de regra está preso, seja porque se trata de remédio mais expedito. »).*

74 Constitution de 1988, article 102, I, g. (STF, *DJU* 22.mar.2011, HC 101.528/PA, Rel. Min. Dias Toffoli). Aussi STF, *DJU* 20.ago, 2010, HC 101.269/DF, Rel. Min. Cármen Lúcia.

75 Statut de l'Étranger, article 76.

76 STF, *DJU* 6 jul. 1964, Compilation de jurisprudence n° 421, Tribunal Plein. Dans le même sens, STF, *DJU* 13 avr. 2007, Ext 997/Alemanha, Rel. Min. Joaquim Barbosa; STF, *DJU* 7 déc. 2006, Ext 967/Bélgica, Rel. Min. Ricardo Lewandowski; STF, *DJU* 17 nov. 2006, Ext 984/ Estados Unidos, Rel. Min. Carlos Britto; STF, *DJU* 10 août. 2006, Ext 995/Espanha, Rel. Min. Carlos Britto.

n'importe quel moment (pourvu qu'ils ne soient accusés d'avoir commis un crime au Brésil et qu'ils n'accomplissent pas une peine de prison) ; ce droit est garanti par la Constitution Brésilienne[77] et par le Statut de l'Étranger[78]. Il n'est pas nécessaire qu'ils obtiennent un visa pour cela. Lorsqu'il quitte le pays, la Constitution garantit que l'étranger est libre d´emporter avec lui tous ses biens[79].

6. Garanties juridiques générales

A. Droits de l'homme et droits fondamentaux des étrangers

Les étrangers résidants au Brésil jouissent des mêmes droits à la vie, à la sécurité et à la propriété que ceux qui sont garantis aux nationaux selon les termes de la Constitution en vigueur et conformément à toutes les Chartes constitutionnelles depuis la première Constitution Républicaine, de 1891. En plus, tous les droits fondamentaux conférés par la Constitution de 1988 dans les alinéas de l'article 5 sont aussi garantis aux étrangers résidents, tels que le droit à l'égalité de traitement, le droit de ne pas être torturé, la liberté d'expression, le droit à la vie privée, le droit au libre exercice de toute profession, le droit d'association, le droit à la propriété privée, le droit d'accès à la justice, ainsi que les droits à l'assistance sociale[80] et à l'éducation[81], parmi d'autres. Le fait que la Constitution ne garantisse tous ces droits qu'aux étrangers résidents, toutefois, ne signifie pas que les non-résidents ne soient pas protégés par le système légal brésilien[82]. En divers moments, le STF a étendu plusieurs droits établis dans la Constitution à tous les étrangers, y compris les touristes et même, dans certains cas, à ceux qui ne sont pas dans le pays, tels que l'accès à la justice, le droit à la propriété privée et la droit à la protection à la propriété intellectuelle.

La garantie de droits fondamentaux à tout étranger non-résident n'a pas toujours été reconnue au Brésil. L'un des premiers cas examinés

77 Constitution de 1988, article 5, XV.

78 Statut de l'Étranger, aticle 50.

79 Constitution de 1988, article 5, XV.

80 Constitution de 1988, article 203.

81 Constitution de 1988, article 205.

82 Celso Bastos, *Curso de Direito Constitucional 178 (1999)*. L'auteur souligne que la Constitution étend les droits fondamentaux à toute pesonne qui se trouve sur le territoire brésilien ; il conclue que les auteurs de la Constitution, lorsqu'ils ont fait référence aux étrangers résidents, n'ont pas utilisé l'expression dans son sens authentique, c'est-à-dire le fait d'être légalement domicilié au Brésil, mais ils ont eu l' intention d'étendre ces doits à toute personne qui se trouve physiquement au Brésil, ce qui signifie toute personne qui est en contact avec notre ordre juridique.

par nos Cours, après la Constituions de 1891, a été un *habeas corpus* au nom de la famille royale portugaise, qui avait été bannie du Brésil à la suite de la Proclamation de la République. Le cas ayant été décidé par nos tribunaux fédéraux en 1903, on soutient que la Constitution de 1891 garantissait les droits établis dans l'article 72[83] seulement aux étrangers résidents. Puisque la famille impériale ne résidait plus au Brésil et puisque l'*habeas corpus* était l'un des droits établis dans ce dispositif, les tribunaux ont conclu que la famille impériale n'avait pas droit à l'*habeas corpus*[84].

Une partie de la doctrine soutient que l'article de la Constitution qui garantit les droits fondamentaux est une norme générique et que les dispositifs suivant cet article pourraient étendre ces droits aux étrangers non-résidents ou bien les nier aux étrangers résidents. Quelques-uns de ces droits, par contre, devraient être garantis à tout être humain[85].

D'autres auteurs font une interprétation littérale de la Constitution lorsqu'elle affirme que les droits ne sont garantis qu'aux étrangers résidents, mais ils concluent que les non-résidents ont aussi cette garantie en raison des conventions internationales de droit de l'homme dûment ratifiées par le Brésil et qui garantissent ces droits à toutes les personnes[86].

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83 « La Constitution assure aux brésiliens et aux étrangers résidents au Pays l'inviolabilité des droits concernant la liberté, la sécurité individuelle et la propriété (...) ».

84 *Habeas Corpus* n° 1.973, 91 *O Direito* 414, 434 (1903).

85 Pontes de Miranda, *4 Comentários à Constituição de 1967 com a Emenda n°1 de 1969* 695-6 (1974) et Manoel Gonçalves Ferreira, *Direito humanos fundamentais* 29 (2004). Dans le même sens, Jacob Dolinger, *Comentários à Constituição de 1988* 114 (1990), classifie les droits fondamentaux en *génériques*, qui sont garantis à tous, *spécifiques*, garantis à tout brésilien et étranger résident, et r*estreints*, qui ne sont garantis qu'aux brésiliens. V. aussi Guido Fernando Silva Soares, *Os Direito Humanos e a proteção dos estrangeiros* 185. In: *Revista de Informação Legislativa,* n° 164, abr.-jun./2004. Dans le même sens, STF, *DJU* 6 avr. 2001, Ext 633/China, Rel. Min. Celso de Mello.

86 José Afonso da Silva, *Curso de Direito Constitucional Positivo* 335 (2005); Baptista, O Estrangeiro: Reflexões para a Constituinte. In*: A nova Constituição e o Direito Internacional* 135, 137 (J. Dolinger ed. 1987). Dans le même sens, José Afonso da Silva, *Comentário contextual à Constituição* 65 (2006) : *« Si la Constitution indique les destinataires de ces droits, cela doit avoir des conséquences normatives. Cela ne veut pas dire que les étrangers non-résidents, lorsqu'ils se trouvent régulièrement sur le territoire national, peuvent être soumis à l'arbitre et ne disposent d'aucun moyen – y compris les jurisditionnels – pour régler les situations subjectives. Pour les protéger, il y a d'autres normes juridiques, y compris de Droit International, lesquelles doivent être respectées et observées par le Brésil et ses autorités, de même qu'il existe des normes légales, traduites dans de législation spéciale, qui définissent les droits et la condition juridique de l'étranger non-résident qui serait régulièrement entré au territoire brésilien » (« Se a Constituição aponta os destinatários desses direitos, isso há de ter conseqüências normativas. Isso não quer dizer que os estrangeiros não-residentes, quando regularmente se encontrem no território nacional, possam sofrer o arbítrio e não disponham de qualquer meio – incluindo os jurisdicionais – para tutelar situações subjetivas . Para*

Il y a encore un troisième courant qui considère que l'expression « résidents au Brésil » doit être interprétée au sens que la Constitution ne peut assurer les droits fondamentaux que sur le territoire national. Ainsi, la norme n'exclut pas de son application les étrangers en transit, par exemple[87]. Or, les droits fondamentaux ont un caractère universel, en s'adressant à tous qui se trouvent sous la tutelle de l'ordre juridique brésilien, dans les limites de la souveraineté nationale, indépendamment de leur nationalité[88]. Beaucoup d'auteurs considèrent en plus que celle-ci est la meilleure interprétation, compte tenu des règles des articles 3º, alinéa IV et 9º, alinéa II de la Constitution Fédérale.

On débat aussi en doctrine la possibilité ou non pour la législation ordinaire de créer des nouvelles distinctions entre les étrangers résidents et les nationaux. Quelques auteurs croient que, hors les distinctions faites dans le texte constitutionnel et les concessions offertes par la Constitution à la législation ordinaire, aucune autre distinction n'est possible. D'autres auteurs adoptent une position différente[89]. Ceux qui affirment que la législation ordinaire ne peut pas discriminé les étrangers résidents sans autorisation expresse de la Constitution fondent leur position sur le principe qui explicitement interdit la discrimination fondée sur l'origine de l'individu, ce qui est l'un des objectifs de la

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protegê-los há outras normas jurídicas, inclusive de Direito Internacional, que o Brasil e suas autoridades têm que respeitar e observar, assim como existem normas legais, traduzidas em legislação especial, que definem os direitos e a condição jurídica do estrangeiro não-residente que tenha ingressado regularmente no território brasileiro »).

87 Alexandre de Moraes, *Direito Constitucional* 29-30 (2006); Kildare Gonçalves Carvalho, *Direito Constitucional* 587 (2007). Dans le même sens, STF, *RTJ* 3/566-68, RE n° 33.919/DF, Rel. Min. Cândido Mota Filho : *l'expression 'résidents au pays' se réfère tantôt aux étrangers, tantôt aux brésiliens, et signifie seulement que les droits et garanties individuelles (...) sont assurés (..) dans les limites de la souverainété territoriale nationale. Il est évident que la Constitution ne pourrait pas assurer à des étrangers et brésiliens hors du pays (...) la validité et la jouissance des droits et garanties. (...) Pourvu, toutefois, qu'il s'agisse d'un acte d'autorité brésilienne et que le remède constitutionnel s'adresse à produire des résultats dans le Pays, peu importe que l'impétrant y réside ou non » (« A expressão 'residentes no País tanto se refere a estrangeiros como a brasileiros e significa tão somente que os direitos e garantias individuais (...) são assegurados (...) dentro dos limites da soberania territorial nacional. Óbvio que a Constituição não poderia assegurar a estrangeiros ou brasileiros fora do país (...) a validade e gozo dos direitos e garantias. (...) Desde porém, que se trate de ato de autoridade brasileira e se destine o remédio processual a produzir resultados dentro do País, pouco importa que o impetrante resida aqui ou não »).* Selon le vote du Ministre Rapporteur, « *si nous reconnaissions qu'au Pays sont abolis les droits des étrangers non-résidents, nous commettrions une violence » (« se reconhecêssemos que no País ficam extintos os direitos dos estrangeiros não residentes, cometeríamos uma violência »).*

88 Kildare Gonçalves Carvalho, *Direito Constitucional* 588 (2007).

89 *V.* O. Tenório, *Direito Internacional Privado*, v. 1, 268, 269 (1976); W. Campos Batalha, *Direito Internacional Privado*, v. 2, 28, 29 (1977).

République Fédérative du Brésil d'après le texte constitutionnel[90]. De la même manière, l'article 5 de la Constitution garantit, en termes généraux, aux brésiliens et aux étrangers résidents, le droit à la vie, à la liberté, à l'égalité, à la sécurité et à la propriété; ces droits sont la base pour tous les droits fondamentaux[91]. Puisque les étrangers ont le droit d'être également traités[92], la législation ordinaire qui établit un traitement discriminatoire sans autorisation expresse de la Constitution devrait être considérée inconstitutionnelle[93].

La distinction entre nationaux et étrangers, pour d'autres auteurs, outre les limites fixées par la Constitution, trouve aussi des restrictions dans les traités et conventions internationales sur les droits et garanties de la personne humaine dont le Brésil fait partie. On peut dire qu'il s'agit de normes du Droit International de la Personne Humaine, dans lesquelles on trouve le droit d'asile et le droit des réfugiés[94].

Le même argument peut être utilisé en relation avec le droit du travail, garanti aux brésiliens et aux étrangers résidents[95]. Quelques auteurs soutiennent que toute législation établissant des limitations au droit de l'étranger au travail est inconstitutionnelle[96]. Par conséquent, les normes qui conditionnent l'exercice d'une profession à la réciprocité seraient inconstitutionnelles [97], ainsi que tous les dispositifs du Statut de l'Étranger interdisant l'exercice de fonctions non expressément mentionnées dans la Constitution[98], toutes les interdictions d'exercer une profession, telles que celle d'interprète public[99], d'expéditeur en douane[100] et d'agent d'assurances[101] et le dispositif de la Consolidation des Lois du Travail (CLT)[102] qui exige que deux tiers de l'ensemble des travailleurs soient nationaux brésiliens[103].

90 Constitution de 1988, article 3, IV.

91 M. Gonçalves Ferreira Filho, *Comentários à Constituição Brasileira* 586 (5 ed. 1984).

92 Constitution de 1988, article 5, I.

93 Dans ce sens, v. STF, *DJU* 19 dez. 1997, RE 161.243/DF, Rel. Min. Carlos Velloso.

94 Guido Fernando Silva Soares, Os Direitos Humanos e a proteção dos estrangeiros 198. In: *Revista de Informação Legislativa*, n° 162, abr.-jun./2004.

95 Constitution de 1988, article 5, XIII.

96 Cette position est soutenue par l'auteur de cet article. Dans le même sens, H. Valladão, *Direito Internacional Privado*, v. 1, 424 (1980); Soares, *Os estrangeiros e as Atividades a eles Vedadas ou Restringidas Proibição Constitucional a Discriminação pela Lei Ordinária de Brasileiros Naturalizados.* In *: A Nova Constituição e o Direito Internacional* 118, 123 (1987).

97 Statut de l'Ordre des Avocats du Brésil, Lei nº 4.215/1963, aticles 48, 49 et 51. Cette loi fut abrogée par la Loi nº 8906/1994, qui ne fait pas référence à la question de la réciprocité.

98 Statut de l'Étranger, article 106, VI, VII, VIII e IX.

99 Decret n° 13.609/1943, article 3, c.

100 Decret n° 4.014/1942, article 19.

101 Loi n° 4.594/1964, article 3, a, § 1°.

102 Consolidation des Lois du Travail, article 354.

103 Alors que la Constitution de 1969, article 165, XII admitait expressément la proportionnalité

Cette discussion se déroule depuis le début du XXe siècle, lorsque la question sur la constitutionalité de l'expulsion d'étrangers résidents fut suscitée, en raison de l'article 72 de la Constitution de 1891 et de son silence en relation à l'expulsion. Pedro Lessa, Ruy Barbosa et Germano Hasslosher croyaient que, puisque la Constitution établissait des droits tout à fait égaux pour les étrangers résidents et pour les nationaux, et comme ceux-ci ne pouvaient pas être expulsés, les étrangers résidents aussi ne le pourraient pas, à moins qu'il y eût une autorisation expresse dans la Constitution.[104]

B. Capacité des étrangers

En principe, chaque État détermine l'étendue de la capacité juridique des personnes qui se trouvent sur son territoire. D´après la doctrine :

> *« Le pouvoir de déterminer les droits et les devoirs dont chaque individu peut avoir la jouissance ; en d'autres termes, l'étendue de la personnalité juridique de chacun, relève de la souveraineté des États. Ce pouvoir n'est que partiellement limité par les instruments internationaux qui garantissent à tout individu, d'une part, la reconnaissance de sa personnalité juridique, et d'autre part, la jouissance des droits de l'homme.»*[105].

Les États, donc, sont en principe libres pour restreindre la capacité de jouissance de certains droits de certaines catégories de personnes, notamment des étrangers. Même les documents internationaux protégeant les droits de l'homme n'imposent pas l'égalité de traitement entre les nationaux et les non-nationaux et reconnaissent les prérogatives des États de créer des distinctions concernant soit le droit privé, soit le droit public.

Le droit brésilien distingue les concepts de personnalité, capacité de droit et capacité de fait. La personnalité est l'aptitude à acquérir des

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de travailleurs brésiliens (« *La Constitution assure aux travailleurs les droits suivants, ainsi que d'autres qui, dans les termes de la loi, visent à l'amélioration de leur condition sociale : (...) XII – la fixation de pourcentages d'employés brésiliens dans les services publics donnés en concession et dans les établissements de certaines branches commerciales et industrielles »),* la Constitution actuelle est silencieuse par rapport à la question.

104 *V.* Jacob Dolinger, *Das Limitações ao Poder de Expulsar Estrangeiros*. In : *Estudos em Homenagem ao Professor Haroldo Valladão* (1983).

105 Marie-Laure Niboyet et Géraud de Geouffre de la Pradelle*, Droit International Privé 639 (2007).*

droits et contracter des obligations dont toute personne est dotée [106]. Ce concept a deux sens techniques: le premier se rapporte à la qualité de la personne pour être sujet de droits, alors que le deuxième concerne le bien juridique inhérent à la dignité humaine[107]. La capacité de droit est la faculté abstraite de la personne de jouir de ses droits. Elle peut ou non, toutefois, être accompagnée de la capacité de fait, qui signifie l'aptitude de l'individu à acquérir des droits et aussi à en jouir ou à les exercer sans assistance ou représentation[108].

La capacité de l'étranger peut être partiellement limitée en quelques circonstances. Il s'agit, parmi autres, des restrictions qui sont imposées par la loi, en ce qui concerne des situations déterminées, des dérogations ponctuelles au principe de l'assimilation des étrangers aux nationaux en droit privé, telles que l'interdiction d'avoir des propriétés dans certaines régions ou d'être actionnaire d'une société. Ces limites, donc, n'affectent pas la personnalité juridique de l'étranger, vu que le droit d'être reconnu en tant que personne devant la loi ne lui est pas nié.

La capacité pour exercer un droit (capacité de fait) est la capacité d'agir en son propre nom dans la sphère juridique. Toute personne domiciliée dans le pays l'a[109], indépendamment de sa nationalité, à l'exception des individus suivants : les mineurs de 18 ans; les handicapés mentaux qui n'ont pas le discernement nécessaire pour pratiquer les actes de la vie civile; ceux qui, bien que par une cause transitoire, ne peuvent pas exprimer leur volonté ; les ivres naturels; les toxicomanes ; ceux qui ont leur discernement réduit par déficience mentale; les exceptionnels, qui n'ont pas eu un développement mental complet ; et les prodigues[110].

Ces règles de capacité n'affectent que ceux qui sont domiciliés au Brésil; si un étranger est domicilié dans un autre pays et a besoin d'exercer un droit au Brésil, sa capacité pour cela sera régie par les lois du pays de son domicile. Ainsi, tout étranger domicilié au Brésil qui a plus de 18 ans et qui n'a aucune des caractéristiques énumérées ci-dessus peut, sans aucune autre formalité, signer un contrat, se marier ou contracter avec quelqu'un au Brésil. Ainsi, on peut entrevoir deux situations différentes: (1) une personne qui a la personnalité juridique et la capacité d'acquérir un droit spécifique peut, selon les lois du pays de son domicile, ne pas avoir la capacité pour exercer ce droit; ou (2)

106 Caio Mário da Silva Pereira, *Instituições de Direito Civil*, v. 1, 213-14 (2004).

107 Gustavo Tepedino, *Temas de Direito Civil* 26 (2004).

108 Caio Mário da Silva Pereira, *Instituições de Direito Civil*, v. 1, 263 (2004).

109 Au Brésil, la capacité d'exercer un droit est réglée pa la loi du domicile de la personne concernée (Loi d´ Introduction aux Normes du Droit Brésilien: *« Article 7 : La loi du pays où la personne est domiciliée détermine les règles sur le commencement et la fin de la personnalité, le nom, la capacité et les droits de famille »).*

110 Code Civil, articles 5 e 6.

une personne domicilié au Brésil qui a la personnalité et la capacité d'exercice de droits selon la loi brésilienne peut ne pas avoir sa capacité reconnue pour acquérir un droit spécifique, selon la *lex fori*, du fait qu'il est étranger. Dans ce cas, l'individu ne pourra pas exercer ledit droit, alors que dans le premier exemple il pourra, mais représenté par une autre personne.

Somme toute, même ceux qui ont les deux capacités susmentionnées (de droit et de fait) peuvent être privés de l'exercice de certains droits au Brésil, dû à une interdiction spécifique contenue dans la Constitution ou dans la législation ordinaire. Autrement dit, l'étranger peut subir quelques limitations en certaines matières, telles que celles concernant l'acquisition d'immeubles situés dans des régions rurales[111], de navires brésiliens[112] ou de moyens de communication[113]. Cependant, ces restrictions aux droits des étrangers sont des exceptions à la règle et qui sont nécessairement justifiées par d'autres principes invoqués par la politique constitutionnelle.

C. Accès à la justice

Conformément à ce qu'on avait mentionné ci-dessus, à tout étranger, résident ou non au Brésil, est garanti le droit d'accéder à nos tribunaux pour obtenir l´assistance juridictionnelle, soit en tant que demandeur, soit en tant que défendeur[114]. Toutefois, le Code de Procédure Civile exige une caution à tout plaideur qui n'est pas domicilié au Brésil et qui n'y a pas de biens, soit-il national ou étranger[115]. Aux étrangers résidents est garanti le droit d'être assisté par des avocats publics, s'ils ne peuvent pas en contracter un[116].

111 Constitution de 1988, article 140; Loi n° 5.709/1971; Decret n° 74.965/1974.

112 Constitution de 1998, article 178, § 2°.

113 Constitution de 1998, article 222.

114 V. Cândido Rangel Dinamarco, *Sobre a tutela jurisdicional ao estrangeiro* 169. In : *Revista Forense*, v. 357, sept.-oct./2001: *« Il n' existe pas, à ce propos, de restriction en référence aux étrangers, voire lorsqu'ils ne sont résidents du territoire national, compte tenu de l'amplitude et de la* ***mens*** *des garanties constitutionnelles des doits fondamentaux ; l'origine du sujet est un facteur qui ne peut pas être pris en considération, sous peine d' infraction directe au contenu de l' article 3, alinea IV, de la Constitution Fédérale et au système de garanties entièrement considéré » (« Não existe a esse propósito uma só restrição em referência aos estrangeiros, ainda quando não residentes no território nacional, em vista da amplitude e da mens das garantias constitucionais dos direitos fundamentais; a origem do sujeito é fator que não pode ser levado em consideração, sob pena de infração direta ao disposto no art. 3°, inciso IV, da Constituição Federal e ao sistema de garantias como um todo »).*

115 Code de Procédure Civile, article 845.

116 Constitution de 1988, article 5, LXXIV ; Loi n° 1.060/1950.

D. Participation à la vie économique

La règle quant aux droits privés, c'est l'assimilation entre les nationaux et les étrangers. L'ancien Code Civil Brésilien, de 1916, contenait une norme qui expressément établissait le principe[117], mais qui n'a pas été reproduite dans le Code Civil, de 2002. Toutefois, la tendance du droit conventionnel est la consécration de ladite règle, tout en assimilant en droit civils, en règle, les nationaux et les étrangers[118]. La règle admet, toutefois, des dérogations ponctuelles auxquelles même les documents internationaux de protection des droits de l'homme ne s'opposent pas.

Ainsi le Pacte des Nations Unies sur les Droits Économiques, Sociaux et Politiques, dans son article 2 (3) établit une exception expresse à la règle de non-discrimination et par conséquent au principe de l'assimilation. Elle détermine que, quant aux droits économiques, les pays en développement peuvent exclure les non-nationaux de la jouissance desdits droits.

La règle, c'est que les activités économiques qui ne sont pas permises aux étrangers ordinaires peuvent l'être par des traités bilatéraux. Par conséquent, les droits qu'ils accordent ne seront pas garantis à tout individu, mais seulement aux nationaux de certains États, c'est-à-dire aux nationaux des pays qui sont parties à ces traités.

La plupart des conventions internationales sur les droits de l'homme garantissent le droit à la propriété privée, mais soumis à des limitations[119]. D'un côté, des instruments internationaux consacrent aussi ce droit dans le contexte de la protection contre l'expropriation. De l´autre côté, le droit pour l'étranger d'acquérir des propriétés n'est pas garanti sans limitation. Ainsi, un étranger peut être empêché d'acquérir une propriété si l'intérêt public l'exige. Une fois acquise avec la permission des lois locales, toutefois, la propriété ne pourra pas être expropriée sans indemnisation[120]. Au niveau international, donc, la

117 Article 3 : *« la loi ne fait pas de distinction entre nationaux et étrangers quant à l'acquisition et à la jouissance des droits civils ».*

118 Code Bustamante, article 1 ; Convention de la Havane, article 5.

119 Déclaration Américaine de Droits et Devoirs de l'Homme, article 23; Déclaration Universelle, article 17; 1er Protocole de la Convention Euopéenne, article 1er ; Convention Américaine, article 21; Charte Africaine, article 14.

120 Des questions concernant les distinctions entre étrangers et nationaux en ce qui concerne l'expropriation ont été débattues. Par rapport aux distinctions fondées uniquement sur le fait que l'individu est étranger, est-ce qu'elles heurteraient la régle de droit international qui interdit la discrimination, ou autrement est-ce qu'elles pourraient être considérées parmi les exceptions admises par le droit international - c'est-à-dire la sécurité nationale, les intérêts nationaux ou l'ordre public -? Je crois que, si une règle comporte des distinctions fondées sur le domicile et sur la résidence, elle peut éventuellement être légale et valide, mais celles fondées uniquement su la condition nationale de l'individu ne le peuvent pas. En relation aux standards

protection n'est garantie qu'à l'usage et au profit de la propriété une fois acquise, mais elle ne l'est pas quant à son acquisition, d'après la plupart des instruments internationaux[121].

Les étrangers admis au pays en tant que résidents permanents, résidents temporaires[122] et réfugiés doivent s´enregistrer dans les 30 jours après leur entrée. Ceux qui sont enregistrés au Brésil reçoivent une carte d'identité[123], document qui doit être présenté pour obtenir la permission pour pouvoir travailler[124].

La Constitution Brésilienne interdit aux étrangers de s'engager dans certaines activités. Ils ne peuvent pas être propriétaires ou contrôler les embarcations brésiliennes[125] ; être propriétaire des moyens de communication[126] ; obtenir des concessions pour la minoration[127] ; obtenir des ressources hydriques et d'autres ressources naturelles[128].

E. Droits politiques

Les droits politiques sont ceux qui garantissent à l'individu le pouvoir de participer directement ou indirectement à l'établissement ou à l'administration du gouvernement[129]. Ils ne sont pas uniquement liés à la gestion de sujets de l'État et à l'exercice des fonctions de responsabilité pour la conduite du gouvernement, mais aussi au choix de ceux qui vont gérer l'État et à la détermination ou au contrôle de la politique publique d'un pays.

Sont compris dans cette définition les droits d'exercer un service public en général; de voter et d'être élu[130] ; d'exercer des fonctions spécifiques

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de compensation, v. Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 *Am.J.Int'l Law* 474 (1991).

121 V. Dennis Campbell e David S. Tenzer, Alien Acquisition of Real Property: A Practitioner's Perspective. In: *Legal Aspects of Aliens Acquisition of Real Property* 6-7 (1980): *« (...) the well-established principle of international law that a nation may absolutely prohibit an alien from taking, holding or owning land within its sovereign territory. Because an alien does not necessarily have any rights in this regard, it follows that whatever rights are granted may be conditioned as the sovereign authority chooses. Furthermore, any economic activity conducted within the territorial borders can be similarly regulated or conditioned »).*

122 Ceux qui sont mentionnés au Statut de l'Étranger, article 13, I, IV – VII.

123 Statut de l'Étranger, article 30.

124 Statut de l'Étranger, article 30.

125 Decret-loi n° 499/1969; Decret-loi n° 670/1969, article 3.

126 Constitution de 1988, article 178, § 2.

127 Constitution de 1988, article 222.

128 Constitution de 1988, article 176, § 1º.

129 *Black's Law Dictionary*, Direito Político. V. aussi José Afonso da Silva, *Curso de Direito Constitucional Positivo* 344 (2005).

130 Ces trois premiers droits sont les droits politiques classiques, les droits politiques fondamentaux et originaux, en opposition aux autres droits, définis comme droits politiques dérivés.

dans le Pouvoir Exécutif ; de participer aux jurys et aux forces armées.

En règle générale, les droits politiques ne sont garantis qu'aux citoyens. La citoyenneté est un concept de droit interne, en ne s'appliquant qu'aux individus nationaux d'un certain État qui sont dans la jouissance pleine des droits politiques. Citoyen n'est pas un synonyme de national: pour être citoyen, il faut avoir des droits politiques, de manière que tout national ne l'est pas[131].

La citoyenneté tient en considération le lien de droit public entre l'individu et l'État. Il faut rappeler que, toutefois, son concept diffère de celui de la nationalité dans la mesure où la citoyenneté présuppose la capacité de l'individu d'influer sur la formation de la volonté nationale. Pour autant, divers droits sont reconnus (droit de liberté, d'égalité etc.) comme nécessaires à l'exercice de droits politiques actifs et passifs[132]. Ainsi, dans la sphère des droits politiques, l'existence de distinctions entre les citoyens et les étrangers est largement acceptée[133] et la règle, au contraire de celle en droit privé, c'est que les étrangers sont privés des droits politiques.

Ainsi, seulement les brésiliens peuvent voter aux élections fédérales, des États et des Municipalités[134] et seulement les nationaux peuvent concourir à des postes publiques[135]. Il s'agit d'une traduction de la notion d'autodétermination des peuples. Toutefois, le fait que les étrangers n'ont pas ces droits est basé sur la théorie selon laquelle seulement les citoyens peuvent participer du gouvernement d'un pays[136];

131 Charles Gordon e Harry N. Rosenfield, *Immigration Law and Procedure*, observent que ceratins citoyens ne jouissent pas entièrement des droits politiques, tels que les mineurs (*Oregon v. Mitchell*, 400 U.S. 112 (1970)), les femmes (*Minor v. Happersett*, 88 U.S. 162, 22L. Ed. 627 (1874)), les personnes condamnées pour certains crimes et résidentes dans District de Columbia (Plan de Réorganisation n° 3 de 1967, 5 USC App). Il faut souligner que cela ne veut pas dire que certains citoyens ne jouissent pas de droits politiques, mais que certains nationaux ne sont pas citoyens.

132 T.H. Marshall,. *Cidadania, Classe e Status,* Trad. Meton Porto Gadelha (1967). José Murilo de Carvalho, *Cidadania no Brasil: o longo caminho* (2001); Ricardo Lobo Torres, *A Cidadania Multidimensional na era dos direitos*. In : Ricardo Lobo Torres (Org.), *Direitos Fundamentais* (2001).

133 Paul Lagarde, in *Studi Emigrazione. Études Migrations 10 (1978)* souligne l'idée que le refus de certains droits politiques aux étrangers est une tradition de la plupart de démocraties et dit : « *le refus de tout droit politique aux étrangers est un tabou sur lequel se sont constitués la plupart des regimes democratiques du monde occidental »*. Francis Delpérée, *Les Droits Politiques des Étrangers* 3 n° 1 (Que sais-je?, 1995). V. encore Gilmar Ferreira Mendes, *Direito de Nacionalidade e Regime Jurídico do Estrangeiro* 17. In : *Direito Público*, n° 14, out.-dez./2006.

134 Constitution de 1988, article 14, § 2°.

135 Constitution de 1988, article 14, § 3°, I.

136 V. Déclaration Universelle de Droits de l'Homme, articles 20 (1 et 2) ; Pacte International sur les Droits Civils et Politiques, article 25 ; Convention Américaine sur les Droits de l'Hommes, article 23 ; Déclaration Américaine de Droits et Devoirs de l'Homme, articles XX, XXXII,

quelques pays néanmoins garantissent certains droits politiques aux étrangers résidents. Ainsi, les nationaux portugais résidant au Brésil y jouissent de certains droits politiques, en raison du traité signé entre les pays et de l'article 12, paragraphe 2, de la Constitution Fédérale. Il faut qu'ils y résident de manière permanente depuis au moins trois ans et qu'ils en fassent la demande à l'autorité compétente[137].

7. Le droit international et la constitution de 1988

La plupart des règles de droit international sont adressées aux États et en général ne peuvent être effectives que si les États eux-mêmes sont disposés à les mettre en œuvre. Ainsi, l'existence de conventions internationales protégeant les droits de l'homme aurait une importance réduite si les États n'accomplissaient pas les obligations qui leur sont imposées par ces textes.

La dernière section de ce travail examinera la posture adoptée par le Brésil en relation à la communauté internationale en ce qui concerne le respect de la condition des étrangers, afin de montrer l'étendue de l´engagement du pays avec les principes internationaux concernant cette matière. La Constitution Brésilienne de 1988 a adopté et/ou a confirmé les principes de droit international suivants, en ce qui concerne le droit des étrangers:

1. *Les nationaux ont le droit d'entrer, de vivre, de se déplacer librement et de ne pas être expulsés du territoire du pays*[138]. Aux étrangers, par contre, ne sont pas garantis les droits d'entrer, de résider et de se déplacer dans le territoire national; même s'ils obtiennent une permission pour cela, ce privilège pourra être abrogé, conformément à la loi. L'article 5, XV et LI de la Constitution de 1988 confère aux brésiliens le droit d'entrer dans le pays et empêche sa déportation, expulsion ou extradition.
2. *Les nationaux et les étrangers ont le droit de quitter le pays*[139]. L'article 5, XV de la Constitution de 1988 n'impose pas de limites au droit de quitter le pays.

XXIV et XXXVIII ; Convention de la Havane sur la Condition des Étrangers, article 7 (1928).

137 Traité de l'Amitié, Coopération et Consulte, entre la République Fédérative du Brésil et la République Portugaise, article 17 (1).

138 Selon la Déclaration Universelle de Droits de l'Homme, article 13 (2) ; Convention Américaine sur les Droits de l'Homme, article 22.5 (1969) ; Déclaration Américaine des Droits et Devoirs de l'Homme, article VIII (1948) ; Convention Européenne de Droits de l'Homme, 4e Protocole, article, article 3 (1) (1968) ; Convention de la Havane sur la Condition des Étrangers, article 6 (1928).

139 Fondé sur la Déclaration Universelle, article 13 (2) ; le Pacte International sur les Droits Civils et Politiques, article 12 (2) (1966) ; la Convention Européenne de Droits de l'Homme, 4e Protocole, article 2 ; et sur la Convention Américaine sur les Droits de l'Homme, article 22, (3 et 4).

3. *Tous doivent avoir le droit à la vie en famille*[140]. L'article 5 de la Constitution de 1988 et le Statut de l'Étranger prennent en considération, lorsqu'ils traitent de l'entrée et de l'expulsion des étrangers, l'existence d'une famille brésilienne de l'étranger.
4. *Tous doivent avoir le droit à la liberté d'association*[141]. Ce concept inclut la liberté de créer une association et de s'associer à une déjà existent; le droit de demeurer associé et d'être actif dans l'organisation associative; la liberté de s'associer ou de quitter l'organisation; la liberté de grève. Ces droits sont prévus par les articles 8 et 9 de la Charte de 1988.
5. *Le droit à l'accès à la justice doit être garanti à tous*[142]. Ce droit est prévu dans l'article 5, XXXV de la Constitution de 1988.

Enfin, les droits qui sont niés aux étrangers au Brésil par la Constitution de 1988[143] – le droit de participer à la vie politique de l'État et l'accès aux postes publiques – sont des droits dont la négation à l'étranger est permise par le droit international[144].

Ainsi, bien que le Brésil n'ait pas ratifié beaucoup de conventions internationales à propos des droits des étrangers, la Constitution de 1988 a réaffirmé l´engagement du pays avec les principes fondamentaux établis par le droit international dans le champ de la protection à l'étranger, et les restrictions à ses droits, y compris celui d'entrer et de séjourner au pays, se justifient par d'autres objectifs établis dans la Constitution, de manière qu'il n'y a pas de discrimination arbitraire.

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Panor. Braz. law - Year 3 - Numbers 3 and 4 - 2015 - pp. 38 - 64.
ISSN 1075-1343 (print)
ISSN 2318-1516 (online)
DOI: http://dx.doi.org/10.17768/pbl.a3.n3-4.p38

LE NEOCONSTITUTIONNALISME AU BRÉSIL : VERS L'EFFECTIVITE DES DROITS SOCIAUX ET LA LUTTE CONTRE LA CORRUPTION

THE NEO-CONSTITUTIONALISM IN BRAZIL: TOWARDS THE EFFECTIVENESS OF SOCIAL RIGHTS AND THE FIGHT AGAINST CORRUPTION

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Résumé : L'effectivité des droits sociaux est le principal défi du constitutionalisme brésilien. Pour le surmonter, il faut combattre la corruption dans la gestion de l'Etat et la crise de confiance. Cette étude consiste à prouver que la loi contre le manquement à l'obligation de probité publique constitue l'un des plus importants instruments légaux pour l'Etat démocratique de droit au Brésil. C'est par la Loi qu'il est possible de rendre viable la bonne gouvernance, de rétablir la confiance populaire dans les institutions d'État, d'améliorer la distribution des revenus, de donner davantage d'efficience aux services publics et aux politiques sociales, en plus de sauvegarder la dignité et l'estime de soi de la personne humaine.

Mots-clés: Neoconstitutionalisme - Effectivité des droits sociaux – Corruption - Manquement à l'obligation de probité

Abstract: The effectiveness of social rights is the main challenge of the Brazilian constitutionalism. To overcome it we must fight against corruption in public administration and against the crisis of confidence. This research consists in proving that the law against administrative improbity constitutes one of the most important legal instruments for strengthening the Democratic State of Law in Brazil. Through this, is

possible to make good governance viable, to restore public confidence in the State's institutions, to improve income distribution, to give greater efficiency to public services and social policies in addition to safeguarding the dignity and self-esteem of the human person.

Keywords: Neo-constitutionalism - Effectiveness of social rights – Corruption - Administrative improbity

1. Introduction

Après 21 ans de dictature militaire (1964-1985), le Brésil a commencé le processus de démocratisation. En 1988, l'Assemblée nationale constituante a promulgué la nouvelle Constitution de la République fédérative du Brésil, plus connue comme « Constitution citoyenne ». C'était la fin d'un régime autoritaire, antidémocratique, violent, responsable de profondes violations des droits de l'Homme. Le texte constitutionnel était le dépositaire de toutes les espérances du peuple, les consensus possible des forces politiques du pays. Quel est le profil de la nouvelle Constitution ? Quel est son principal fondement axiologique ? Quel est le degré d'effectivité des droits fondamentaux ?

Le constitutionalisme brésilien a été forgé dans un climat de reconstruction nationale, dans l'esprit de la protection des droits de l'Homme et des institutions démocratiques. La Constitution de 1988 représente les efforts de toutes les idéologies politiques pour construire un État démocratique de droit ancré sur des principes axiologiques dotés de force normative et impérative.

Le nouvel ordre constitutionnel privilégie les droits de l'Homme et les libertés publiques. Pour la première fois dans son histoire, le Brésil a assumé la tâche de promouvoir les droits sociaux, tels que la santé publique, l'éducation, le travail, l'habitation, les loisirs, la sécurité sociale, la protection des personnes défavorisées, la protection de la maternité et de l'enfance (art. 6). Parmi ceux-ci, nous pouvons aussi ajouter le droit à l'administration publique probe et transparente (art. 37, caput).

Ces droits sont le produit du libéralisme social adopté par les constituants brésiliens, inspirés du modèle rédistributif où l'égalité d'opportunités, la solidarité et la lutte contre la pauvreté sont les plus importants objectifs de l'État-Providence. Autrement dit, le but de la république est le bien-être de son peuple. Mais celui-ci passe par une bonne utilisation des ressources, par une chasse au gaspillage, parmi d'autres actions publiques. Il exige une bonne redistribution des revenus et une forte présence des services publics (Aubry, 2013)[1]. Bien sûr que le bon fonctionnement de ce système exige l'engagement de la

1 Martine Aubry. Extrait du livre Il est grand temps (Albin Michel), paru en 1997. Cité dans l'introduction du dossier État-Providence : un modèle à réinventer. (Le Monde/Histoire, 2013, p. 5).

population dans la lutte contre la corruption, puisqu'elle dégrade non seulement l'économie et la gouvernance du pays, mais aussi la qualité des services publiques offerts aux citoyens.

Le modèle de constitutionnalisme adopté par le pays est ancré sur la dignité de la personne humaine comme principe majeur. Sur le plan axiologique, d'autres principes sont dotés de force impérative : la liberté, l'égalité, la solidarité et la démocratie. L'engagement de l'Etat brésilien passe aussi par le pluralisme politique et par la lutte contre toutes les formes de discrimination en raison de la conviction religieuse, politique, philosophique ou raciale. En plus, la Constitution assure la pleine indépendance du pouvoir judiciaire pour juger des affaires relatives au disfonctionnement des politiques publiques dans tous les niveaux de la fédération, y compris les infractions de manquement de probité. On peut affirmer qu'il existe une « dimension politique de la juridiction constitutionnelle ».

2. Le constitutionnalisme Bresilien : entre les principes et règles de droit

Au Brésil, les droits sociaux sont dotés de force impérative et sont passibles d'application immédiate par le juge. En plus, le juge a le pouvoir de se manifester sur des aspects constitutionnels des politiques publiques, des programmes sociaux et des discriminations positives, sans que cette intervention soit considérée une violation à la séparation des pouvoirs ou du principe démocratique. Tous les citoyens sont sujets des droits sociaux, universels et imposables à l'État. Ils sont titulaires du pouvoir d'exiger des prestations positives, concernant le bien-être de l'individu et de la société. L'effectivité des droits sociaux exige un ensemble de mesures administratives, législatives et judiciaires susceptibles d'assurer des conditions essentielles à la dignité humaine, afin que chaque personne puisse se développer selon ses aspirations et talents (minimum existentiel). Ce sont des droits à des prestations sociales, telles comme l'accès universel à l'enseignement public, au système de santé, aux transports collectifs, à l'emploi etc. (CF, art. 6).

La jurisprudence brésilienne, sous l'influence de la doctrine allemande produite après la Seconde Guerre mondiale, s'est éloignée du positivisme normatif, dont Kelsen est son principal représentant, pour adopter une orientation post-positiviste, selon laquelle l'interprétation de la règle constitutionnelle présuppose le rapprochement entre la morale et le droit. Au lieu de la subsomption, le discours juridique repose sur des arguments rationnels dotés de forte connotation axiologique. Les juges font souvent appel à des principes moraux pour le bien-fondé de leurs décisions. Selon le degré d'abstraction les normes constitutionnelles sont considérées des *règles* ou des *principes*, thèse soutenue par Ronald

Dworkin (2002, p.73) et Robert Alexy (2004, p. 36), parmi d'autres auteurs. Dans le texte constitutionnel, il y a une sorte de cohabitation entre les deux espèces normatives.

Les règles ont un faible degré d'abstraction. Généralement elles ne suscitent aucun doute sur son contenu. C'est la raison pour laquelle leur application est conditionnée à la subsomption d'un fait sous une règle de façon presque mécanique. En revanche, les principes ne sont pas que des normes constitutionnelles ouvertes, porteuses de contenus indéterminés et dotées de grande abstraction en ce qui concerne la prescription normative du droit. Ces aspects exigent un raisonnement particulier du juge lors de l'interprétation des normes constitutionnelles. La pondération est la méthodologie utilisée pour affronter les difficultés herméneutiques et les antinomies entre les principes, assez fréquentes quand il s'agit de l'application des droits fondamentaux. Dans une étude critique sur ce modèle, Pierre Bruné observe que « l'interprétation est donc censée pouvoir parvenir à une solution juste parce que le juge consulte l'univers de la morale et de la philosophie politique. Le juge disposera certes d'un pouvoir discrétionnaire parce que les principes qu'il doit appliquer ne peuvent l'être de façon mécanique et exigent qu'il exerce son jugement prudentiel»(BRUNE, [s.d], p. 4). Nous pouvons présenter deux objections à cette critique. D'abord le juge n'a pas de pouvoir discrétionnaire pour décider selon ses convictions morales, politiques ou idéologiques. Sa subjectivité est très restrictive, puisqu'il a l'obligation de démontrer son raisonnement. Le discours du juge fondé sur des principes doit respecter des critères rationnels – Robert Alexy (2004, pp.39-48) en propose trois (pertinence, nécessité et proportionnalité) – et sur des arguments solides afin de convaincre les tribunaux de la conformité de la décision. Ensuite, cette méthodologie d'interprétation est la plus appropriée pour remplir de vide des principes, qui sont des énoncés vagues, ambigus, ouverts et indéterminés. Comment définir de façon générique dignité, solidarité, fonction sociale de la propriété ? Le rôle du juge est de trouver le contenu des principes constitutionnels lors de l'appréciation de certains dossiers, surtout les litiges difficiles, complexes (*hard cases*).

Pour clarifier cette question, il est possible de s'interroger : comment pouvons-nous distinguer un principe d'une règle ? Plusieurs auteurs se sont consacrés à ce sujet, surtout Robert Alexy et Ronald Dworkin. Mais le concept est très complexe, ce qui présente quelques difficultés théoriques.Il est possible de présenter quelques pistes. D'abord, les principes sont des normes juridiques de droit constitutionnel. Ils présentent une composante axiologique accentuée. Egalement, ce sont des normes indéterminées, vagues, ce qui pose quelques difficultés au niveau de l'interprétation. Finalement, les principes sont des normes fondamentales dans le système juridique.

Riccardo Guastini(2104, p. 2) présente trois arguments pour justifier la nature fondamentale des principes constitutionnels :

> a) « premièrement, il s'agit d'une norme qui caractérise le système juridique en question, en tant qu'élément essentiel à l'identification de la physionomie axiologique du système ;
> b) deuxièmement, il s'agit d'une norme qui donne fondement axiologique (une justification éthico-politique) à une pluralité d'autres normes appartenant au même système ;
> c) troisièmement, il s'agit d'une norme qui n'exige à son tour aucun fondement, aucune justification éthico-politique, car elle est conçue dans la culture juridique existante comme un axiome, c'est-à-dire une norme évidemment juste et correcte ».

Sur le point de vue théorique, le constitutionalisme brésilien est très attaché à l'effectivité des droits fondamentaux et à la protection du patrimoine public, celle-ci étant essentielle à l'amélioration de l'action publique à tous les niveaux. A partir de la promulgation de la Constitution de 1988, la doctrine et la jurisprudence ont beaucoup évoluées. Parmi les transformations les plus importantes, quelques postulats peuvent être cités: a) La reconnaissance de la force normative de la Constitution ; b) le principe de la progressivité des droits sociaux et la prohibition de la rétroactivité sociale; c) l'élargissement de la juridiction constitutionnelle ; d) la nouvelle herméneutique constitutionnelle ; e) le respect du droit supranational en matière de droits de l'Homme; f) la constitutionnalisation des branches du droit.

3. La reconnaissance de la force normative de la constitution

Le Brésil, comme tous les pays qui ont vécu des dictatures militaires, a adopté une constitution analytique, autrement dit, un texte long et détaillé a fin de se prémunir contre tout risque de retour en arrière. L'introduction des mécanismes de protection des droits fondamentaux ainsi qu'une complexe procédure législative envisagent d'éviter des propositions d'amendements constitutionnels susceptibles de mettre en risque les principaux fondements de la démocratie brésilienne. La rigidité est devenue un véritable rempart pour protéger la stabilité et la pérennité de la Constitution. Les libertés publiques ont été intégrées au noyau dur de la Constitution, insusceptibles d'être supprimées par le Congrès National. Un complexe système de contrôle de constitutionnalité a été conçu sous l'inspiration du modèle nord-américain et du modèle autrichien : soit le juge le fait dans des dossiers ordinaires où la question est suscitée par l'une des parties du litige, soit le Tribunal Fédéral Suprême, en tant que Cour Constitutionnelle procède à l'analyse de conformité de la loi de façon abstraite.

En plus, les constituants ont confié aux magistrats la tâche

d'exercer le contrôle de la gestion du patrimoine public dans tous les niveaux de la fédération. Ce phénomène est nommé « la judiciarisation de la politique », puisque la Constitution assure au Pouvoir Judiciaire la mission de décider sur la validité des politiques publiques dans tous les secteurs des droits sociaux, demander la prestation de comptes aux gouvernants, sanctionner la pratique de la corruption et exiger l'amélioration des services publics.

Au lieu d'être seulement un texte politique et structurant des institutions de l'État, la Constitution est considérée comme un document normatif, impératif et obligatoire comme n'importe quelle règle juridique. Son efficacité est à la fois verticale et horizontale puisque le juge peut l'appliquer également dans des affaires de droit public et de droit privé.

4. Le principe de la progressivite des droits sociaux et le principe de la prohibition de la retroactivite sociale

L'article 2 du *Pacte international des droits économiques, sociaux et culturels, adopté par les Nations Unies* du 16 décembre 1966 (entrée en vigueur le 13 janvier 1976, a consacré le principe de la progressivité dans son article 2, par. 1 *in verbis* :

« Chacun des Etats parties au présent Pacte s'engage à agir, tant par son effort propre que par l'assistance et la coopération internationales, notamment sur le plans économique et technique, au maximum de ses ressources disponibles, en vue d'assurer progressivement l'exercice des droits reconnus dans le présent Pacte par tous les moyens appropriés, y compris en particulier l'adoption des mesures législatives[2] ».

Sur ce principe, nous présentons deux remarques :

Pour respecter cette règle impérative de droit international, le Brésil doit prendre toutes les mesures possibles pour faire avancer les politiques publiques en envisageant d'élargir les droits sociaux de façon à bénéficier tous les citoyens. Le Pacte reconnaît que sa mise en œuvre doit être progressive, en respectant les conditions économiques, sociales, politiques et culturelles de chaque pays. La protection sociale exige de gros investissements financiers qui dépendent de la prévision budgétaire et de la planification. Les besoins sociaux augmentent à chaque jour, pendant que les ressources publiques sont limitées. Par conséquent, le gouvernement doit faire des choix difficiles, parfois tragiques en ce qui concerne la distribution sectorielle des dépenses publiques. Mais le principe de la progressivité exige que l'État avance vers l'effectivité des droits sociaux et le bien-être de la population.

Le principe de la progressivité évoque l'idée selon laquelle

2 Le PIDESC a été ratifié par le Brésil par le Décret 591, du 07 juillet 1992.

l'effectivité des droits sociaux est conditionnée à une certaine gradualité et dépend de plusieurs variables. Il faut reconnaître que les droits sociaux ne peuvent pas être assurés pleinement en un court laps de temps. Mais les États doivent adopter des mesures concrètes qui démontrent son engagement à donner la plus vaste effectivité à ces droits. Dans l'Observation n. 3/90, le Comité DESC souligne que, même si les États démontrent que les ressources sont insuffisantes pour promouvoir certaines obligations sociales, ils doivent s'efforcer « d'assurer l'assurance la plus large possible des droits pertinents dans les circonstances qui lui sont propres ». Evidemment ces droits sont universels : toutes les personnes en sont titulaires. Mais dans un contexte de crise économique, de récession ou de grave pénurie, les gouvernements peuvent adopter des politiques sélectives, pour favoriser les démunis et les groupes vulnérables, lesquels doivent être soutenus par des programmes sociaux.

La deuxième remarque concerne l'interdiction de la rétroactivité sociale. Le législateur, le juge ou le gouvernement ne peuvent pas supprimer certaines prestations sociales essentielles à la dignité de la personne humaine, sans adopter des mesures compensatoires. C'est pour ça que l'Observation 3/90 du Comité DESC affirme que « toute mesure délibérément régressive dans ce domaine doit impérativement être examinée avec le plus grand soin, et pleinement justifiée par référence à la totalité des droits sur lesquels porte le Pacte, et ce en faisant usage de toutes les ressources disponibles ». La règle générale est la réalisation progressive des droits économiques, sociaux et culturels ; l'adoption de mesures régressives est exceptionnelle et impérativement fondées sur des justificatives rationnelles.

5. L'elargissement des compétences de la juridiction constitutionnelle

La Constitution de 1988 a renforcé les compétencesdu pouvoir judiciaire et lui a confié, parmi d'autres tâches, le contrôle de constitutionnalité des politiques publiques, des dépenses gouvernementales, des financements de campagnes électorales et, bien sûr, de la sanction des actes de corruption des hauts fonctionnaires et des élus. (articles 101-103).

Pour bien exercer leurs fonctions, ils jouissent de l'autonomie administrative et financière, l'inamovibilité, la nomination à vie et l'irréductibilité de rémunération. Le Tribunal Fédéral Suprême est à la fois une cour constitutionnelle et un tribunal qui a des compétences spécifiques pour juger des affaires en première instance, comme, par exemple, des infractions de droit commun commises par le président de la République, membres du Congrès National et le Procureur général de

la République (CF, art. 102,b). Les juges de siège, ainsi comme tous les tribunaux brésiliens peuvent se prononcer sur la constitutionnalité des traités internationaux ou d'une loi fédérale. Ils ont la tâche de décider sur la validité d'une loi ou d'un acte de gouvernement local contesté au regard de la Constitution (CF, art. 102, III, a, b, c).

Lorsque le juge analyse un dossier de corruption ou une affaire de manquement au devoir de probité publique, il doit se prononcer tant sur les infractions commises que sur la constitutionnalité de certains actes administratifs comme, par exemple, les dépenses pour la construction d'un hôpital, un contrat de prestation de services, la mise en œuvre d'un programme social, etc. Ainsi, dans le système brésilien, le pouvoir judiciaire est doté de compétences pour décider sur des activités des élus, surtout les membres du gouvernement et leurs auxiliaires (ministres, secrétaires d'État, directeurs des entreprises publiques, etc.).

La « judiciarisation de la politique » est un phénomène du constitutionnalisme contemporain susceptible de tensions et de critiques. Les opposants à tel modèle de constitutionnalisme argumentent que les décisions judiciaires portent atteinte à la séparation des pouvoirs, empêchent l'implantation des programmes proposés par des partis politiques qui sont au pouvoir, bouleversent la démocratie et réduit l'ampleur des décisions discrétionnaires du gouvernement. Il y a, également, ceux qui affirment que ce modèle incite au « gouvernement des juges » et affaiblit les décisions politiques.

Mais le contrôle des politiques publiques, de l'utilisation des ressources budgétaires et du financement des campagnes électorales est aujourd'hui un mécanisme que s'impose dans tous les pays démocratiques. Il est vrai que quelques affaires excessivement médiatisées, donnent parfois l'impression qu'est en cours une campagne de « criminalisation de la politique », menée par des forces occultes. Pourtant l'action ferme de la Police judiciaire (fédérale et civile) et du Ministère public dans la lutte contre la criminalité en col blanc apporte des résultats positifs. Les affaires « Mensalão » et « Opération Lava-Jato » en sont des exemples paradigmatiques. Il est indiscutable que la condamnation de certains hommes politiques, des fonctionnaires de haut rang et des personnes morales qui ont détourné ou gaspillé le patrimoine public renforceles valeurs républicaines et contribuent à forger une gestion publique responsable, transparente et probe.

6. La nouvelle hermeneutique constitutionnelle

Au Brésil, l'interprétation constitutionnelle est devenue une discipline de grand prestige dans plusieurs facultés de droit. Même dans les tribunaux la construction d'un discours juridique rationnel de forte connotation axiologique est un sujet d'actualité. Plusieurs chercheurs

se consacrent aux études de l'argumentation et de la rhétorique juridique. Les nouvelles méthodes herméneutiques sont conçues pour réduire la subjectivité de juges et favoriser des décisions plus justes et raisonnables

La collision des principes constitutionnels est assez fréquente dans le droit brésilien. Il y a plusieurs situations où des droits fondamentaux du même rang hiérarchique s'entrechoquent. Exemples : liberté de presse et le droit à l'intimité ; la liberté de religion et le droit au repos de voisins ; le droit à la santé et l'insuffisance de ressources budgétaires ; le droit de propriété et la protection à l'environnement, le droit de passation de marchés publics et l'intérêt public. Au lieu de discuter la validité des principes, le juge raisonne en termes de pondération et de prévalence occasionnelle d'un intérêt sur l'autre. L'idée est de les donner la plus vaste applicabilité. C'est pour ça que Robert Alexy affirme que les principes sont des « normes d'optimisation » dont l'effectivité doit être la plus vaste possible devant les circonstances juridiques et sociales (ALEXY, 2004, 37).

A propos de la collision des droits fondamentaux, le juge du Tribunal Fédéral Suprême, Luís Roberto Barroso, argumente qu'il s'agit d'un « phénomène naturel – parce qu'inévitable – dans le constitutionnalisme contemporain. Les Constitutions modernes sont des documents dialectiques qui consacrent des biens juridiques qui s'opposent ». Pour résoudre ces questions pratiques, les méthodes traditionnelles d'interprétation sont insuffisantes, voire dépassées devant la complexité des sociétés modernes. Pour cette raison, la pondération de normes, de biens et de valeurs est la technique la plus efficace pour rendre les droits fondamentaux effectifs. L'auteur suggère que d'abord les juges doivent faire des concessions réciproques, en préservant au maximum chacun des intérêts en conflit. Et puis « procéder au choix du droit qui devra prévaloir concrètement pour être celui qui réalise de la manière la plus adéquate la volonté constitutionnelle» (BARROSO, 2014).

7. La constitutionnalisation des branches du droit

Les Constitutions analytiques ont pour caractéristique principale la densité normative : le texte est long, détaillé, dont l'ampleur abrite plusieurs branches du droit. A tel point qu'aujourd'hui nous pouvons parler de droit civil constitutionnel, droit pénal constitutionnel, droit fiscal constitutionnel et droit administratif constitutionnel. En plus, la Constitution est le fondement de validité des normes de droit infra-constitutionnel. Elle s'impose sur tous les pouvoirs de la République, sans exception. Les valeurs consacrées dans son texte sont porteurs de force impérative dans les relations de droit public et de droit privé.

La constitutionnalisation du droit est un sujet qui a attiré l'attention de plusieurs juristes français, parmi lesquels Georges Vedel, François Luchaire, Louis Favoreu et Dominique Rousseau. Il a été objet de l'atelier « La constitutionnalisation des branches du droit », organisé par l'Association Française des Constitutionnalistes en 1996. Au Brésil, ce phénomène est étudié par des importants auteurs, parmi lesquels Ingo Sarlet, Luís Roberto Barroso et Daniel Sarmento. Dans ce contexte, nous citons également l'article fondateur de Paulo Luiz Netto Lôbo, intitulé « La Constitutionnalisation du droit civil » (LÔBO 1999, 99-109), où ce phénomène est abordé dans le cadre du droit privé.

Georges Vedel souligne que le contrôle de constitutionnalité dans plusieurs secteurs des disciplines juridiques a gagné force à partir de 1981, grâce à certaines circonstances politiques et à l'évolution de la jurisprudence. Ce nouveau modèle a suscité des débats acharnés chez les juristes. Pourtant, l'idée que les règles du droit objectif doivent avoir une base constitutionnelle s'impose dans la majorité des pays occidentaux comme, par exemple, en Espagne, Portugal et Allemagne. Le rôle du juge consiste à faire un contrôle de conformité du droit objectif (infra-constitutionnel), ainsi qu'à combler les lacunes légales à partir de l'interprétation des principes constitutionnels (VEDEL, 1996, p.16).Il est aussi le gardien des droits fondamentaux, dont la dignité de la personne humaine »). Devant les règles juridiques ouvertes, ambiguës, génériques et porteuses de concepts indéterminés, le juge constitutionnel est le protagoniste de l'interprétation, puisqu'il fait la médiation entre l'énoncé normatif et la situation concrète qui est l'objet du conflit intersubjectif d'intérêts. Dans certains dossiers, la décision est, par conséquent, le produit d'un complexe exercice herméneutique. Evidemment, les décisions politiques n'échappent pas au contrôle de constitutionnalité, de légalité et de moralité administrative.

L'objectif de cette forme de raisonnement est de construire un « droit vivant » fondé sur l'interprétation consolidée de la règle constitutionnelle ou de la loi. La jurisprudence est sa principale source, mais pas l'unique. Comme observe Thierry de Manno, « ce qui est déterminant dans la formation du droit vivant, ce n'est pas ni rang ni la fonction de l'autorité juridictionnelle qui l'élabore, mais bien le degré de *consensus* autour d'une interprétation jurisprudentielle de la loi » (DI MANNO, 1996, p.32). Dans le système brésilien, le Tribunal Fédéral Suprême adopte l'interprétation conforme à la Constitution et diffuse des « súmulas vinculantes », qui représentent l'interprétation de la Cour sur des questions controversées. Dotées de force contraignante, elles guident des juges dans les dossiers similaires. De la même façon, les tribunaux sont aussi responsables de construire un cadre jurisprudentiel bien articulé, dont la légitimité est ancrée sur l'accord de la société.

Dans le système brésilien, le juge joue le rôle de protagoniste

de l'interprétation des principes constitutionnels. Parfois c'est lui qui établit son contenu dans certains dossiers. Pourtant, cet « activisme judiciaire » n'est pas exempt de critiques. Parfois nous reprochons au Pouvoir judiciaire d'usurper la fonction législative et administrative, dans la mesure où les magistrats s'immiscent dans la gestion publique et se prononcent sur la validité des lois démocratiquement votées par le Parlement.

La doctrine française utilise l'expression « gouvernement des juges », depuis 1921, proposée par le juriste Éduard Lambert. Cette notion a été diffusée aux États-Unis – « *gouvernment by the judiciary* », qu'aujourd'hui utilisent beaucoup plus la notion de « activisme judiciaire ». Au Brésil, cette dernière expression est vastement utilisée dans la littérature juridique.

L'expression gouvernement des juges est polysémique et controversée. Elle est parfois utilisée de façon péjorative et trompeuse. Cette question a fait l'objet d'une importante recherche menée par Michel Troper et Otto Pfersmann. Ils ont essayé de présenter les principales approches sur ce sujet (2001, p. 24-31). Nous pouvons en retenir quelques-unes. Dans l'exercice de leurs compétences,

a) Les juges ont le pouvoir de prendre des décisions politiques pour défendre les intérêts collectifs ;

b) Les juges peuvent affronter des élus pour les obliger à prendre des décisions concernant l'effectivité des droits fondamentaux, y compris les droits sociaux ;

c) Les juges ont le pouvoir de s'autosaisir lors de l'application des principes : c'est la dimension législative de la juridiction ;

d) Les juges ont le pouvoir d'exercer le contrôle de constitutionnalité des lois, des actes administratifs et judiciaires ;

Pour les auteurs, le « gouvernement des juges » est plutôt une expression rhétorique. Il ne s'agit pas de l'appropriation de la fonction législative ou administrative. Le point de départ de leur raisonnement, c'est le propre concept de gouvernement qu'ils présentent : « exerce le gouvernement toute autorité dont les décisions sont susceptibles d'avoir des conséquences pour l'organisation et le fonctionnement de la société » (TROPER, Michel; PFERSMANN, Otto. 2001, p. 33). Or, les décisions judiciaires ont une indiscutable influence sur la vie privée et institutionnelle. Les juges peuvent décider sur les biens ou la liberté d'une personne, quand, par exemple, il se prononce sur un contrat, l'état civil, les droits d'héritage ou de propriété. De la même façon ils ont compétence pour décider sur la qualité des services publics, la validité d'une loi ou la poursuite d'un agent public corrompu. Donc, l'activité judiciaire a une dimension transformatrice de la société, voire de l'Etat constitutionnel de droit.

Par contre, il y a d'autres auteurs qui estiment que le

gouvernement des juges dans le cadre de l'action politique peut bouleverser l'équilibre entre les pouvoirs de la république et provoquer une crise de légitimité démocratique[3]. Cette peur a été appelée par Jacques Chevalier « le spectre du gouvernement des juges ». Certes, il y a parfois des excès. Mais nous sommes devant une évidence : sans l'intervention du pouvoir judiciaire les réponses à l'accroissement de la corruption seraient faibles, voire inefficaces. Pourtant, la lutte contre la corruption doit respecter des garanties procédurales comme le procès équitable, l'égalité des armes, les droits de défense, la présomption d'innocence, la prohibition des preuves illicites, etc.

Sans doute, la corruption menace l'État du droit et la société démocratique. Mireille Delmas-Marty souligne qu'elle « frappe les droits de l'homme en plein cœur ». C'est la raison pour laquelle la lutte contre la corruption est avant tout une arme politique. Elle reconnait que le gouvernement des juges, ou l'activisme des juges, est essentiel à la protection à la probité publique. A ce propos, l'auteur observe qu'il faut « éviter les excès d'un gouvernement de juges, mais il faut éviter aussi que le spectre du gouvernement des juges ne soit argument pour soumettre les juges au gouvernement». Elle propose une « politique criminelle combinatoire », qui implique la pluralité de moyens et de voies utilisés contre la corruption : réforme des législations nationales pour prévenir, détecter et sanctionner les infractions ; renforcement du cadre législatif international ; élargissement de la coopération internationale, parmi d'autres stratégies qui présupposent l'internationalisation de la politique criminelle anticorruption (DELMAS-MARTY, Mireille; MANACORDA, Stefano, 1997. p. 696-700).

Comme le texte constitutionnel brésilien est à l'origine des branches du droit, le juge peut l'appliquer dans toutes les affaires judiciaires, soit de droit public, soit de droit privé. En matière de protection à la probité publique, la Constitution brésilienne a plusieurs règles concernant la responsabilité des agents publics. Selon art. 37, XXI, p. 4, « les actes de malhonnêteté administrative entraînent la suspension des droits politiques, la radiation des cadres de la fonction publique, l'indisponibilité des biens et le dédommagement du Patrimoine public, selon les formes et les degrés établis par la loi, sans préjudice de l'action pénale possible ».

Au Brésil la lutte contre la corruption se déroule en trois fronts : civil, pénal et administratif, comme on l'a déjà exposé. L'indépendance entre l'action civile et l'action pénale adoptée par le système brésilien est un facteur qui prolonge excessivement les procédures et rend la justice plus difficile. Dans le droit pénal français la répression est plutôt criminelle. Quand il s'agit du pacte corrupteur, le droit pénal des

3 Sur ce sujet, nous recommandons la lecture de « *Juízes: novo poder* », de Rui Verde.

affaires concilie des sanctions de privatives de libertés et des grosses amendes, infligées à des personnes dépositaires de l'autorité publique, chargées d'une mission de service public ou investies d'un mandat électif. Concernant le crime de corruption active ou passive est un crime puni de peines principales : 10 ans d'emprisonnement et 150.000 euros d'amende (art. 432-11, 433-1, 435-1), mais dans certains cas, comme la corruption passive d'un magistrat en matière criminelle la peine peut atteindre 15 ans de réclusion et 225.000 euros d'amende, plus les peines complémentaires. Pour le trafic d'influence, 10 ans d'emprisonnement et 150.000 euros d'amende. Dans le système français, la Cour de cassation a décidé que la corruption passive « institué principalement en vue de l'intérêt général, tend également à la protection des particuliers ». De cette façon les particuliers, personnes physiques ou morales, qui ont subi des préjudices en raison de l'acte de l'agent public corrompu peut demander une réparation en se constituant en partie civile (VERON, 2011, p. 78).

Concernant les appels d'offre dans des marchés publics, source de plusieurs affaires de corruption, l'article 37, XXI de la Constitution brésilienne est clair :

> *« Sauf dans les cas spécifiés par la loi, les marchés ayant trait à des travaux, services, achats et aliénations sont adjugés par appels d'offre public garantissant l'égalité de conditions à tous le concurrents et dont les clauses établissent les obligations de paiement ; les propositions retenues sont maintenues, conformément la loi, ce qui n'implique d'autres exigences que celles liées à la qualification technique et économique indispensable à la garantie d'acquittement des obligations ».*

Le constituant brésilien a la préoccupation de protéger les marchés publics des discriminations, du favoritisme, du trafic d'influence et des appropriations abusives. En fait la corruption empêche l'effectivité des droits sociaux, mine la confiance des citoyens au gouvernement et plonge le pays dans la crise de légitimité du pouvoir. C'est la raison pour laquelle il a confié au Ministère Public, à la Cour de Comptes, au Pouvoir judiciaire, parmi d'autres institutions, la tache de mener un combat contre la corruption dans tous les niveaux de la fédération.

8. Le respect au droit supranationaldans la lutte contre la corruption

Le Brésil a ratifié toutes les conventions de lutte contre la corruption dans le cadre des Nations Unies, de l'OCDE et de l'OEA.

A partir de l'amendement 45, du 8 décembre 2004, plus connue comme Reforme du Judiciaire, les traités internationaux portant sur la protection des droits de l'homme ont valeur constitutionnelle et sont placés au sommet de l'ordonnancement juridique. Cela implique la possibilité d'application directe des règles de droit international lors du jugement des affaires.

Pour mieux comprendre le contexte brésilien, on mettra en relief l'approche théorique développée par Peter Häberle, l'un de plus imminents représentants du mouvement constitutionnalisme supranational.

En 1978, Peter Häberle a développé le concept de l'Etat Constitutionnel pour identifier l'organisation politique et administrative dont le principe anthropologique et culturel était la dignité de la personne humaine, le respect des droits fondamentaux, la démocratie pluraliste, la séparation des pouvoirs et la souveraineté populaire. Dans ce modèle, la Constitution est le fondement d'un ordre juridique représentatif d'un système de valeurs qui caractérise la société ouverte.

Mais le modèle constitutionnel conçu par Peter Häberle n'est pas autoréférentiel, renfermé sur lui-même. Il propose une organisation ouverte à la fois à l'intérieur et à l'étranger, profondément liée au droit supranational. Quelques années plus tard, il a appelé ce type idéal « État constitutionnel coopératif », cela pour souligner le moment historique où le constitutionnalisme occidental s'engage dans la protection des droits de l'homme, de la paix mondiale et de la responsabilité internationale.

L'une des conséquences naturelles de l'État constitutionnel coopératif est l'intégration entre le droit national et international. Cela implique une ouverture progressive à l'adoption de procédures juridiques communes, l'application interne des traités internationaux. Peter Häberle propose également l'expansion de la juridiction internationale, la coopération entre les pays dans plusieurs domaines, y compris la lutte contre la corruption.

Dans sa formulation théorique, l'harmonisation de la législation nationale au droit supranational est volontaire, puisqu'elle dépend de l'adhésion libre et éclairé de chaque pays, et pas de la force contraignante du droit international. Ainsi, l'État constitutionnel coopératif adopte spontanément des normes crées par la communauté internationale, sans renoncer aux principes éthiques, politiques et philosophiques que lui sont chers.

Le juriste allemand démontre que le constitutionnalisme contemporain subit des transformations importantes dont les résultats ne seront pas perçus qu'à l'avenir. Le droit constitutionnel et le droit

international ne peuvent plus être considérés comme des structures incommunicables, mais intégrées dans une relation de complémentarité. Grâce à cette action fusionnelle, on peut considérer l'existence d'un «droit commundе la coopération ». L'Union européenne, avec son droit communautaire, est actuellement le modèle le plus avancé de la communauté constitutionnelle basée sur la coopération (internationale et régionale) et la solidarité.

Le Brésil suit le même chemin. De plus en plus les tribunaux brésiliens appliquent des règles de droit international, surtout les traités portant sur la protection des droits de homme. Ceux-ci ont une position privilégiée dans l'ordonnancement juridique du pais, puisqu'ils sont considérés comme des règles constitutionnelles, sauf les traités ratifiés avant l'amendement 45/2004 – lesquels, selon l'interprétation du Tribunal suprême fédéral, sont supérieurs aux lois (valeur supra légale). De cette façon, le Brésil adopte le monisme modéré proposé par Peter Háberle, dans la mesure où il avance vers l'harmonisation de la législation nationale et internationale.

9. Lutte contre la corruption : reforcement du cadre normatif Brésilien

Du point de vue de la technique législative, la Constitution de 1988 adopte les règles et les principes comme catégories normatives. Sans abandonner la précision de certaines prescriptions juridiques, la Charte politique se tourne vers la moralisation du droit, ce qui exige du juge la construction d'une axiologie constitutionnelle.

La constitutionnalisation des principes et valeurs par le pouvoir constituant est une autre marque du droit brésilien contemporain. On peut dire que, sous l'influence du droit allemand, la Carte politique est devenue un « ordre objectif de valeurs » Autrement dit, les principes éthiques ont une force normative indiscutable, susceptibles d'être appliqués par le juge Malgré sa nature essentiellement axiologique, les valeurs inscrites dans le texte constitutionnel ont un caractère contraignant et jouent un rôle très important dans le discours et dans l'argumentation juridiques. A ce propos, Stéphane Pierré-Caps remarque que « les valeurs participent ainsi d'une sorte de norme fondamentale posée par la Constitution, autrement dit d'une référence matérielle qui gouverne l'interprétation de l'ordonnancement constitutionnel et, en même temps, en définit aussi la limite» (PIERRÉ-CAPS, [s.d], p. 287).

A partir de son préambule, la Constitution brésilienne considère comme des valeurs suprêmes l'exercice des droits sociaux et individuels, la liberté, la sûreté, le bien-être, le développement, l'égalité et la justice. Elle considère aussi comme principes fondamentaux la citoyenneté, la dignité de la personne humaine, la solidarité et le pluralisme politique,

parmi d'autres. Le texte privilégie aussi les choix politiques dans le but de permettre le contrôle de l'action politique par le juge. On peut mentionner, par exemple, les directives de l'article 3, qui sont porteuses des valeurs républicaines:

Art. 3. Les objectifs fondamentaux de la République fédérative du Brésil sont les suivants:

I - construire une société libre, juste et solidaire;

II - garantir le développement national;

III - éradiquer la pauvreté et la marginalisation et réduire les inégalités sociales et régionales;

IV - promouvoir le bien de tous, sans préjugés d'origine, de race, de sexe, de couleur, d'âge ou toute autre forme de discrimination.

En plus, la Constitution a autorisé le Pouvoir judiciaire à exercer le contrôle des politiques publiques mises en œuvre par le gouvernement, ainsi que punir le manquement au devoir de probité des hommes politiques et fonctionnaires de haut rang.

Au Brésil, la lutte contre la corruption se déroule sur trois niveaux indépendants : pénal, civil et administratif.

La structure de la répression pénale commença en 27 février 1967, à l'occasion de la publication du Décret-loi 201. Il prévoit 23 infractions de responsabilité des maires et des conseillers municipaux. Editée pendant le gouvernement militaire, d'origine dictatoriale, il reste encore en vigueur.

Dans le Code pénal, il y a un titre consacré aux attentes contre l'Administration Publique : corruption active et passive (art. 333 et 317), péculat (art. 312), utilisation indue de finances publiques (art. 315), trafic d'influence (art. 321 et 331), etc.

On peut également mentionner la Loi 7.492, du 16 juin 1986, qui sanctionne les crimes contre le système financier national ; la Loi 9.034, du 3 mai 1995, qui sanctionne les organisations criminelles ; la Loi 9.613, du 3 mars 1998, qui sanctionne le blanchiment et occultation de capitaux ; la Loi 10.028, du 19 juin 2000, concernant les crimes relatifs au manque de responsabilité fiscale dans la gestion des finances publiques.

Sur le plan civil, plusieurs lois prévoient des sanctions très sévères en ce qui concerne le manque de probité. Nous avons mis l'accent sur la Loi 8.429, qui porte sur les violations contre le devoir de probité. Pourtant, d'autres lois nous permettent d'établir le profil du système de combat contre la corruption dans les pays : Loi 8.666, du 21 juin 1993, qui règlemente les contrats et les appels d'offre dans les marchés publics ; Loi 8.730, du 10 décembre 1993, qui impose aux fonctionnaires publics fédéraux et aux élus le devoir de déclarer les biens et les revenus ; la Loi complémentaire n 101, du 4 mai 2000, concernant la responsabilité des fonctionnaires dans la gestion fiscale.

Sur le plan administratif, la Loi organique de la Cour de comptes

fédéraux – Loi n. 8.443, du 16 juillet 1992 – apporte plusieurs normes de contrôle externe de la gestion publique dans plusieurs échelons.

10. Organes chargés de prévenir, détecter et sanctionner la corruption au Brésil

Dans la structure administrative et judiciaire brésilienne, plusieurs institutions publiques et privées sont responsables du combat contre la corruption, y compris des associations représentatives de la société civile.

A. Le Ministère Public

Le Ministère public brésilien joue un rôle très important dans la lutte contre la corruption et le blanchiment de capitaux. Institution indépendante et autonome du point de vue budgétaire et fonctionnel, elle est responsable de la protection du patrimoine publique et de la répression à la criminalité financière, parmi d'autres attributions constitutionnelles. L'organe a deux niveaux d'organisation : Ministère public fédéral et Ministère public des États. Mais le contrôle des activités au niveau national a été confié au Conseil National du Ministère Public (CNMP), dont les Résolutions normatives orientent le travail des procureurs du parquet. Il faut remarquer qu'ici on ne présente qu'une simple synthèse de son fonctionnement, puisque la structure organisationnelle est beaucoup plus complexe.

Dans le cadre de la politique anticorruption, le Ministère Public de chaque État de la fédération a créé des Groupes d'action spéciaux de lutte contre la criminalité organisée, plus connus sous la désignation de GAECO. Ce sont des unités spécialisées qui s'occupent des affaires concernant à la grande corruption, à la criminalité financière, au blanchiment de capitaux et aussi à la coopération internationale[4].

Envisageant de donner des réponses concrètes contre la corruption, le Ministère public brésilien est responsable de plusieurs affaires, puisqu'il est partie légitime pour demander des requêtes, engager des poursuites et de porter plainte contre des personnes physiques ou juridiques impliquées dans des fautes administratives, l'enrichissement illicite, fraude commise dans le cadre d'une procédure de marché public, financement irrégulier de campagnes électorales, malversation de ressources publics, blanchiment de capitaux, parmi d'autres modalités de corruption *lato sensu*.

Afin de protéger le patrimoine public, le Parquet peut demander

4 Sur ce sujet, Rapport OCDE de suivi de la mise en œuvre des recommandations au titre de la phase 2. Brésil : phase 2, du 4 juin 2010. Disponible sur le site : <www.oecd.org/fr/france>. Accès : 10 dec. 2014.

au juge des mesures préliminaires et conservatoires comme, par exemple, l'interception des communications téléphoniques et télématiques, la levée du secret bancaire, fiscal et patrimonial du prévenu, le gel des biens et de valeurs, gestion des avoirs, etc. En cas de condamnation civile, les sanctions sont très sévères : perte de la fonction publique, perte des avoirs, amendes pécuniaires, suspension des droits politiques, restitution des avoirs obtenus irrégulièrement, l'interdiction de participer à des procédures de marché public. Si la condamnation est aussi pénale, le juge imposera au prévenu une peine de prison et d'autres sanctions accessoires.

La Loi 12.850, du 2 aout 2013, concernant la lutte contre les organisations criminelles, permet au Ministère public la signature d'un accord de collaboration avec le prévenu, lequel pourra bénéficier d'une réduction de la peine, voire du « pardon judiciaire », à condition qu'il apporte des informations susceptibles de sanctionner les membres du réseau criminel. Le collaborateur – aussi nommé délateur par la presse et chez les avocats – bénéficie également d'autres avantages procéduraux comme, par exemple, la préservation de son identité et l'acceptation dans le « Programme fédéral d'assistance des victimes et des témoins menacés[5] ».

B. Le Conseil de contrôle des activités financières

La lutte contre la délinquance financière et la corruption a été renforcée par la création du Conseil de contrôle des activités financières qui s'occupe de la prévention et de la détection des crimes de blanchiment de capitaux et financement du terrorisme. Crée par la Loi 9.613, du 3 mars 1998, cet organe est responsable de la coordination de la coopération nationale et internationale et fonctionne aussi comme lanceur d'alerte auprès des autorités brésiliennes.

Le signalement du non-respect est un outil essentiel dans le cadre de la répression du blanchiment de capitaux et de la grande corruption. Il permet des enquêtes sur des opérations financières suspectes et combat l'opacité de certaines transactions dans le monde des affaires. Mais son efficacité est conditionnée au renforcement du contrôle interne et de l'élargissement de la coopération judiciaire internationale.

Le COAF est aussi responsable de la formation des fonctionnaires publics et des dirigeants des entreprises privées, y compris les institutions financières et le Ministère public. Dans le cadre du Programme national de renforcement des moyens d'action et de formation en matière de lutte contre la corruption et le blanchiment de capitaux(PNLD), lancé par le Ministère de la Justice, le COAF a formé, entre 2004 et 2009, 6.180 professionnels, qui ont obtenu le *certificat d'aptitude à la prévention et à la lutte contre le blanchiment de capitaux*

5 Loi 9.807, du 13 juillet 1999.

ou le *certificat de spécialisation dans la prévention et la lutte contre le blanchiment de capitaux*, selon leurs compétences[6].

Plusieurs mesures ont été adoptées par le gouvernement brésilien pour contrôler les activités financières des personnes politiquement exposées, afin de prévenir et de sanctionner la pratique de blanchiment de capitaux. L'article 3o – B de l'Instruction normative de la Commission des Valeurs Mobilières (CNM) a donné une très grande ampleur au concept de PPE et a imposé aux institutions financières le renforcement des mesures d'identification, de signalement d'opérations suspectes et de conservation des informations de leurs clients.

C. Le contrôle général de l'Union

Le Contrôle général de l'Union (CGU) est l'organe responsable pour orienter le Président de la République sur des questions relatives à la protection du patrimoine public et la transparence dans la gestion publique. Il a aussi pour tâche le contrôle interne et la prévention de la corruption. Toutes ses compétences sont prévues dans la Loi n. 10.683, du 28 mai 2003 et du Décret n 8.109, du 17 septembre 2013.

Dans le cadre de la prévention de la corruption transnationale, la CGU s'est chargée de la diffusion de la Convention de l'OCDE auprès des plus gros exportateurs brésiliens, rappelant leurs obligations envers leurs obligations dans le commerce international. Elle invite aussi les entreprises à adopter des principes d'intégrité et de codes de bonnes pratiques, en les sensibilisant à rejeter le paiement de pots-de-vin à des agents public nationaux ou étrangers.

Enfin, la CGU est responsable de plusieurs initiatives comme, par exemple, l'adoption de critères susceptibles de permettre l'élaboration d'une « Liste des entreprises vertueuses », la publication du manuel « Responsabilité sociales des entreprises dans la lutte contre la corruption », partenariat avec l'institut Ethos envisageant la diffusion d'un pacte pour l'intégrité contre la corruption[7].

11. L'effectivite du droit a l'administration publique probe et efficiente

Selon l'OCDE, en 2014, le Brésil a comblé les lacunes juridiques en matière de corruption internationale, mais l'institution espère que ces mesures vont se traduire par une action répressive efficace et intensifié. L'avancement le plus important de cette période a été la publication de

6 Loi 9.807, du 13 juillet 1999.

7 Sur ce sujet, Rapport OCDE de suivi de la mise en œuvre des recommandations au titre de la phase 2. Brésil : phase 2, du 4 juin 2010. Disponible sur le site :<www.oecd.org/fr/france>. Accès : 15 dec. 2014.

la nouvelle loi sur la responsabilité des entreprises. Pourtant la faible effectivité de son cadre législatif est encore une source de préoccupation.

Dans le rapport du Groupe de Travail de l'OCDE sur la corruption transnationale, publié en 2014, on trouve des importantes recommandations concernant la politique criminelle brésilienne anticorruption :

> « 1. D'être plus proactif en matière de détection, d'enquête et de poursuite de la corruption transnationale ;
> 2. de promulguer instamment le décret d'application annoncé de sa Loi sur la responsabilité des entreprises ;
> 3. de clarifier sa nouvelle loi sur la responsabilité des entreprises, notamment sur la procédure visant à établir la responsabilité et à imposer des sanctions, afin de tirer pleinement bénéfice de cette législation ;
> 4. d'assurer un suivi de l'arsenal, renforcé des mesures dont disposent les autorités brésiliennes pour encourager le signalement et la divulgation d'actes de corruption transnationale – notamment par le biais d'accords de coopération et de clémence avec des individus et des entreprises ;
> 5. De continuer à encourager les entreprises, notamment les PME, à mettre au point et à adopter des systèmes de contrôle interne, de déontologie et de conformité adéquats afin de prévenir et de détecter la corruption transnationale.
> 6. D'adopter des mesures de protection complète des lanceurs d'alerte afin de protéger les salariés du secteur privé dénonçant de faits de corruption transnationale[8] ».

Or, les résultats diffusés par l'OCDE nous permettent de faire trois remarques. D'abord, il est perceptible une importante évolution du cadre législatif brésilien. Ensuite, les entreprises et les institutions financières doivent s'engager dans la lutte contre la corruption transnationale. Enfin, le manque d'effectivité concernant l'application des lois reste encore un problème majeur dans cette démarche.

Premièrement, il est clair que depuis 1992 le pays a mis en œuvre une importante production législative pour affronter la corruption dans tous les niveaux de la république. La répression a été renforcée au niveau civil comme au niveau pénal. Les mécanismes de contrôle sont aussi plus rigides qu'avant. Donc, sur le plan législatif, le droit brésilien s'harmonise aux conventions internationales, ce qui représente un progrès dans la voie de la protection à la probité administrative.

Deuxièmement, la lutte contre la corruption concerne aussi d'autres acteurs, y compris les entreprises et les banques. L'OCDE, met en relief le devoir du gouvernement brésilien d'encourager les entreprises à élaborer des codes déontologiques, à adopter des

8 Phase 3 : Report on implementing the OECD anti-bribery Convention in Brazil. 2014. Disponible sur :<www.oecd.org>. Accès : 15 dec. 2014.

pratiques de bonne gouvernance, de créer des systèmes de contrôle internes, de signaler des opérations suspectes. La bonne formation des cadres et la probité dans des relations commerciales sont des facteurs incontournables pour assurer l'égalité d'opportunités dans l'occupation des marchés publics.

Mais le principal obstacle à ce projet est la faible effectivité des lois anticorruption. L'OCDE insiste sur la nécessité de développer des mécanismes de prévention plus efficaces, en adoptant une posture proactive. Autrement dit, l'Etat doit s'attaquer à l'origine de la corruption afin d'en restreindre au maximum sa pratique. De l'autre côté, l'application des sanctions doit être plus rapide, tout en respectant les droits de défense. La lenteur des réponses judiciaires mine la confiance que les citoyens déposent dans des institutions démocratiques. En conséquence, le grand défi du pays repose sur l'effectivité du droit à l'administration publique probe et efficiente à partir d'un ensemble de mesures prévention, détection et sanction de la corruption politique. Cette tâche est difficile dans la mesure où le pouvoir judiciaire, le Ministère public et même l'administration publique ne sont pas bien structurés pour affronter la croissante complexité du crime organisé, qui bénéficie de la dérèglementation des marchés financiers internationaux et de la complicité de ce qu'on appelle « la bourgeoisie mafieuse » - des avocats, comptables, banquiers, consultants, fonctionnaires de haut rang. En fait, « l'interpénétration de la criminalité et du monde politique permet à celle-ci à la fois d'accéder aux marchés publics et d'obtenir une protection à l'échelle nationale (démantèlement de cellules judiciaires jugées trop efficaces, comme en Italie) et internationale (adoption de normes peu contraignantes)[9] ».

Les électeurs ont aussi un rôle très important à jouer. Le jugement politique est essentiel pour renforcer la lutte contre la corruption. Un exemple, s'impose. 40% des sénateurs et députés fédéraux brésiliens élus en 2014 sont objet de poursuites judiciaires, la plupart en raison des crimes de corruption (SASSINE; BRESCIANI; SOUZA, 2014). Cette posture de l'électorat, pleine de condescendance, renforce le sentiment d'impunité et mine la démocratie. La tolérance de l'électeur à l'égard des atteintes à la probité publique est au centre des recherches développées par Pierre Lascoumes. Une grande partie de la population se méfie des hommes politiques, surtout de ceux qui sont impliqués dans des scandales, vastement diffusés par les médias. Cependant, les sanctions politiques sont faibles, voire inexistantes. Selon l'auteur, trois facteurs expliquent ce paradoxe : « tout d'abord, ce qui fait *corruption* pour les uns ne le fait pas pour les autres. Les significations données à ce terme sont très diverses. Ensuite cette forme de déviance bénéficie

9 L'Atlas du monde diplomatique 2014– mondes émergents. La mondialisation criminelle, p.64.

d'un vaste ensemble de justifications et d'excuses qui en relativisent la gravité. Enfin, il existe des liens étroits entre le type de perception de la *corruption* et la perception du politique » (LASCOUMES, 2011, p. 17). Mais le phénomène est tellement complexe qu'on peut ajouter d'autres explications. Quand il s'agit des pays en voie de développement, comme le Brésil, l'opinion publique est sidérée par l'image du candidat soigneusement retouchée par le marketing politique. Ensuite, le financement privé de campagnes électorales renforce le « pouvoir de persuasion » des grands partis politiques envers l'électorat grâce à dépenses pharamineuses. De l'autre côté les promesses des candidats alimentent l'espoir des communautés plus défavorisés et susceptibles de se laisser convaincre par le clientélisme et les tromperies les plus variées. Enfin, on considère que le refus des citoyens honnêtes de participer à la vie politique laisse un vide qui est rempli par des criminels, surtout dans les parlements et dans la gestion publique. Cet ensemble d'éléments explique les distorsions de la démocratie et la crise de la représentation politique, ainsi que le manque de confiance de citoyens envers les élus.

12. Conclusions

Phénomène mondial, la corruption affecte la gestion publique et l'économie des nations contemporaines. Les pays se situant à la périphérie du capitalisme sont les principales victimes de ce fléau et les conséquences sont manifestes : la qualité de vie se dégrade, la population s'appauvrit, la violence croît, les droits de l'homme sont systématiquement bafoués, les politiques publiques inefficaces et les taux d'intérêt internationaux augmentent. Les pays riches aussi en sont affectés. Le blanchiment d'argent, la criminalité financière, les fraudes dans les appels d'offre et le financement privé des campagnes électorales sont responsables de la circulation clandestine de milliards de dollars tous les ans. En fait, la corruption s'est mondialisée. Elle ne respecte aucune frontière, aucun peuple, aucune idéologie. La combattre est donc devenu l'une des plus grandes priorités de la communauté internationale.

Le Brésil fait partie de ce projet. Bien que les indices de corruption dans le pays soient alarmants, plusieurs mesures ont été prises dans le sens de réduire de manière significative les actes de corruption dans le cadre de ses organismes administratifs.

La Loi de 8.429/92 a renforcé l'engagement dans la probité, dans la bonne gestion et dans le respect des principes de l'administration publique. La corruption a été affrontée par de rigoureuses sanctions qui se projettent dans la dimension patrimoniale et politique de l'agent malhonnête. Son application croissante par le Judiciaire tend à décourager les pratiques telles que l'enrichissement illicite, l'usage abusif des ressources financières, le trafic d'influence, le népotisme et

la déloyauté envers les institutions. Ce qui est vraiment nouveau c'est que, de nos jours, le fonctionnaire a conscience de la responsabilité qui entoure l'exercice de son poste public : se laisser séduire par la tentation du pot-de-vin est une conduite trop risquée, au gain douteux, pouvant le mener irrémédiablement à la ruine et à la perte de sa citoyenneté.

A partir de cette loi, le Brésil a ouvert ses portes à la mise en place de l'administration publique gestionnaire, fondée sur la professionnalisation de ses fonctionnaires, sur l'autonomie, l'impersonnalité, l'efficacité et la tutelle des intérêts collectifs. L'usage rationnel des ressources publics et le respect des principes déontologiques de la fonction administrative vont répercuter sur l'amélioration des services publics et sur la qualité de vie de la population, engendrant ainsi développement et harmonie dans le pays.

Outre cet aspect, la baisse de la corruption au Brésil ne sera perceptible qu'à partir de changements structuraux dans le fonctionnement du système administratif, qui, comme nous l'avons soutenu précédemment, suppose au préalable 1) la démocratisation des processus de décisions quant à l'allocation des ressources publiques, 2) la transparence des appels d'offre, 3) l'indépendance du Pouvoir judiciaire, 4) le renforcement des organismes de contrôle financier et comptable, 5) la mobilisation de la société civile en faveur du Trésor public et de la bonne qualité des services publics, 6) la liberté d'exercice dans l'investigation journalistique, 7) la formation permanente des fonctionnaires, 8) le financement public des campagnes électorales, 9) la formation et l'articulation des juges, des procureurs de la République, des autorités du fisc et de la police dans le combat contre la corruption et 10) le respect des droits fondamentaux.

Il y a plus. Il ne suffit pas que l'agent public soit honnête. Encore faut-il qu'il ait une préparation adéquate à l'exercice de la fonction publique et qu'il prenne l'engagement de faire bon usage des ressources de l'Etat et d'améliorer les services publics. De plus, le comportement des fonctionnaires doit être en harmonie avec les principes de l'administration inscrits dans la Constitution fédérale. C'est dans l'Ethique administrative que la fonction publique va trouver l'ensemble des valeurs de base pour la construction d'une bureaucratie efficace tournée vers le bien commun.

La réalisation des objectifs de l'Entreprise-Etat dépend du bon fonctionnement de sa machine administrative. Autrement dit, l'application des fonds publics doit êtretournée vers les « bénéfices collectifs ». La corruption appauvrit l'Etat dans la mesure où elle vise à la promotion de l'appropriation privée du patrimoine public, empêchant de la sorte la distribution de la justice sociale, l'amélioration des services publics et le développement du pays. Ceci explique pourquoi la lutte contre la corruption est l'une des conditions préalables les plus importantes pour la modernisation de l'Etat. Sans cela, la nation subira

les effets de la pauvreté, de la crise de légitimité des institutions, de la concentration des revenus, de l'immobilisme social et financier.

Nous pouvons ainsi montrer les deux axes d'action pour contenir l'escalade de corruption au Brésil. Le premier réside dans l'engagement réel de la société civile dans le combat contre toutes les formes de corruption, surtout celles du clientélisme, du népotisme et de la vénalité du fonctionnariat. Tous les efforts doivent être canalisés dans l'inspection de l'usage des fonds du trésor public, en constituant un véritable réseau de vigilance des actes pratiques par les fonctionnaires. La démocratie participative offre des mécanismes d'organisation sociale capables d'assurer le succès de cette stratégie. L'engagement civil et communautaire renforcera le système de contrôle des dépenses publiques et évitera le détournement ou l'utilisation indue des biens collectifs.

Le deuxième axe passe par la reconnaissance de l'importance jouée par les lois dans le combat contre la corruption. Tout pays soucieux d'en finir avec les crimes en « col blanc » doit commencer par se doter d'un cadre normatif capable de faire front à la corruption. Le vide légal crée un rideau d'impunité qui affaiblit l'Etat et plonge la société dans l'anomie la plus profonde. Au cours des années 90, le Brésil a élaboré une législation capable de réprimer les conduites malhonnêtes, de moraliser le processus d'appel d'offre et d'implanter une gestion fiscale efficace. Ce processus continue aujourd'hui avec des réformes de la législation pénale.

Cependant, la tutelle administrative sur le patrimoine public n'atteindra sa dimension maximale qu'avec l'application de normes juridiques qui agissent sur l'usage rationnel des montants budgétaires, sur la transparence dans l'application des fonds d'Etat et sur la clarté des appels d'offre. Ceci ouvre un champ de recherche très vaste dans des domaines spécifiques du Droit administratif et du droit pénal encore peu explorés dans les études avancées. En ce qui nous concerne, nous nous contentons de montrer la tâche qui incombe à la Loi d'improbité pour ce qui est du renforcement des bases dans la gestion administrative moderne, en particulier par rapport à la punition des fonctionnaires corrompus.

Du succès de cette mobilisation internationale contre la corruption dépend le développement de beaucoup de pays périphériques. On estime que 600 milliards de dollars circulent annuellement de façon clandestine dans le marché financier mondial, échappant au paiement d'impôts. Une grande partie de cette fortune provient d'actes de corruption, principalement de subornation payée à des fonctionnaires jouissant d'un pouvoir de décision. L'argent sale ne respecte aucune frontière, aucune souveraineté, aucun système politique ou économique. Le crime organisé s'infiltre dans toutes les formes de gouvernement et ronge la crédibilité des institutions démocratiques. Isolement, aucune nation n'est en mesure d'éradiquer la criminalité financière. C'est là la

tâche de la coopération internationale qui réclame la réunion de toutes les forces pour la vaincre définitivement.

A l'autre bout de la corruption, se trouvent les entreprises transnationales ou nationales de grande envergure qui font du paiement de pots-de-vin une stratégie pour la conquête de marchés publics. Pour parvenir à leurs fins, elles financent des campagnes électorales, font des dons généreux, versent de juteux montants pour la publicité aux organismes de communication, participent à des actions philanthropiques, influencent l'élaboration des budgets ; tout cela pour obtenir des privilèges à la signature de contrats avec l'Etat. En gros, elles agissent par le truchement de stratagèmes tels que le trafic d'influence, le paiement de « commissions » occultes, la surfacturation de travaux et services, et la séduction de groupes politiques.

Plus que jamais, l'Etat doit assumer son rôle de promotion du bien-être social. Cela n'est possible qu'avec une gestion responsable des fonds publics, la démocratisation des services publics essentiels et l'infrastructure éthique des actions administratives. Se battre contre le détournement des montants budgétaires, veiller à la clarté des licitations, qualifier constamment les cadres du service public, exonérer les agents publics malhonnêtes et promouvoir la satisfaction des intérêts collectifs, telles sont les stratégies qui doivent être adoptées par les gouvernants intéressés par la réalisation concrète de la légalité et de la moralité en tant que valeurs suprêmes d'un régime démocratique.

Il est essentiel, aussi, que l'Etat soit en mesure de se doter d'un appareil capable de réagir énergiquement aux assauts du crime organisé. La formation de forces d'action composées de juges, de membres du Ministère public, de policiers, de comptables et d'agents du fisc a donné de bons résultats ici et à l'étranger. Le travail intègre dans les institutions a l'avantage de prendre les devants sur les évènements, d'élargir le spectre des investigations et d'atteindre des résultats en un temps moindre. Il est temps que le Brésil abandonne sa posture réactive et entreprenne la prévention contre les crimes en « cols blancs ». Cela sera possible moyennant la modernisation de la législation pénale, la mise en place d'un service d'intelligence agissant au niveau national et international, la création de commissariats spécialisés dans les crimes contre l'administration publique et le blanchiment d'argent.

Hors de ces engagements, le Brésil ne pourra guère trouver la voie du développement durable, de l'inclusion sociale, du bonheur de son peuple et de la solidité du régime démocratique. L'éradication de la corruption s'impose comme l'une des priorités nationales, le seul espoir de s'assurer la jouissance des droits de l'homme dans toute sa plénitude. Tout cela justifie l'existence du droit fondamental à l'administration publique probe et efficiente dans la Constitution brésilienne.

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Panor. Braz. law - Year 3 - Numbers 3 and 4 - 2015 - pp. 65 - 85.
ISSN 1075-1343 (print)
ISSN 2318-1516 (online)
DOI: http://dx.doi.org/10.17768/pbl.a3.n3-4.p65

L'IMPORTANCE DU MULTICULTURALISME DANS LES CONSTITUTIONS DES ÉTATS LATINS ET L'ABOUTISSEMENT D'UN NOUVEAU CONSTITUTIONALISME

THE IMPORTANCE OF MULTICULTURALISM IN THE CONSTITUTIONS OF LATIN STATES AND THE ARRIVAL OF THE NEW CONSTITUTIONALISM

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Résumé : L'article vise à montrer l'importance du multiculturalisme, ainsi que les apports pour les États latino-Américain en analysant son évolution. Pour développer cette question, nous allons conceptualiser ce multiculturalisme, ainsi que l'arrivée du nouveau constitutionnalisme adopté par les constitutions latines ces dernières années, en abordant le cas spécifique de la législation brésilienne.

Mots-clés : Multiculturalisme - États latins - Nouveau constitutionalisme - Constitutions latines

Abstrat: The article aims to show the importance that multiculturalism brings to Latin American states by analyzing its evolution. To develop this question, we will conceptualize multiculturalism, and show the arrival of the new constitutionalism adopted by the Latin constitutions in recent years, demonstrating the specific case of Brazilian legislation.

Keywords: Multiculturalism - Latin states - New constitutionalism - Latin constitutions

I. Introduction

L'évolution actuelle est celle des grands changements de paradigmes[1] dans le contexte constitutionnel latino-américain. De nouvelles idées apparaissent, basées sur l'importance du constitutionnalisme tournée vers la prise en compte des États pluriels et d'une certaine idée démocratique. C'est donc principalement l'acceptation des groupes minoritaires et la reconnaissance de la population autochtone en repensant l'ancien modèle postcolonial.

Depuis quelques années, les États latins réussissent, peu à peu, à rompre avec leur histoire. Cette évolution est visible notamment d'un point de vue social et institutionnel. Celle-ci est inscrite dans l'héritage du colonialisme, c'est-à-dire, le néo-constitutionnalisme[2]. Chargés des concepts venus de l'époque postcoloniale, ces idéaux sont restés durant une très longue période dans la culture de ces pays.

Orienté vers le multiculturalisme, un nouveau phénomène est apparu. Un nouveau type de constitution est né au sein des États latins[3]. En réalité, certains pays ont mis en avant la diversité de leurs peuples, ainsi qu'une véritable identité nationale, celle ci a été effacée avant leurs indépendances. La multi-culturalité qui existe dans les États du continent sud, est mise en évidence par une reconnaissance de cette partie de la population qui est mise en avant[4].

De plus, les mouvements sociaux, apparus dans les États du sud, ont donné lieu à un nouveau constitutionnalisme latino-américain et au paradigme de l'État multiculturelle. De ce fait, la formation d'une identité nationale a vu le jour au sein des États latins, ce qui a contribué à un nouvel apport pour leurs systèmes constitutionnels.

Le Venezuela, l'Équateur et la Bolivie sont les pionniers de la

1 Le paradigme auquel le texte fait référence est l'État moderne constitutionnel latino-américain.

2 Dans le développement de cet article, nous démontrerons l'influence des pays européens sur la législation, ainsi que dans le système juridique concernant leurs anciennes colonies latino-américaines. Pour plus d'informations sur l'influence du néo-constitutionnalisme européen, voir: MAGALHAES, José Luiz Quadros de. *O estado plurinacional e o direito internacional moderno.* Curitiba : Juruá, 2012, pp. 30-31.

3 Les nouvelles constitutions auxquelles nous nous référons, sont celles récemment introduites par le Venezuela (1991), l'Équateur (2008) et la Bolivie (2009), qui insèrent les droits des minorities et de la population d'origine, c'est-à-dire le peuple autochtone. Cette question sera développée plus loin.

4 Il importe de reconnaître la construction des bases d'une société, limitée par les dogmes de la culture dominante. Voir SILVA, Heleno Florindo da. *Teoria do estado plurinacional: o novo constitucionalismo latino-americano e os direitos humanos*. Curitiba: Juruá, 2014, p. 3.

modification de leur constitution nationale. Pour ce faire, cet article développe la question relative aux nouveaux modèles des constitutions nés en Amérique latine ces dernières années. Ainsi, nous allons partager le texte en deux parties ; nous présenterons tout d'abord le multiculturalisme adopté par les États latins ainsi que les conséquences sur leur contexte constitutionnel, en démontrant le nouveau constitutionalisme latino américain (**II**). Ensuite, nous montrerons l'application de cette doctrine dans la législation du Brésil, ainsi que l'influence du droit international (**III**).

II. Le multiculturalisme adopté par les États latins et leur nouveau constitutionnalisme

Parmi les thèmes les plus discutés actuellement dans la doctrine latine, figure celui relatif au État multiculturel. Soulignons, pour débuter, que cette question est apparue il y a quelques années et qu'elle a pris de plus en plus d'importance depuis que certains États ont changé leur texte constitutionnel, comme par exemple le Venezuela dans les années 1999, puis l'Équateur et la Bolivie en 2008 et 2009 respectivement.

Ainsi, afin de bien comprendre les idées et les motivations de ce nouveau système adopté par la plupart des États latins, nous allons, dans un premier temps, tenter de conceptualiser l'État multiculturelle[5].

M. Heleno Silva explique que l'État plurinational pourrait être considéré comme un nouveau paradigme d'organisation sociale, cherchant à donner un sens propre aux États concernés. En effet, l'auteur affirme que le « sens » recherché doit aller au-delà de l'homogénéisation et de l'uniformisation culturelle, politique, économique et sociale représenté par la modernité européenne. Autrement dit, l'État plurinational souhaite dépasser la rationalité universelle européenne, après avoir reconnu la diversité des peuples[6].

M. Magalhães, dans son ouvrage, va encore plus loin, affirmant que le nouvel État moderne touche à sa fin[7]. Il soutient l'idée selon

5 En France, État plurinational, État-multination ou État multinational, sont également acceptées. Voir ROULAND, Norbert; PIERRÉ-CAPS, Stéphane et POUMARÈDE, Jacques. *Droit des minorités et des peuples autochtones*. Paris : Les Presses universitaires de France, 1996, 581 p.

6 SILVA, Heleno Florindo da. *Teoria do estado plurinacional: o novo constitucionalismo latino-americano e os direitos humanos*. Curitiba: Juruá, 2014, pp. 133-134.

7 L'État moderne est l'appellation utilisée à ce que concerne à ces dernières années dans le monde entier. Le droit moderne suit la norme hégémonique et la standardisation. L'État moderne a été implémenté par l'universalisation européenne, avec l'idée, ancrée depuis le XVIème siècle, selon laquelle l'État seul devrait détenir le pouvoir de façon unique et centrale. Pour plus de détails sur l'État moderne, voir VAL, Eduardo Manuel; BELLO, Enzo; (Orgs). *O pensamento pós e descolonial no novo constitucionalismo latino-americano.* Caxias do Sul:

laquelle le nouveau système créé au sein des États latins, marqué par le manque d'uniformité, est basé sur une multiplicité de points de vue, une pluralité de philosophies, de manières de vivre, de sentir et de comprendre le monde[8].

Quant à M. Boaventura Santos, il écrit que

> *« [e]n el contexto latinoamericano, la refundación del Estado pasa en algunos casos por el reconocimiento de la plurinacionalidad. Implica un desafío radical al concepto de Estado moderno que se asienta en la idea de nación cívica — concebida como el conjunto de los habitantes de un cierto espacio geopolítico a quienes el Estado reconoce el estatuto de ciudadanos — y, por lo tanto, en la idea de que en cada Estado sólo hay una nación: el Estado-nación. La plurinacionalidad es una demanda por el reconocimiento de otro concepto de nación, la nación concebida como pertenencia común a una etnia, cultura o religión.»*[9]

On peut remarquer qu'au cours de ces dernières décennies, de nouveaux concepts, fondés sur la démocratie, la participation politique, la légitimité et la citoyenneté ethnique sont apparus dans la plupart des États latins. En fait, au fur et à mesure, ils se sont renforcés en prenant pour bases les nouveaux idéaux, le concept de la constitutionnalisation de l'État a été reconfiguré[10].

Afin de bien comprendre l'émergence de ce phénomène, il est nécessaire d'évoquer l'histoire des États du continent sud-américain depuis leur époque coloniale[11]. Pour mieux l'expliquer, dans un premier temps, nous allons revenir brièvement sur le passé historique des nations de l'Amérique latine, à l'époque coloniale (**A**). Par la suite, nous

Educs, 2014, 258 p.

8 MAGALHAES, José Luiz Quadros de. *O estado plurinacional e o direito internacional moderno.* Curitiba: Juruá, 2012, p. 18.

9 SANTOS, Boaventura de Sousa. *Refundación del Estado en América Latina – Perspectivas desde una epistemología del Sur*. Lima : Instituto Internacional de Derecho y Sociedad, Programa Democracia y Transformación Global, 2010, p. 81.

10 Voir : MAGALHAES, José Luiz Quadros de. *O estado plurinacional e o direito internacional moderno.* Curitiba: Juruá, 2012, 122 p.

11 L'origine de l'actuel système plurinational est en formation depuis l'indépendance des pays latins, ayant eu lieu au XIXème siècle. Ainsi, l'Argentine est devenu indépendante en 1816 ; la Bolivie en 1809 ; le Brésil et l'Equateur en 1822 ; le Venezuela et le Paraguay en 1811 et l'Uruguay, 1828. Rappelons nous que les européens ont dominé et exploré l'Amérique du Sud dès le XVème siècle.

démontrerons le résultat des idées multiculturelles, avec la mise en place d'un système de nouveau constitutionnalisme latino américain (**B**).

A. L'historique des États du continent sud-américain

L'Amérique latine, comme nous le savons, a vécu sous l'égide de la culture juridique européenne, basée sur le libéralisme et l'individualisme[12]. Depuis le XV^{ème} siècle, les pays latins ont été des colonies européennes. Ils ont été exploités par l'Europe pendant des siècles[13].

L'Europe, ancien colonisateur, avait imposé aux peuples latins son mode de vie, ainsi que sa structure juridique homogène. Il est vrai que la copie des modèles juridiques européens, ainsi que des modèles nord-américains, après l'indépendance des États latins, ont été une évidence dans les sociétés latines. Il importe de signaler que l'adoption d'un modèle juridique par un État doit correspondre aux besoins, ainsi qu'être en accord avec sa nature économique, politique et sociale. Ainsi, le fait d'avoir copié un modèle déjà existant, sans avoir été entièrement adapté à la réalité latine, présente des faiblesses et a pour conséquence la mise en place d'un système que ne correspond pas vraiment à la société dans laquelle ce modèle a été implanté. Aussi, à cause de cette absence d'adaptation, nous vivons un phénomène de mutation vers un nouveau constitutionnalisme et la naissance des États plurinationaux[14].

M. Wolkmer, s'est exprimé sur ce sujet

> *« L'indépendance des colonies en Amérique latine n'a pas donné lieu au début du XIXe siècle, à un changement total et définitif par rapport à l'Espagne et au Portugal, mais seulement une restructuration, sans rupture importante dans la vie sociale, économique et politique constitutionnelle.»*[15]

12 Voir CARPANO, E., *État de droit et droits européens : l'évolution du modèle de l'État de droit dans le cadre de l'européanisation des systèmes juridiques.* Paris : l'Harmattan, 2005, 662p.

13 Pour toute l'histoire de la colonisation européenne des États latins, voir GALEANO, Eduardo. *As veias abertas da América Latina*. São Paulo: Makron Books, 2002, 400 p. Voir également SCWARTZ, Stuart B. et LOCKHART, James. *A América Latina na Época Colonial*. Rio de Janeiro: Civilização Brasileira, 2002, 543 p.

14 MELO Milena Petters. *As recentes evoluções do constitucionalismo na américa latina : neoconstitucionalismo ?* p. 67. In : WOLKMER, Antônio Carlos; MELO, Milena Petters (org). *Constitucionalismo Latino-Americano* : *tendências conteporâneas*. Curitiba: Juruá, 2013.

15 WOLKMER, Antonio Carlos. *Constitucionalismo latino-americano : tendências contemporâneas*. Curitiba : Juruá, 2013, p. 21.

Plusieurs questions concernant la méthode adoptée par les États latins depuis leur indépendance, ont fait l'objet de débats. Depuis un certain temps, le système constitutionnel ancré dans les anciennes colonies européennes était le même que celui utilisé en Europe. Les idées et les principes européens ont été appliqué dans les systèmes juridiques des États latins sans mettre en valeur les différences, les particularités, et encore moins les priorités de ces pays[16].

À la suite des processus d'indépendance des États de la région, la culture juridique européenne est restée ancrée dans les sociétés de l'Amérique latine. Ce qui a entraîné la construction d'un constitutionnalisme oligarchique, libéral, conservateur et exclusif, guidé par le modèle européen d'organisation sociale qui devait créer un État homogène et non ouvert à la diversité[17]. Mais cette question va à l'opposé de la réalité latino-américaine.

Parallèlement au manque de démocratie hérité des systèmes colonisateurs, il convient d'ajouter les dictatures militaires imposées par les gouvernements des États latins durant une grande partie du XIX^{ème} et du XX^{ème} siècles[18]. En plus, les gouvernements qui étaient au pouvoir dans ces pays, principalement dans les années 60 et 70, ont bloqués l'expansion de la prise en compte de la démocratie, et du respect des droits de l'homme. En effet, ce ne fut qu'à partir des années 80 et 90, avec la chute de ces gouvernements dictatoriaux, que des mouvements sociaux ont surgi, remettant en question l'ordre social instauré jusque là. C'est à partir de là que sont nés, en Amérique latine, les droits pluriels et démocratiques, afin d'assurer l'égalité entre les peuples[19].

Les changements survenus avec les nouveaux gouvernements démocratiques ont été caractérisés par l'affirmation des droits pluralistes à travers l'origine ethnique, la politique et la culture des peuples. Il s'agissait donc, de mener les minorités sociales ou bien les peuples autochtones, à un même niveau d'égalité, en les autorisant à participer à la vie politique concernant les questions qui les préoccupent. Il importe de réfléchir à une nouvelle conception de l'organisation sociale guidée

16 Pour plus de détails, voir SILVA, Heleno Florindo da. *Teoria do estado plurinacional: o novo constitucionalismo latino-americano e os direitos humanos*. Curitiba: Juruá, 2014, 252 p.

17 Voir VAL, Eduardo Manuel; BELLO, Enzo; (Orgs). *O pensamento pós e descolonial no novo constitucionalismo latino-americano.* Caxias do Sul: Educs, 2014, 258 p.

18 La plupart des États latins ont vécu des dictatures militaires au sein de leurs gouvernements au XX^{ème} siècle. Ce modèle autoritaire a survécu pendant des années. Sur ce point, voir HAMMOUD, Ricardo H. Nahra. Crescimento, desenvolvimento e desigualdade de renda: análise dos clássicos – Furtado, Cardoso e o "milagre" econômico. In: Anais do XI Encontro Regional de Economia – ANPEC-Sul 2008. Curitiba, Universidade Federal do Paraná.

19 Voir à ce sujet ARRIGHI, Giovanni. *América Latina, globalização e integração*. Belo Horizonte: Ibec, 1997, 215 p. Et : CARRIQUIRY, Guzmán. *O Bicentenário da Independência dos Países latino-americanos.* Fortaleza: Shalom, 2013, 136 p.

par l'indépendance, la participation, la diversité, la tolérance et la décentralisation, tout en apportant une idéologie séparatiste fortement caractérisée par la souveraineté populaire[20].

De ce fait, compte tenu de la diversité latine, de la pluralité sociale, ethnique, culturelle et politique des États sud américains[21] dont il est question dans cet article, un nouveau constitutionnalisme a vu le jour.

Ainsi, nous allons approfondir le concept du nouveau constitutionnalisme, en démontrant son développement au sein des États latins (**B**).

B. La mise en place du système du nouveau constitutionnalisme latino américain

Le nouveau constitutionalisme né dans les États latins est le reflet de la reconnaissance multiculturelle latine[22]. Le nouveau constitutionalisme est le résultat du multiculturalisme des États latino-américain. Il faut comprendre par multiculturel, l'idée ayant émergé des idéaux d'une Amérique qui souhaite répondre aux aspirations de son peuple et, avant tout, qui souhaitait respecter l'origine et l'identité de ses habitants[23].

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20 BURCKHART, Thiago Rafael. O `novo` constitucionalismo latino americano e a positivação de direitos pluralistas : uma análise crítica acerca do direito indígena nas recentes constituições. Revista Eletrônica Direito e Política, Programa de Pós-Graduação *Stricto Sensu* em Ciência Jurídica da UNIVALI, Itajaí, v.8, n.2, 2º quadrimestre de 2013. Disponible sur: www.univali.br/direitoepolitica - ISSN 1980-7791. Accès le 02 février 2015.

21 Lorsqu'on analyse l'histoire des pays du sud, ont note que la population de l'Amérique latine s'est formée à partir de l'immigration, d'où la grande diversité culturelle de ce continent. De plus, sa population originaire, c'est-à-dire les Indiens, ont été oubliés par les colonisateurs, qu'ont abusée de leur main-d'œuvre ou les ont massacres. Pour approfondir sur ce sujet, voir : GALEANO, Eduardo. *As veias abertas da América Latina*. São Paulo: Makron Books, 2002, 400 p.

22 « *Le nouveau constitutionnalisme de l'Amérique latine implique une redéfinition des concepts tels que la légitimité, la participation populaire et les droits fondamentaux des personnes, dans le but d'intégrer les demandes des peuples historiquement exclus du processus de prise de décision, notamment la population indigène.* » La traduction a été réalisée par nos soins. ALVES, Mariana Vitório. *Neoconstitucionalismo e Novo Constitucionalismo Latino Americano: Características e Distinções*. Rev. SJRJ, Rio de Janeiro, v.19, n.34, p. 133-145, ago 2010. Sur : http://www4.jfrj.jus.br/seer/index.php/revista_sjrj/article/viewFile/363/289. Consulté le 05 mai 2014, p. 141.

23 SANTOS, Boaventura de Sousa *Refundación del Estado en América Latina – Perspectivas desde una epistemología del Sur*. Lima : Instituto Internacional de Derecho y Sociedad, Programa Democracia y Transformación Global, 2010, p. 72) afirme : « *Contrariamente, la voluntad constituyente de las clases populares, en las últimas décadas, se manifiesta en el continente a través de una vasta movilización social y política que configura un constitucionalismo desde abajo, protagonizado por los excluidos y sus aliados, con el objetivo de expandir el campo de lo político más allá del horizonte liberal, a través de una institucionalidad nueva (plurinacionalidad), una territorialidad nueva (autonomías asimétricas), una legalidad*

Selon M. Uprimny

> *« [d]epuis le milieu des années 1980, plus précisément, à partir des années 1990, l'Amérique latine a connu une intense période de changements constitutionnels. En effet, la quasi-totalité des pays de la région non seulement a adopté de nouvelles Constitutions, mais aussi introduit des réformes primordiales dans les Constitutions en vigueur. Ces changements constitutionnels présentent des différences nationales majeures, et ils ont également de nombreux points communs. »* [24]

Conformément à l'idée de M. Boaventura, les facteurs majeurs instaurés pour que l'idée pluraliste puisse parvenir à son but devront également être basés sur « *la social democracia, el keynesianismo, el Estado de bienestar y el Estado desarrollista de los años 60 del siglo pasado son las principales formas políticas de este `modus vivendi`* »[25].

Parmi les principes de base pour fonder le nouvel État sud Américain, il faut à la fois reconnaître et défendre l'idée d'un État qui puisse s'orienter vers la démocratie représentative, la démocratie participative, et où la population d'origine a l'opportunité de s'exprimer, ainsi que de pouvoir être représentée selon ses principes et ses idéaux[26].

M. Lacroix signale que

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nueva (pluralismo jurídico), un régimen político nuevo (democracia intercultural) y nuevas subjetividades individuales y colectivas (individuos, comunidades, naciones, pueblos, nacionalidades). Estos cambios, en su conjunto, podrán garantizar la realización de políticas anticapitalistas y anticoloniales. »

24 UPRIMNY, Rodrigo. *Les récentes transformations constitutionnelles en Amérique latine: Un effort de créativité démocratique ?* pp. 245-255. *In* : Institut de Recherche et débat sur la Gouvernance - IRG. *La gouvernance et la révolution : Chroniques de la gouvernance.* Paris : ECLM, 2012, 288 p.

25 SANTOS, Boaventura de Sousa. (2010, p. 25).

26 « *Las movilizaciones populares de las dos últimas décadas por un nuevo constitucionalismo, desde abajo; por el reconocimiento de los derechos colectivos de las mujeres, indígenas y afrodescendientes; la promoción de procesos de democracia participativa en paralelo con la democracia representativa; las reformas legales orientadas al fin de la discriminación sexual y étnica; el control nacional de los recursos naturales; las luchas para retomar la tensión entre democracia y capitalismo eliminada por el neoliberalismo (democracia sin redistribución de la riqueza y, al contrario, con concentración de riqueza); todo ello configura un uso contrahegemónico de instrumentos e instituciones hegemónicas.* » SANTOS, Boaventura de Sousa. *Refundación del Estado en América Latina – Perspectivas desde una epistemología del Sur*. Lima : Instituto Internacional de Derecho y Sociedad, Programa Democracia y Transformación Global, 2010, p. 59.

> *« [d]epuis le début des années 1990, un modèle latino-américain du multiculturalisme s'est constitué (…). Cette spécificité latino-américaine a pour conséquence une prégnance de la politique de reconnaissance de droits collectifs (…). Ces droits collectifs sont d'ordre culturel (reconnaissance de la diversité culturelle, des modes de vie, des croyances, etc.), éducatif (éducation bilingue et interculturelle), juridique (reconnaissance d'un droit coutumier local), territorial (délimitation de territoires ou de terres collectives), politique (acceptation d'une certaine forme d'autonomie politique locale). »*[27]

Il importe de signaler que le Venezuela, en 1999, a débuté l'application du « *poder ciudadano* », suivi par la Bolivie en 2008, avec la mise en place du « *controle social* » et l'Équateur en 2009 par le « *quinto poder* ». Ces États sont considérés comme les pionniers de la modification et l'adoption des politiques publiques d'intérêt populaire[28].

27 LACROIX, Laurent. *Un multiculturalisme sans minorité ? Quelques réflexions sur l'État plurinational en Bolivie et en Équateur*. Belgeo [en ligne], 3/2013, p. 3. Mis en ligne le 02 juin 2014, consulté le 02 juin 2015. URL : http://belgeo.revues.org/11512.

28 M. Vieira énumère les dix caractéristiques du nouveau constitutionnalisme adopté par les États latino-américain : « 1. Dès son origine, avec la promulgation de la Constitution du Venezuela de 1999, le nouveau constitutionnalisme a donné lieu aux Constitutions actuelles de l'Équateur (2008) et de la Bolivie (2009). 2. La Constitution a été élaborée par une assemblée constituante participative, puis a ensuite été soumise à l'approbation populaire (référendums). 3. Les vastes Constitutions qui ont été mises en place (Venezuela : 350 articles, Bolivie : 411 articles, Équateur : 444 articles), ont été adaptées à la réalité de chaque pays en fonction de ses propres sites historiques et culturels. Par comparaison, la Constitution brésilienne de 1988 comporte 250 articles. 4. Il provient du constitutionnalisme classique, d'origine européenne, s'étant attaché à trouver des solutions à ce qui n'avait pas fonctionné auparavant. 5. À cette fin, il a favorisé la récupération et associé la catégorie souveraine populaire afin de refonder l'État, de promouvoir la participation directe du peuple dans la préparation et l'approbation de la nouvelle Constitution, ainsi que le contrôle et la gestion de l'administration. 6. Il a établi des institutions de contrôle parallèles basées sur la participation populaire, le « Pouvoir du citoyen » (Venezuela), le « Contrôle social » (Bolivie) et le « Cinquième pouvoir » (Équateur). 7. Il considère l'ensemble des personnes comme une communauté ouverte de constituants soumis les unes aux autres qui « contractent », s'« engagent » et acceptent la manière dont l'État gouverne. 8. Il révèle le phénomène de la « glocalisation », c'est-à-dire, le fait de relier le global au local, dans un processus qui combine l'intégration internationale et la redécouverte des valeurs, des traditions et des structures locales et privées. 9. Il cherche à promouvoir un nouveau modèle d'intégration de l'Amérique latine, dépassant l'isolationnisme intercontinental d'origine coloniale ; l'intégration assume un contenu social plus fort. 10. Il garantit, également la puissance de l'intervention publique dans l'économie, par opposition au modèle néolibéral d'intervention » La traduction a été réalisée par nos soins. Voir : VIEIRA, José Ribas RODRIGUES, Vicente A.C. *Refundar o Estado : O novo constitucionalismo latino-americano,*

Ces États ont mis en avant les droits de leur peuple, de façon à les intégrer dans l'ordre constitutionnel, en leur donnant un droit à la parole, ainsi que d'être représenté. Ceci est suivi par la pleine reconnaissance de droits humains. Par cette affirmation, signalons l'importance de la reconnaissance de l'identité des peuples autochtone de l'Amérique Latine.

Notons que par rapport aux contextes sociaux, politiques et juridiques en Amérique du Sud, c'est-à-dire la valorisation de l'autre, ainsi que de ses origines, le nouveau constitutionnalisme reconnait également les droits de la nature (*Pachamama*)[29] et la culture du bien vivre (*Buen Vivir*)[30]. Ce sont les principes constitutionnels étiques et moraux de la société pluriel[31].

Récemment adopté par la constitution de l'Équateur, ainsi que celle de la Bolivie, une grande importance est donnée à la nature. Le respect des anciennes cultures indigènes, ainsi que la préoccupation d'avoir un environnement sain, sont les directions du multiculturalisme[32].

Nous pouvons affirmer que la principale idée commune dans chaque constitution, a été le droit des peuples originel. Dans toutes les constitutions des États mentionnés ci-dessus, une partie est entièrement dédiée aux droits des peuples indigènes[33].

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p. 14. Sur : http://www.direito.ufg.br/up/12/o/24243799-UFRJ-Novo-Constitucionalismo-Latino-Americano.pdf?1352146239, consulté le 28 mai 2015.

29 *Pachamama* appartient à la langue *quechua*. Pour bien la comprendre, il faut diviser en deux : *Pacha* : nature et *Mama* : mère. Évoquée par les préambules des Constitutions de l'Équateur et de la Bolivie, conforme VAL, Eduardo Manuel; BELLO, Enzo; (Orgs). *O pensamento pós e descolonial no novo constitucionalismo latino-americano.* Caxias do Sul: Educs, 2014, p. 56, Il s'agit d'un droit non seulement multiculturel, mais aussi anthropocentrique.

30 *Buen Vivir* en espagnol, bien vivre en français, cette dénomination a d'autres sortes dans la langue indigène. Citons que pour les indigènes équatoriens, en langue *quéchua,* il faut dire "*Sumak Kawsay*". Déjà par indigènes de la Bolivie, en langue *aimara,* disons "*Suma Qumaña*". Pour toute informations sur les variations du terme, voir GUDYNAS, Eduardo e ACOSTA, Alberto, *A renovação da crítica ao desenvolvimento e o Bem Viver como alternativa.* Sur: http://www.ihu.unisinos.br/noticias/507956-a-renovacao-da-critica-ao-desenvolvimento-e-o-bem-viver-como-alternativa, consulté le 19 aout 2015.

31 Voir FREITAS, Raquel Coelho de ; MORAES, Germana de Oliveira (Coord). *UNASUL e o novo constitucionalismo latino-americano.* Curitiba : CRV, 2013, pp. 11-14.

32 l'institutionnalisation du "bien vivre" proposée pour surmonter le modèle anthropocentrique qui sous-tend les systèmes juridiques actuels, s'approfondie en une réalité plus égalitaire en pleine harmonie, tout en respectant la nature pour plus de détails, voir SILVA, Heleno Florindo da. *Teoria do Estado Plurinacional : O Novo Constitucionalismo Latino-americano e os Direitos Humanos.* Curitiba : Juruá, 2014, p. 96-99.

33 Pour plus d'informations, voir l'intégralité des constitution respective: Constitution Bolivarienne du Venezuela, sur : http://pdba.georgetown.edu/Constitutions/Venezuela/ven1999.html; Constitution de l'Équateur, sur: http://www.asambleanacional.gov.ec/documentos/constitucion_de_bolsillo.pdf; Constitution Politique de l'État Plurinational de la Bolivie, sur : http://www.harmonywithnatureun.org/content/documents/159Bolivia%20Consitucion.pdf.

À titre d'exemple, citons la Constitution de la Bolivie (2009), dans laquelle il existe un traitement du droit réservé aux indigènes dans 80 de ces 411 articles. Entre les droits assurés citons des quotas pour les postes de parlementaires qui viennent des peuples indigènes; la garantie de la propriété de la terre, de l'eau et des ressources forestières par les communautés indigènes; l'équivalence entre la justice indigène et la justice commune. Tous ces changements se tournent vers des valeurs positives proposées par le nouveau constitutionnalisme : la pluralité, l'association, la participation effective et une plus grande légitimité de la Constitution et de la loi.

Par conséquent, nous avons, brièvement, conceptualisé l'État multiculturel, en démontrant l'arrivée du nouveau constitutionnalisme en Amérique latine. Par la suite, nous allons montrer que ce nouveau phénomène a apportée des conséquences au sein du système constitutionnel et juridique brésilien (**III**).

III. Le nouveau constitutionnalisme, la réaction brésilienne et le droit international

En ce qui concerne la présentation des constitutions dans un État, rappelons que, en Amérique latine, la culture juridique a été imposée par les métropoles tout au long de la période coloniale. Ainsi, les institutions juridiques formées après le processus d'indépendance (tribunaux, codes et constitutions) sont issues de la tradition juridique européenne, représentée par les sources classiques de droits romains, germaniques et canoniques[34]. Par ailleurs, au début de l'indépendance des pays, les constitutions des États latins ont été nourri par divers idéaux vécus dans le continent latin. En effet, la formation du peuple de ces États est basée sur un grand mélange de culture et de races.

M. Wolkmer explique que

« [l]a Constitution ne doit pas être seulement une

34 WOLKMER, Antonio Carlos. *Constitucionalismo latino-americano : tendências contemporâneas*. Curitiba : Juruá, 2013, p. 22. « *La colonisation et la dépendance de la culture juridique latino-américaine de l'époque du modèle euro-centrique hégémonique romano-germanique ont eu lieu non seulement dans le cadre général des ``idées juridiques``, mais aussi au niveau des constructions formelles du droit public, en particulier le positivisme constitutionnel. Ceci est démontré dans le processus constitutionnel des États latins qui ont été doctrinalement marqués par les déclarations des droits anglo-français, par les constitutions libérales des États-Unis (1787) et la France (1791 et 1793), ainsi que par l'historique Constitution espagnole de Cádiz (1812). En ce qui concerne l'affirmation moderne de la codification du droit privé en Amérique latine, elle a été façonnée par les valeurs individualistes, romaines et patrimoniales de la législation napoléonienne (1804), malgré le statut privé allemand (1900).* » La traduction a été réalisée par nos soins.

> *matrice qui génère des processus politiques, mais le résultat de fortes corrélations et des luttes sociales à un moment historique pour le développement de la société. »* [35]

En prenant pour bases ses propos, nous pouvons justifier d'une nouvelle émergence qui est née au sein des États latins au regard de leur propre constitution. Ces constitutions visaient à revaloriser le pluralisme et la diversité dans tous les domaines des États en question.

Le nouveau constitutionnalisme permet une reconfiguration des États en Amérique latine. En effet, la culture juridique de ces pays a subi un changement profond, celle-ci n'étant plus essentiellement individualistes ni conservateurs. Ils sont devenus pluralistes et démocratiques. Dans cette perspective, les nouvelles constitutions ne sont pas seulement édictées pour garantir les droits individuels, mais elles assurent aussi, concernant les droits collectifs[36].

Note M. Uprimny que

> *« [l]e constitutionnalisme latino-américain récent appartient donc à un nouveau genre : il aspire à la transformation avec une forte composante égalitaire. En effet, il parait clair que les processus constitutionnels ont cherché à approfondir la démocratie et à combattre les exclusions et les inégalités sociales, ethniques et de genre. »* [37]

Compte tenu de ces propos, et après toutes les informations apportées dans le titre II, des conséquences ont eu lieu sur le plus grand État de l'Amérique latine, le Brésil.

Ainsi, pour pouvoir expliquer les probables influences de ce nouveau phénomène sur le Brésil et sur le monde, nous allons partager ce titre III en deux alinéas. Tout d'abord, nous commencerons par décrire la dernière constitution brésilienne de 1988 (**A**). Par la suite,

35 WOLKMER, Antonio Carlos. *Constitucionalismo latino-americano : tendências contemporâneas*. Curitiba : Juruá, 2013, p. 19. La traduction a été réalisée par nos soins.

36 Les droits collectifs environnementaux et le droit à l'eau, car ils ne sont plus considérés comme des biens destinés à la consommation, ils sont devenus des droits pour tous; leur privatisation n'est donc pas autorisée. Voir : MELO, Milena Petters. *O Patrimônio Comum do Constitucionalismo Contemporâneo e a virada biocêntrica do 'novo' constitucionalismo latino-americano*. Florianópolis: UNIVALI, 2012.

37 UPRIMNY, Rodrigo. *Les récentes transformations constitutionnelles en Amérique latine: Un effort de créativité démocratique ?* pp. 245-255. *In* : Institut de Recherche et débat sur la Gouvernance - IRG. *La gouvernance et la révolution : Chroniques de la gouvernance.* Paris : ECLM, 2012, 288 p.

nous démontrerons l'influence du droit international pour le nouveau constitutionnalisme (**B**).

A. Le passé constitutionnel brésilien

Si l'on remonte dans le temps, nous pouvons vérifier que le passé constitutionnel du Brésil a été marqué par une succession de constitutions. Après son indépendance, la première constitution du Brésil est apparue en 1891 et, depuis, plusieurs ont été instituées[38]. La dernier constitution, datée de 1988, en vigueur actuellement, est celle qui a duré le plus longtemps, c'est la plus démocratique et celle qui respecte le mieux les droits humains[39]. Nous pouvons signaler que sa constitution, intitulée Constitution de la République Fédérale du Brésil, datée de 1988, était une réponse au manque de démocratie vécu par cet État pendant sa longue période de dictature[40].

Certains auteurs évoquent l'idée que, avec celle-ci, le Brésil a débuté l'État multiculturelle. Mais, nous ne partageons pas cette idée, en effet, malgré une constitution novatrice, reconnaissant plusieurs droits humains, nous ne pouvons pas la considérer comme un point de repère du multiculturalisme[41].

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38 Les dates des constitutions brésiliennes: 1891 – Constitution de l'empire; 1934 – Constitution de l'Ère VARGAS (cette constitution a institué le vote secret et le vote féminin, ainsi que la justice du Travail et leurs lois); 1937 – État Nouveau, suite au coup d'État de VARGAS; 1967 – Dictature Militaire (cette constitution a été marquée par l'absence de démocratie, et par l'octroi de tous les pouvoirs aux gouvernants); 1988 – Démocratisation, née avec la fin de la période dictatoriale (cette constitution a apporté: la réforme électorale, la lutte contre le racisme, la sécurité de la tenure des terres aux peuples Indiens, de nouveaux droits du travail et autres).

39 « *La constitution brésilienne de 1988, bien qu'elle ait conservé certaines idées du républicanisme libéral, analytique et mono-culturel, était la constitution la plus avancée de toute l'histoire du Brésil. Ainsi, la soi-disant ``Constitution Citoyenne`` consacre le pluralisme, en y ajoutant l'adjectif `` politique`` dans un sens beaucoup plus large.* » Selon WOLKMER (2013, p.27). La traduction a été réalisée par nos soins.

40 Le Brésil a vécu une longue période de dictature militaire, avec l'absence de démocratie, datées de 1964 à 1985. Les régimes autoritaires au Brésil a commencé avec le coup d'Etat militaire qui a renversé le gouvernement de João Goulart, le président démocratiquement élu. Le régime a pris fin lorsque José Sarney a assumé la présidence, moment qui a commencé la période connue comme la Nouvelle République. Pour plus d'informations, voir : HAMMOUD, Ricardo H. Nahra. Crescimento, desenvolvimento e desigualdade de renda: análise dos clássicos – Furtado, Cardoso e o "milagre" econômico. In: Anais do XI Encontro Regional de Economia – ANPEC-Sul 2008. Curitiba, Universidade Federal do Paraná.

41 Sur ce point, voir CADEMARTORI, Daniela Mesquita Leutchuk de; COSTA, Bernardo Leandro Carvalho. *O novo constitucionalismo latino-americano: uma discussão tipológica*. Revista Eletrônica Direito e Política, Programa de Pós-Graduação Stricto Sensu em Ciência Jurídica da UNIVALI, Itajaí, v.8, n.1, 1º quadrimestre de 2013. Disponible sur : www.univali.br/direitoepolitica - ISSN 1980-7791; p. 225.

En réalité, le système juridique constitutionnel brésilien n'a pas été modifié radicalement comme celui du Venezuela, de la Bolivie et de l'Équateur.

D'un part, M. Wolkmer (2010, p.152) signale que la Constitution brésilienne de 1988, même de manière limité, a contribué à rompre une tradition libérale-individualiste et sociale interventionniste de l'État utilisée jusqu'alors. En fait, selon lui, cette charte constitutionnelle a été considérée comme une première étape vers le nouveau constitutionalisme du type pluraliste et multiculturelle.

D'autre part, M[me] Souza affirme que

> *« la Constitution de 1988 n'a pas été influencée par une idéologie particulière ni par une quelconque puissance étrangère. (...) [Elle] fut le résultat d'un élan politique, marqué par un besoin de légitimer la démocratie. Cela signifie qu'il fallait réconcilier les intérêts contradictoires avec les anciens et les nouveaux acteurs, étant donné que la transition vers la démocratie était encore en cours. »*[42]

Dernièrement, la législation brésilienne, amorce un changement de mentalité pour la réussite de l'incorporation de la population indigène concernant les droits et les devoirs en tant que peuple d'une nation, mais en effet, la réaction de la législation brésilienne envers l'État multiculturel est encore timide.

Ainsi, quelle que soit la situation d'un pays, le sujet concernant la pluri-nationalité prend une immense importance, car il devient un véritable concept de justice et de reconnaissance pour le pouvoir d'État, ainsi que de la diversité et des particularités impliquant la population autochtone[43].

Il est vrai que les nouvelles avancées de la dernière constitution datée de 1988, comme l'instauration de la démocratie, la reconnaissance des droits humains fondamentaux et l'adoption des droits et garanties pour son peuple. De plus, la reconnaissance constitutionnelle des droits des indigènes, marque le début d'une époque d'innovations et de changements dans la société brésilienne.

De ce fait, il est important de souligner que, la législation brésilienne n'a pas adapté sa constitution ou même son système juridique comme certains États, telle que le Venezuela ou la Bolivie. Car ces États ont changée leurs constitutions en renforçant le droit et les

42 SOUZA, Celina. *La République fédérale du Brésil*. *In :* KINCAID John. *Un Dialogue mondial sur le fédéralisme,* volume 1. Publié par le Forum des fédérations en février 2005, p. 6, sur : http://www.forumfed.org/fr/produits/dmlivre1.php, consulté le 29 septembre 2012. La traduction a été réalisée par nos soins.

43 Voir : http://www.socioambiental.org/inst/esp/consulta_previa/?q=convencao-169-da-oit-no-brasil/a-convencao-169-da-oit, consultée le 04 juillet 2015.

représentations des peuples autochtones, ainsi que le droit de la nature et la philosophie du bien vivre[44]. Mais, même si elles ne sont pas au niveau des dernières constitutions citées ci-dessous, il est tout à fait remarquable de voir que la constitution de 1988 a apporté des idées novatrices et qui ont été de grandes importances pour la reconnaissance et l'intégration des peuples originaires.

B. Légitimation de droits de peuples autochtones par le droit international

Il est tout à fait essentiel de souligner que le droit international a un rôle très important dans la conservation et application des droits humains. Cela a contribué avec les idéaux du nouveau constitutionnalisme, en assurant les droits des peuples autochtones.

Selon M^me^ Siqueira,

> *« le nouveau constitutionnalisme en Amérique latine émerge comme un paradigme de la modernité et apporte de profonds changements qui ont eu un impact sur le droit international, et notamment en matière des droits de l'homme »*[45].

Une étape importante, concernant la légitimation des droits des peuples originaires de l'Amérique, fut franchie grâce à la Convention de l'Organisation Internationale du Travail (OIT) n° 169[46]. En réalité, cette convention de l'OIT est l'instrument international ancien qui traite spécifiquement des droits des peuples indigènes et tribaux dans le monde.

D'auprès les MM. Urquidi, Teixeira et Lana,

> *« [l]e développement du droit international sur les questions autochtones a eu lieu progressivement tout au long du XX^ème^ siècle, dans un processus dirigé [pour] surmonter le clair accent individualiste des droits de l'homme en dépit de la Déclaration universelle de 1948 »*[47].

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44 Pour plus de détails, voir SILVA, Heleno Florindo da. *Teoria do Estado Plurinacional : O Novo Constitucionalismo Latino-americano e os Direitos Humanos.* Curitiba : Juruá, 2014, p. 87-146.

45 La traduction a été réalisée par nos soins. SIQUEIRA, Andrea Cristina Matos. *Direitos humanos, Estado plurinacional na América Latina e parcerias estratégicas internacionais.* Jus Navigandi, Teresina, ano 18, nº 3693, 11 août 2013. Disponible sur: http://jus.com.br/artigos/25066. Consulté le 20 mars 2014.

46 Pour consulter l'intégralité du texte, accéder sur : http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_100907.pdf, consultée le 04 juillet 2015.

47 URQUIDI, Vivian; TEIXEIRA, Vanessa; LANA, Eliana. *Questão Indígena na América*

À la suite et dans le même esprit, il y a eu la déclaration des Nations Unies sur les droits des peuples autochtones qui a été signée en 2007[48]. Cette déclaration a été accueillie avec exaltation par les populations autochtones, car elle touche plus de 300 millions de personnes dans le monde[49]. La déclaration stipule que les peuples autochtones sont égaux à tous les autres peuples de la planète et qu'ils auront donc des droits égaux selon le système juridique international[50].

Cette déclaration est fondamentale, car elle reconnaît l'égalité entre tous les peuples. D'une part, elle assure aux populations autochtones le droit de déterminer librement leur propre statut politique. D'autre part, elle assure à la population originelle, leur propre modèle de développement. La déclaration garantit également la participation de l'État pour la prise de décisions, si le peuple autochtone le souhaite[51].

De ce fait, nous pouvons noter que le nouveau constitutionnalisme est de plus en plus présent dans le contexte latin, ainsi que dans le droit international. Le grand apport de ce phénomène est dû au changement de paradigmes de la modernité, avec l'acceptation du pluriel et le respect au passé des populations autochtones.

IV. Conclusion

Le principal objectif de notre travail était d'expliquer le sens de l'État multiculturel ou plurinational. Et également, de justifier par sa propre histoire, dominé par les idéaux européens, ce qui a abouti à la nouvelle forme de constitutionalisme née dans les États latins. Pour ce faire, nous avons distingué les principaux aspects de l'adaptation de ces États au système européen, pour aboutir sur le système actuel.

Il est clair que les modèles copiés de l'Europe depuis l'indépendance des pays latins s'expliquent par le système colonial mis en place à l'époque et qui a existé durant des années dans ces territoires. De plus, la déclaration de l'indépendance des États latins n'a pas

Latina : Direito internacional, novo constitucionalismo e organização dos Movimentos Indígenas. p. 200. In: Cadernos PROLAM/USP, ano 8, vol.1, 2008.

48 Cette déclaration réussie a engendré d'importantes conséquences pour le peuple indigène, selon Stephen Corry, voir : http://www.alterinfos.org/spip.php?article1681, consultée le 10 juin 2015.

49 Les informations ont été prises sur le site: http://cms.unige.ch/isdd/spip.php?article264, consulté le 10 aout 2015.

50 La Déclaration des Nations Unies sur les peuples autochtones, voir le texte complet sur: http://www.humanrights.ch/upload/pdf/100112__dclaration_peuples_autochtones_20.pdf, consultée le 10 juin 2015.

51 FAJARDO, Raquel Z. Yrigoyen. *Aos 20 anos do Convênio 169 da OIt: Balanço e desafios da implementação dos direitos dos Povos Indígenas na América Latina,* p. 15; In : VERDUM, Ricardo (Org). *Povos Indígenas: Constituições e reformas Políticas na américa Latina.* Brasília: Instituto de Estudos socioeconômicos, 2009, 236 p.

démontrée, tout de suite, une rupture des liens. En effet, ce n'est que récemment qu'ils ont obtenu une totale indépendance de leurs idéaux ainsi qu'une représentativité économique, par l'affirmation des leurs propres modèles de diversité, avec le nouveau constitutionnalisme.

Ainsi, l'État plurinational a construit une société basée sur le dialogue et la participation populaire. Cet État entame une nouvelle ère, reposant sur le consensus mutuel, brisant les idéaux d'une suprématie d'un groupe sur un autre. Une diversité est en train d'émerger vers la compréhension multiculturelle et la coexistence pacifique.

Toutefois, suite à l'adoption du concept pluri-nationaliste, le nouveau constitutionalisme s'est renforcé et s'est matérialisé à travers la rupture d'une culture euro-centrique hégémonique, donnant une redéfinition de la démocratie fondée sur le respect de la diversité.

Le Brésil, en tant qu'État latin, perçoit également les effets du nouveau constitutionnalisme, mais il n'a pas effectuée de changements radicaux contrairement à ses voisins pour l'acceptation du concept multiculturel.

En ce qui concerne le droit international, il participe, avec des déclarations, ainsi que des conventions, à former, à contribuer et à assurer la cause des minorités et des peuples autochtones.

De ce fait, une fois décrit le multiculturalisme, notons que, lentement, il prend place au sein des États latins. De plus, doucement, la mentalité néocolonialiste, qui a perduré pendant plusieurs années, cède la place à un nouveau phénomène qui prône l'égalité, le respect et la reconnaissance de la diversité.

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PPanor. Braz. law - Year 3 - Numbers 3 and 4 - 2015 - pp. 86 - 106.
ISSN 1075-1343 (print)
ISSN 2318-1516 (online)
DOI: http://dx.doi.org/10.17768/pbl.a3.n3-4.p86

LA QUESTION DES DROITS HUMAINS COMME PRECEPTES OCCIDENTAUX

THE ISSUE OF HUMAN RIGHTS AS OCCIDENTAL PRECEPTS

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Résumé: Où nait la force des droits humains ? Les droits humains qui devront prévaloir représenteront-ils toujours la protection d'un attribut universel présent en tout être humain ? Ou bien ces standards devront-ils dépendre de la culture ou du groupe social de la personne humaine ? Tandis que certains manifestent la préoccupation concernant la limitation des recours à la critique et à la justification de la diversité des codes moraux, d'autres jugent illégitime (et improbable) la recherche de normes extensives à tous – qui que ce soit, où que ce soit. Les normes morales ne s'acquièrent qu'au sein de la structure sociale, autrement dit, dans l'ensemble particulier des restrictions physiques et sociales ? Et les raisons qu'elles ont pour justifier leurs normes ne seront-elles impositives qu'à ceux qui partagent la même condition ? Nombreuses sont les questions concernant l'étendue des droits humains. La reconnaissance légale est condition nécessaire, mais non suffisante, à la pleine jouissance des droits. Même ainsi, de nos jours il n'est pas nécessaire de recourir à des arguments moraux comme uniques raisons pour dénoncer l'illégitimité de quelque législation et de certaines décisions d'État. L'ouverture à des discussions relatives aux meilleures méthodes pour organiser les sociétés politiques et civiles est le signe essentiel à la promulgation légale des droits humains. La méthodologie utilisée était quantitative, la méthode d'approche inductive, la méthode de procédure historique, parmi les plus importants.

Mots-clés: Condition de la personne humaine - Droits humains - Société internationale.

Abstract: Where the strength of human rights comes? Human rights which should avail they still represent the protection of a universal

attribute present in every human being? Either these standards they will depend on the culture or social group of human beings? While some express concern regarding the limitation of use of criticism and justification of the diversity of moral codes, others deem illegitimate (and unlikely) the extensive research standards at all - anyone, anywhere either. Moral standards can only be learned that within the social structure, that is, in the particular set of physical and social restrictions? And the reasons they have to justify their standards will they impositives only those who share the same condition? There are many questions about the extent of human rights. Legal recognition is necessary, but not sufficient, to the full enjoyment of rights. Even so, these days it is not necessary to resort to moral arguments as unique reasons to denounce the illegitimacy of some laws and some state decisions. The opening of discussions on best ways to organize political and civil societies is the essential sign the legal enactment of human rights. The methodology used was quantitative, inductive approach method, historical method of procedure, among the most important.

Keywords: Condition of the human being - Human rights - International society

1. Introduction

L'expression « droits humains » est très employée. Elle est sortie des salles universitaires, a dépassé les décisions judiciaires et a gagné les rues. Dans chacun de ces espaces elle a acquit un sens propre. C'est pourquoi la proximité de l'abordage historiciste – entrepris ici sans la moindre prétention – passe par la mention de faits et concepts et renforce l'intention de ne pas confondre les éléments et leurs espaces. Dans les sciences sociales, beaucoup d'auteurs ont étudié ce qu'il est convenu d'appeler « droits humains ». Dans les diverses formes de libéralisme, dans les diverses lignes de pensée socialiste, dans les écrits philosophiques, sociologiques, économiques, juridiques etc, tous ont leur concept de droits humains.

Pour ce qui est du rapport entre droits humains et droits fondamentaux, on sait qu'ils sont tous deux liés à la notion de droit *à quelque chose* (ALEXY, 2003, p. 16-20). Aussi bien les droits fondamentaux que les droits humains sont garantis par des ordres juridiques. En raison de la pression entre les diverses forces sociales, les droits fondamentaux se présentent comme un ensemble de valeurs objectives de base et comme jalon de protection des situations juridiques subjectives (PÉREZ LUÑO, 2004, p. 43-46). Il est possible de trouver des droits positivés comme fondamentaux dans un ordre d'État déterminé qui ne représentent pas des droits humains reconnus

dans l'ordre juridique international. Bref, les droits fondamentaux sont essentiellement des droits de la personne humaine et représentants des droits humains transformés en droit constitutionnel positif (ALEXY, 2003, p. 21-29).

Il y a aussi la question de l'établissement des droits humains. Pour Eusebio Fernández (1981, p. 77), la recherche des fondements des droits humains touche au problème de les justifier rationnellement. L'auteur relève trois fondements : a) jusnaturaliste (droits naturels) ; b) historiciste (droits historiques) ; et c) éthique (droits moraux). Dans la justification jusnaturaliste, le droit naturel naît de la nature humaine et compose l'ordonnance universelle. Ce droit sera toujours au-dessus du droit positivé (FERNÁNDEZ, 1981, p. 80). Jean Morange (1982, p. 45) reconnaît (1) le droit naturel objectif, développé par Aristote, considéré effet de la Nature, révélateur de Dieu créateur et obéissant à l'ordre rationnel des choses ; et (2) le droit naturel subjectif, qui chez Platon découle de la Nature de l'être humain, car chaque être posséderait quelque chose de divin en soi. Les droits humains, sont'ils preceptes occidentaux ?

2. Les fondements des droits humains

Sur toutes les théories des droits naturels retombent les critiques suivantes : a) les droits humains ne peuvent être supérieurs ni antérieurs au droit positif puisqu'ils n'ont été positivés en aucun ordre ; b) l'idée de nature humaine serait encore profondément ambiguë ; c) la notion de droits naturels immuables entre en choc avec l'expérience historique (FERNÁNDEZ, 1981, p. 88). L'utilitarisme de Bentham, qui a dominé la pensée sociale anglaise une grande partie du XIXe siècle, renforce l'idée de contradiction dans l'existence de droits antérieurs au droit positif (HART, 1981, p. 149-168). En dépit des critiques véhémentes, les réflexions sur le droit naturel n'ont pas disparues au XIXe siècle. Leo Strauss, par exemple, reprend le débat et défend que la décadence de la philosophie politique est liée à la rupture d'avec l'idée de droits naturels classiques (1986, p. 99).

Dans la raison historiciste, les droits humains sont historiques, variables, relatifs. Il s'agit de droits d'origine sociale. La principale critique faite à l'historicisme est la perception selon laquelle quelques droits ne seraient pas aussi variables. Il serait possible de défendre l'existence relative au moment historique de droits civiques et politiques, économiques et sociaux, culturels. Toutefois, pourrait-on en dire autant des droits personnels, du droit à la vie et à l'intégrité physique et morale ? De plus, ce fondement historiciste entrave toute construction de droits fondamentaux. Face à cette critique, Eusebio Fernández souligne la nécessité de distinguer la vision historique des droits humains de leur

argumentation historiciste (FERNÁNDEZ, 1981, p. 94).

Quant a l'argumentation éthique, elle considère les droits humains comme étant des droits moraux. Ici, les droits humains assument deux versants indissociables : éthique et juridique. Les droits humains sont moraux parce qu'ils sont strictement liés à l'idée de dignité humaine (FERNÁNDEZ, 1981, p. 98-99). Ils apparaissent comme exigences éthiques et comme droits que les êtres humains possèdent par le fait qu'il s'agit d'êtres humains. En outre, ils imposent au Pouvoir Politique et au Droit (sens objectif) leur reconnaissance, protection et garantie. La dignité humaine fonctionne comme critère de vérification des systèmes éthiques qui doivent placer au premier plan la satisfaction des nécessités humaines, le développement des capacités personnelle, l'élimination des souffrances et la concrétisation des désirs.

L'argumentation des droits humains dans la conception marxiste (matérialiste) les désigne comme étant une conquête historique de la bourgeoisie. Bien qu'il n'y ait pas de théorie juridique, quand Marx théorise l'extinction de l'État, se trouve implicite dans ses écrits la théorisation de l'extinction de la forme juridique. Sous cet angle, il est possible d'analyser les droits humains dans la théorie marxiste. Manuel Atienza Rodríguez relève une certaine ambiguïté chez Marx par rapport aux droits humains. Il dit que, bien qu' étant critique des droits humains, Marx s'est rendu compte que la grande contradiction existante entre ces derniers et le système capitaliste pourrait également être là où ce système s'écroulerait. Ainsi, les droits humains ne seraient jamais une fin en soi valorisée éthiquement, mais plutôt des instruments politiques (ATIENZA, 2008, p. 226).

Dans cette recherche ou réfutation des fondements des droits humains, émergent d'autres questions. Le rapport anachronique entre positivité des droits humains et leur effectivité sociale, le rôle des sujets et des acteurs de droit international, l'efficacité des normes du droit international des droits humains et leur étendue etc. Pour cette raison, la compréhension historique des droits humains doit contribuer moyennant des propositions plus critiques aux problèmes présentés.

3. Retour au débat entre Jellinek et Boutmy : connaissance de la pensée occidentale des droits humains

La philosophie des droits humains naît à la fin du XVIIIe siècle, en Europe Occidentale et en Amérique du Nord. Sa présence s'est prêtée à la composition de « l'esprit de l'époque », dans la guerre idéologique au service d'une classe sociale déterminée. Les droits humains étaient vus comme le résultat d'une évolution purement rationnelle dont nul ne pouvait s'écarter (MORANGE, 1982, p. 27). Selon Georg Jellinek, la naissance de la philosophie des droits humains coincide avec les

Déclarations des Droits. Le texte qui a suscité le débat avec Émile Boutmy, *La Declaración de los Derechos del Hombre y del Ciudadano*, analyse le document le plus important de la Révolution Française, la Déclaration des Droits de l'Homme et du Citoyen, du 26 août 1789. C'est à partir de ce document que l'on peut parler de « droits humains ». Ainsi, quelle est l'origine de la Déclaration des Droits de l'Homme et du Citoyen (ou Déclaration Française de 1789) ?

Selon Jellinek, la Déclaration Française de 1789 révèle des aspects politiques et historiques, ainsi que historico-juridiques. Avant la Déclaration Française, la littérature juridico-politique ne connaissait que les droits des Chefs d'État, les privilèges de classe, de particuliers ou des corporations. La Déclaration a influencé les Constitutions Françaises du 3 septembre 1791 et du 4 novembre 1848 quant à l'insertion de catégories juridiques reconnues aux personnes (auparavant connues uniquement par le Droit Naturel). Jusqu'en 1848, la plupart des Constitutions Allemandes parlaient de droit des sujets ; à partir de cette date, l'Assemblée votait les droits fondamentaux du peuple allemand (JELLINEK, 2000, p. 42). Il s'est produit une reproduction à grande échelle de ces catégories.

Jellinek critique l'abordage superficiel des recherches sur l'origine de la Déclaration Française de 1789. Pour lui, les ouvrages de Droit Politique se sont contentés de relever les précédents de la Déclaration (de la Grande Charte jusqu'á la Déclaration d'Indépendance américaine), sans enquêter avec une plus grande profondeur les sources qui ont inspiré les Français et qui, en d'autres termes, ont donné naissance à la philosophie des droits humains. La théorie du contrat social (comme fondement de la Déclaration Française) et la Déclaration d'Indépendance des 13 États Unis d'Amérique du Nord (comme modèle de la Déclaration Française) constituent les questions de fond (JELLINEK, 2000. P. 41-44).

Paul Janet, dans son *História da ciência política*, affirme l'influence du contrat social sur la Révolution Française. Jellinek critique cette affirmation parce que, pour lui, Rousseau n'a fait que présenter un principe dans le contrat social : le remplacement de tous les droits de l'individu à la société. Tout droit découlerait de la volonté générale. Devant cela, aucun droit individuel ne se conserverait en entrant dans l'État. Toute liberté civile correspondant aux devoirs civiques se perdrait. L'idée de droit originaire transféré à la société pour limiter juridiquement le souverain n'existerait pas. Il n'existerait que des libertés contraires à l'État (liberté de religion, droit d'association). Les principes du contrat social ne naitraient pas de droits individuels, mais de l'omniprésence de la volonté générale. Par conséquent, rien ne serait plus contraire à la Déclaration que la base du contrat social de Rousseau.

Sans nier l'influence du contrat social (JELLINEK, 2000, p. 67)

sur la Déclaration Française – qu'il signale dans les articles 4, 6 et 13 –, il passe à l'examen des *Bills of rights* des États Particuliers de l'Union Nord-Américaine. Pour Jellinek, dans les archives parlementaires françaises, il y avait déjà un chapitre qui traitait de la nécessité d'établir des droits au peuple et c'est le Marquis de Lafayette qui a présenté cette proposition à l'Assemblée Nationale le 2 juillet 1789. Bien que Lafayette, aristocrate français, ait participé à la Guerre d'Indépendance des États-Unis d'Amérique et au début de la Révolution Française, selon les mémoires du Marquis, la Déclaration d'Indépendance n'a formulé que des principes de souveraineté nationale et des droits pour le changement de la forme de gouvernement. (JELLINEK, 2000, p. 49-53).

À propos des mouvements constitutionnels antérieurs à la Révolution Française, Jellinek affirme que les Constitutions des États Particuliers de l'Union étaient précédées de Déclarations de Droits, la première en date étant la Déclaration de Virginie (JELLINEK, 2000, p. 51). Le 15 mai 1776, le Congrès de Philadelphie représentait les colonies qui voulaient leur séparation d'avec la Couronne Britannique. Des 13 colonies, 11 avaient déjà adhéré à la rupture, tandis que deux avaient transformé les chartes coloniales octroyées en Constitutions (Charte de *Connecticut* de 1662 et de *Rhode Island* de 1663). L'État de Virginie a été le premier à adopter une constitution avec un *Bill of rights*, entre le 6 et 29 juin 1776, à la Convention de *Williamburg*. Elle a influencé les autres Constitutions et le Congrès des États-Unis (il mentionne que Jefferson, citoyen de Virginie, en fut le rédacteur). Ainsi, l'auteur admet-il l'influence de la Déclaration de Virginie dans le modèle adopté par la Déclaration Française de 1789.

Quant aux Déclarations anglaises, elles n'ont pas eu autant d'impact sur le modèle adopté par les révolutionnaires français. Pour Jellinek, autant la Déclaration française que les Déclarations américaines ont énoncé avec la même passion des principes abstraits. Toutefois, la Déclaration française, en adoptant le modèle américain, serait restée en deçà de celui-ci, car elle ne le surpasse en contenu que lorsqu'elle traite, timidement, dans l'article 10, des manifestations d'opinions en matière religieuse. Même comme ça, elle se contente de proclamer la tolérance, et non pas la liberté religieuse. Aux États-Unis, des communautés organisées se sont créées ; en France, c'est la perturbation sociale qu'elle a engendrée (Lalley Tollendal et Mirabeau) (JELLINEK, 2000, p. 67-70).

Il ne resterait guère aux textes anglais (*Bill of Right* de 1689, *Habeas Corpus* de 1679, *Petition of Rights* de 1627 et la *Magna Charta Libertatum* de 1215) la formation des fondements des *Bills of rights* américains. Outre ce laps de temps, Jellinek souligne (se fondant sur Baneroft – historien de la Révolution Américaine – et Sir Edward Coke – jurisconsulte anglais) que les lois anglaises étaient purement

historiques, ponctuelles et qu'elles n'avaient nullement l'intention de reconnaître des droits généraux « de l'homme ». Toute loi élaborée et acceptée par le Parlement possédait une égale valeur et il n'y avait pas de différence entre les législateurs constitutionnels et ordinaires. Les *Bills of rights* américains déterminaient la ligne de séparation entre les individus et l'État, tandis que les lois anglaises traitaient des devoirs du Gouvernement (JELLINEK, 2000, p. 71). Seuls deux (des treize) points se rapportaient aux droits des sujets. Les droits du peuple se résumaient à l'idée de restrictions imposées à la Couronne (conception médiévale – Ve et Xve siècles – visible dans l'État germanique, où le peuple et le prince, parce qu'étant opposés et indépendants, auraient besoin d'établir une relation contractuelle). Les lois anglaises ne traitaient que d'anciens droits et libertés.

L'idée selon laquelle les droits à la liberté sont des devoirs du Gouvernement se serait développée en Grande-Bretagne, principalement avec l'affaiblissement de la doctrine de Locke et de Blackstone. Georg Jellinek trouve le droit à la liberté dans l'idée de Locke sur la propriété. Pour Locke, la propriété est un droit originaire antérieur à l'État, c'est pourquoi il incombe à ce dernier de la protéger. Cependant, ce droit à la liberté ne serait rien de plus qu'une attribution limitatrice du Pouvoir Législatif. Quant à Blackstone, il reconnaissait aux sujets anglais l'exercice de la sécurité, de la liberté et de la propriété, qui se fondait sur la liberté naturelle, dispensant toute restriction légale au nom de l'intérêt commun. Les Déclarations américaines reconnaissent une liste bien plus grande de droits innés et inaliénables à tous dès la naissance. Puisque le modèle adopté par les Déclarations américaines ne viendrait pas des lois anglaises, Jellinek revient sur les conceptions de droit naturel de l'époque. Auparavant, il rappelle que les anciennes conceptions de droit naturel n'avaient pas été développées pour être confrontées au droit positivé (ex : Ulpiano visualisait l'égalité des hommes par le droit naturel et acceptait l'esclavage comme institut du droit civil, ainsi que Locke dans la Constitution de la Caroline du Nord) (JELLINEK, 2000, p. 77-79).

L'origine des droits universels « de l'homme » résiderait dans la liberté religieuse des colonies anglo-américaines, spécialement dans le Congrégationisme de Roberto Brown – fin du XVIe siècle en Angleterre –, origine de la forme primitive de l'Indépendantisme, Il s'agit de l'idée de séparation entre l'Église et l'État, ainsi que de l'autonomie de chaque communauté. Le coup d'envoi, en Angleterre, du développement de cette pensée a été la soumission de l'*agreement of the people* au Conseil Général de l'armée de Cromwell le 28 octobre 1647. L'*agreement*, transformé en projet et présenté au Parlement anglais, contenait la proposition de limiter le Parlement et de laisser à la charge des connsciences les questions religieuses (JELLINEK, 2000, p. 79).

Ces « pactes d'établissement » ont été réalisés par les pasteurs pèlerins congrégationistes dans la fondation des colonies anglaises du nouveau monde, créant des contrats en conformité avec leurs principes ecclésiastiques et politiques. Ces pactes reconnaissaient et garantissaient la liberté religieuse. Ils ont été célébrés aussi bien à Salem, fondée par des puritains en 1629, Massachusetts, qu'à Providence, fondée en 1636 par Roger Williams, sous couvert de l'idéal selon lequel « la conscience de l'homme appartient à lui-même, et non pas à l'État ». D'une façon ou d'une autre, les pactes ne réglementaient que des affaires civiles. De là serait apparue naturellement la forme de démocratie directe (JELLINEK, 2000, p. 80).

La liberté religieuse absolue cherchée par Roger Williams n'a été reconnue officiellement qu'à travers le Code de *Rhode Island* (1647) et la Charte (1663) que Charles II a octroyé aux colonies de *Rhode Island* et aux Plantations de Providence. L'Europe ne vivrait quelque chose de semblable qu'avec les Maximes de Frédéric de Prusse, lors de son avènement au trône en 1740. Le principe de la liberté religieuse aurait atteint en Amérique une consécration juridico-constitutionnelle. Le droit à la liberté de conscience ouvrait une voie à la naissance d'un « droit de l'homme ». Jellinek observe que l'idée de positiver de tels droits n'a pas été politique, mais bien religieuse. L'auteur voit en Roger Williams, et non pas en Lafayette, le premier apôtre des « droits de l'homme » (JELLINEK, 2000, p. 80-86).

La force des événements historiques a aidé à mettre en relief les théories du droit naturel. Jellinek critique l'abstraction de ces droits et signale l'exigence d'un relevé de droits fondamentaux reconnus expressément par l'État et à partir de la Révolution américaine. Avec le développement économique des colonies, sont apparues d'autres mesures essayant de les restreindre, même devant la reconnaissance des américains comme citoyens anglais. À ce moment-là, existait déjà l'idée de liberté de conscience, ainsi que la reconnaissance du fait que les personnes conservent en société leurs droits et que ces droits devaient être considérés dans l'État et contre l'État (JELLINEK, 2000, p. 87-89).

Les tentatives de limiter les colonies ont impulsé le mouvement de déclaration de ces droits. Les déclarations reconnaissaient des droits de liberté personnelle, de propriété, de conscience, des droits de libertés individuelles (presse, réunion, établissement), ainsi que des droits de pétition, protection légale, procédure judiciaire applicable et garanties politiques ;en général, droits publics des individus. Les textes prévoyaient aussi le principe de séparation des pouvoirs et de la responsabilité des fonctionnaires, la temporalité de l'occupation des charges et les limites à leur exercice. La souveraineté est du peuple, et la Constitution doit être formulée par tous. Jellinek signale les contradictions dans l'emploi des termes *man* et *freeman*, au lieu de *citizen*. Les termes originaux

donnaient de la marge au déni d'humanité de certains groupes humains (par la race, le genre etc) (JELLINEK, 2000, p. 96).

La réponse d'Émile Boutmy à la thèse soutenue par Jellinek à propos de la contradiction entre les Déclarations de droit et les principes du Contrat social mérite d'être prise en considération (Boutmy, 1907, p. 122). Il défend que la philosophie de Rousseau et les maximes du Contrat social ont pu influencer en partie les articles de la Déclaration Française de 1789. Selon Boutmy, la Déclaration n'est aucunement contradictoire avec les principes du Contrat social. Le Contrat social représenterait la convention entre deux personnages, l'un abstrait (la totalité des individus) et l'autre concret (l'unanimité d'individus considérés isolément). Les conséquences du Contrat seraient la constitution d'un corps politique, composé par l'État (ou souverain) et par les citoyens (ou sujets), et l'établissement de la relation entre les membres de ce corps politique. Le lien entre eux (État et citoyens) consisterait dans l'aliénation complète de l'individu, sa personnalité et ses biens pour l'État, et ensuite, dans la reconstruction de l'individu par l'État, avec la garantie de tout ce qui serait nécessaire pour assurer à chacun la jouissance égale des droits. C'est pourquoi le citoyen serait bien plus libre avant le Contrat qu'après. (BOUTMY, 1907, p. 124-125).

De même que la Déclaration, selon Boutmy, l'essence du contrat serait l'égalité de droits de tous les citoyens, le fondement de la loi dans la nécessité du maintien de l'isonomie entre eux et l'inéluctable généralité de la loi. Cela éliminerait toute idée de contradiction entre les Déclarations de droit, spécialement la Déclaration Française de 1789, et les principes du Contrat social et la philosophie de Rousseau (BOUTMY, 1907, p. 125).

La recherche de l'origine de la Déclaration Française de 1789 est le fondement pour la vision historique des droits humains. La Déclaration Française de 1789 ne doit pas être réduite à une simple copie des Déclarations américaines, et cela est fait par Jellinek quand il répond aux critiques de Boutmy. Un exemple de cela est le fait que la Constitution Française de 1789 et l'Américaine de 1776 sont complètement distinctes. De plus, la Déclaration de 1789 a été la première à étendre les droits reconnus à tous les êtres humains, différemment des Déclarations américaines qui protégeaient seulement ses citoyens.

Autres caractéristiques de la Déclaration Française de 1789 : a) transcendance – le préambule révèle ne pas avoir l'intention de faire un travail créatif ; b) universalisme – droits étendus à tous les êtres humains, indépendamment de la nationalité, la religion, l'ethnie etc. ; c) individualisme – seul l'individu est titulaire de droits reconnus (la Nation a été l'unique collectivité mentionnée dans la Déclaration) ; d) abstraction – les principes présentés (liberté, égalité, assurance juridique et droit à la propriété) n'ont pas de finalité prédéfinie, chacun

les utilisant à son bon vouloir (MORANGE, 1982, p. 34). La lecture comparative de la Déclaration des Droits de l'Homme et du Citoyen de 1789 et de la Déclaration Universelle des Droits Humains de 1948 montre l'influence que le texte français a exercé sur celle-ci. Sans oublier que la DUDH contient des normes de droit international, alors que la Déclaration de 1789, en dépit de ses aspects de transcendance et d'universalité, découle de normes créées par un seul sujet. Les critiques à ces caractéristiques seront faites ultérieurement.

Gregorio Peces-Barba (1981, p. 169-253) signale *La Declaración de los Derechos del Hombre y del Ciudadano* de Georg Jellinek, comprenant la réponse à Émile Boutmy, comme étant un texte qui contribue à l'analyse historique de l'origine des droits humains en profondeur, concernant le niveau de formation de ses valeurs et principes éthiques. Il est important de ne pas confondre vision historique et argumentation historiciste.

4. Autre désaccord autour des droits humains

Où nait la force des droits humains ? L'histoire des droits humains remonte au XVIIe siècle et, bien qu'il existe une asymétrie temporelle entre cette histoire et la récente codification de la dignité humaine dans le droit international, c'est en elle que les droits humains trouvent leur fondement (HABERMAS, 2012, p. 10). Les droits humains se rattachent à l'idée d'être humains jouissant de contextes minimalement dignes. La culture des droits humains s'est trouvée renforcée à partir de la reconstruction des États et des communautés après les crimes de masse (guerres mondiales, génocides etc). L'idée de droits humains peut servir de paramètre pour valoriser des actions ou des comportements. Les crimes de masse, par exemple, sont avant tout considérés crimes parce qu'ils violent essentiellement l'idée de droits humains. En d'autres termes, la raison/idée trouvée derrière les actes de violence en masse ne s'harmonise pas avec la notion d'expériences minimalement humaines.

La reconstruction des États et des communautés après les crimes de masse part de la perspective analytique qui s'écarte de la dichotomie « la guerre de tous contre tous »/ « la pure manipulation de populations pacifiques ». La raison attaquée par cette perspective est celle qui nie la possibilité de vie sociale commune parmi des êtres différents. Cette négation de l'humanité potentialise les crimes de masse (POULIGNY, 2007). La reconstruction de la paix doit prendre en compte comment la violence transforme la société, les effets post-génocide, les différentes mémoires et les représentations de la violence. Toutes ces idées harmonieuses ou discordantes affectent et modifient l'idée des droits humains.

Les êtres humains, les États, les collectivités d'État et les acteurs

politiques jouent un rôle clef dans le processus de « percevoir » les mémoires des massacres commis dans l'histoire, sans négliger le fait que rappeler ou oublier n'est pas un processus linéaire. Les discours officiels peuvent promouvoir les conflits ou la construction de la paix, tout comme le fait la mémoire. Toutefois, dans la plupart des cas, ce processus de contraste n'est pas aussi évident en soi. Il y a des idéologies créées à partir d'un *quantum* arbitraire élevé qui a recours à divers moyens de camoufler l'incompatibilité avec l'idée de droits humains. Tout cela se produit y compris au sein même de la conception des droits humains.

Même si la dignité humaine n'était pas vraiment exprimée dans les premières déclarations, elle y était implicitement présente, dans le noyau des droits humains, alimentée par les injustices subies par les êtres humains dans de nombreux processus historiques. En raison de celle-ci, les droits humains sont indivisibles. Cependant, le fondement de la dignité humaine ne rend pas les droits humains moins abstraits. Les droits humains font partie de l'idéologie dominante de la société internationale, d'une grande partie des États et des communautés. L'abstraction de ces droits ne doit pas être l'objet d'une recherche sous un aspect terminatif négativiste. Elle doit prendre en compte les pratiques sociales qui les concernent. La question de l'universalité des droits humains illustre bien cette critique. D'une manière générale,

> *[...] mientras para la crítica filosófica la universalidad es impugnada por su carácter ideal y abstracto, para la crítica política se la reputa nociva porque intenta allanar y desconocer las diferentes tradiciones políticas de las distintas culturas, en tanto que desde la crítica jurídica se insistirá en que la universalidad es imposible, al no existir un marco socioeconómico que permita satisfacer plenamente todos los derechos humanos a escala planetaria […]. (PÉREZ LUÑO, 2002, p. 36).*

Même ainsi, il y a des points positifs à l'abstraction des droits humains. Pour Pérez Luño, les philosophes dits post-modernes qui ont émis des critiques au caractère idéal et abstrait des droits humains ne sont post-modernes qu'au sens chronologique et non pas qualitatif (PÉREZ LUÑO, 2002, p. 37-38). Face à la nécessité traditionnelle d'apporter un fondement philosophique aux droits humains – écartée par Rabossi –, Pérez Luño signale la création d'une synthèse de valeurs multinationales et multiculturelles qui rende possible la communication intersubjective, la solidarité et la paix. Il s'agit de trouver l'*ethos* universel.

Selon lui, laisser de côté l'*ethos* universel au profit d'un

nationalisme radical est une absurdité logique et éthique. Se fondant sur Hume et Moore, Pérez Luño montre que, du point de vue logique, le nationalisme représente l'une des manifestations du raisonnement fallacieux naturaliste (*Naturalistic Fallacy)*, car le discours nationaliste part toujours de diverses évidences de fait ; par exemple, les défis distincts qu'ont certains groupes ou personnes en raison de la couleur de la peau, des cheveux, des croyances et aptitudes (PÉREZ LUÑO, 2002, p. 39). Le respect des traditions politiques de cultures distinctes impose la nécessité de communication intersubjective, dans la mesure où le droit à la différence ne peut devenir un droit à l'indifférence (IMBERT *apud* PÉREZ LUÑO, 2002, p. 40).

Dans les critiques juridiques, il y a deux formes de traiter l'universel : comme universalité *dans* les droits humains et comme universalité *des* droits humains. La première (sens extensif et descriptif) renvoie à l'accueil des droits humains dans tous les ordres juridiques. La seconde (sens intensif et prescriptif) se demande si l'universalité est un élément inhérent ou constitutif du concept des droits humains. Pérz Luño ne trouve de sens que dans la critique juridique sur l'universalité *dans* les droits humains (2002, p. 44).

En fait, est inhérente aux droits humains l'universalité de leurs préceptes ; défendre le contraire serait soutenir quelque autre espèce de droit, sauf les droits humains. L'abstraction universelle fait partie de l'idée de droits humains et ne doit pas être analysée comme quelque chose de négatif. Cependant, quels droits doivent être considérés comme étant des droits humains ? Il est vrai que la question de l'inhérence et de l'essentialité de certains préceptes contenus dans la DUDH a affaibli l'idée d'universalité. Il est important que les critiques de l'idéologie des droits humains soient confrontées aux pratiques sociales, afin d'identifier les idéologies arbitraires.

Outre les critiques déjà connues à chacune de ces argumentations, il y a des auteurs – comme par exemple l'Argentin Eduardo Rabossi – qui présentent les droits humains comme des faits du monde. La thèse défie les philosophes (et autres spécialistes des droits humains) en pensant la culture des droits humains comme quelque chose de créé par le monde post-Holocauste (post-crimes de masse), dont la violation ne ferait que renforcer son existence. La valorisation de comportements et la création de structures, programmes et politiques publiques font des droits humains des faits du monde. La création des Nations-Unies (1945) marque le phénomène des droits humains. La reconnaissance légale est nécessaire, mais insuffisante à la pleine jouissance des droits. Ainsi même, l'échec des argumentations ne parvient pas à les écarter comme faits du monde. Ils sont toujours là, composant les idéologies sociales.

Les arguments sont compatibles avec la pertinence de la connaissance historique (no historiciste) des droits humains, surtout à

partir des révolutions bourgeoises américaine et française. La discussion entre Jellinek et Boutmy sur les influences de la Déclaration Française de 1789 apporte des points importants à cette vision historique des droits humains. La lecture comparative de la Déclaration des Droits de l'Homme et du Citoyen de 1789 et de la Déclaration Universelle des Droits Humains de 1948 montre l'influence que le texte français a exercé sur cette dernière. Dans les déclarations, les droits sont transcendantaux, universels, individuels et abstraits.

La Déclaration Française de 1789, influencée par le contrat social de Rousseau, ne peut se résumer à une simple copie des Déclarations américaines. Elle a été le premier texte à étendre à tout le monde (pas seulement au citoyen français) les droits reconnus. De cette origine à l'idéologie actuelle, la notion de droits humains a subi maintes transformations.

La discussion sur les droits humains et leurs caractéristiques est essentiellement un conflit d'idéologies. La théorisation sur la question de l'idéologie est diverse. Le premier aspect se présente dans les sens faible et fort de l'idéologie. Dans le sens faible, l'idéologie apparaît comme source des idées, lieu où sont désignés les systèmes de croyances politiques et valeurs. Le sens fort correspond aux contributions de la critique marxiste de distorsion de la connaissance. Il est toutefois possible de visualiser des différences internes de l'idéologie – idéologies historiquement organiques et idéologies arbitraires. Il faut disqualifier les idéologies arbitraires par l'analyse critique, alors que les idéologies historiquement organiques construisent les champs d'avancées scientifiques dans lesquels les représentations de la réalité sont , même provisoirement, des validités. Bien que les idéologies dominantes ne soient pas toujours le reflet de la réalité sociale, les réduire comme synonyme de « fausse conscience » sépare la critique de l'idéologie de la recherche d'autonomie. En d'autres termes, l'impuissance est condamnée et le pouvoir de l'idéologie remise à un autre groupe social.

L'un des façons de parler de la négation des droits humains consiste à les rapporter aux régimes totalitaires (MORANGE, 1982, p. 66). À partir du XXe siècle, la philosophie des droits humains est devenu l'objet de critiques radicales. Le refus systématique des fondements des droits humains a renforcé les discours de supériorité (MORANGE, 1982, p. 60), à l'instar des régimes fasciste (supériorité absolue de l'État), nazi (supériorité de la race) et staliniste (supériorité idéologique d'une certaine classe). Le marxisme, dans la pratique, se fondait sur le pouvoir autoritaire qui s'appuyait sur une nouvelle couche sociale, sur une nouvelle classe (SCHWARTZENBERG, 1979, p. 91-92).

La création d'une nouvelle classe dominante est présentée par Claude Lefort (*Éléments d'une critique de la bureaucratie*), ainsi que par Milovan Djilas (*La nouvelle classe dirigeante*), par Marc Paillet

(*Marx contre Marx, La société technobureuacratique*) etc. Quant au pouvoir autoritaire, il a établi la dictature sur le parti et sur l'État. Au lieu de disparaître, l'État a persisté dans tous ses aspects (justice, police, défense nationale, gestion de l'économie et.), s'appuyant sur trois piliers : sur l'appareil du parti (Stalin comme secrétaire-général) ; sur l'énorme bureaucratie de l'État (dirigisme et centralisme économique) et sur la police (qui préfabrique de nombreux procès politiques et exécute les expurgés) (SCHARWTZENBERG, 1979, p. 91). D'une manière générale, le totalitarisme crée, selon l'expression de Hannah Arendt, *l'homme sans âme* (MORANGE, 1982, p. 60). Le régime déconstruit la personnalité de l'être humain et le lance dans une personnalité juridique vide et manipulée selon le type de supériorité instaurée.

La question de l'existence des droits humains peut se référer à la justification morale (RABOSSI, 1990, p. 167). Les droits humains existeraient quand il y aurait reconnaissance sociale et promulgation légale. Une autre forme pour qu'existent les droits humains serait la nécessité de raisons morales justifiant ou fondant les exigences morales constitutives de la nature de ces droits, même si l'existence des droits humains ne dépend pas du succès de cette justification philosophique. L'échec d'une tentative de découverte des raisons signifierait simplement qu'il y a encore quelque chose à découvrir (RABOSSI, 1990, p. 67).

Obrad Savic présente l'article d'Eduardo Rabossi – *Human Rights Naturalized* –, ratifiant l'argument selon lequel les philosophes doivent penser à la culture des droits humains comme quelque chose de nouveau, créé dans le monde post-crimes de masse. Pour Rabossi, des philosophes tel que Alan Gewirth auraient tort d'argumenter que les droits humains ne pourraient dépendre de faits historiques. Les changements dans le monde, ainsi que le phénomène des droits humains, ont transformé les efforts concernant l'argumentation du fondement des droits humains en quelque chose de « démodé » et de peu d'importance (SAVIC, 2013, p. 69).

Eduardo Rabossi se penche sur les arguments concernant la nécessité de l'argumentation du fondement, support ou justification rationnelle des droits humains (RABOSSI, 1990, p. 159-160). Les fondamentalistes, comme il les appelle, soutiennent que : l'argumentation morale des droits humains présuppose une contribution philosophique importante à l'existence de la théorie des droits humains ; les droits humains sont du type droits moraux ; les droits humains sont formés à partir d'un principe moral ou d'un ensemble de principes moraux (RABOSSI, 1990, p. 160). Rabossi observe que ces argumentations ne s'ajustent pas aux faits et qu'elles ne sont pas suffisamment persuasives.

Les droits humains seraient des « faits du monde ». La constatation des violations de droits humains peut attrister, susciter leur refus ou l'expression d'une opinion à leur sujet etc. En outre,

l'existence de groupes et de mouvements défenseurs des droits humains est reconnue ; face à cela, il est possible de les critiquer, de les rejoindre etc. Des comportements sont valorisés et les droits humains sont utilisés comme bannières. Voilá des exemples qui, selon Rabossi, font des droits humains des faits du monde. Ils forment notre vision du monde, puisqu'ils guident la façon dont on valorise des aspects importants de la vie (personnels, sociaux et politiques). Pour l'auteur argentin, « [...] il existe une florissante culture des droits humains dans le monde. Nous en faisons partie. Nous sommes immergés en elle » (RABOSSI, 1990, p. 159). La création des Nations-Unies (1945) a été la principale borne du phénomène des droits humains, vu qu'elle est apparue avec l'intention de créer une communauté mondiale.

L'Organisation des Nations-Unies réglemente les relations amicales entre les États fondées sur l'égalité et l'autodétermination des peuples, et elle prend des mesures pour renforcer la paix. En plus de déclarer des principes, la Charte de l'ONU crée des organes (Assemblée Générale, Secrétariat Général, Conseil de Sécurité etc.) ayant leurs propres attributions. Le souci de la Charte envers les droits humains découle de l'engagement assumé par les États-membres de coopérer avec l'ONU. La Déclaration Universelle des Droits Humains (1948) a entamé un processus complexe de codification des droits humains. Le Pacte International sur les Droits Économiques, Sociaux et Culturels et le Pacte International sur les Droits Civils et Politiques sont les instruments légaux de base de ce processus. La reconnaissance légale des droits humains ne doit pas être considérée comme une simple liste de droits, car elle crée aussi des entités, des organes, des commissions, des groupes, des agences, des comités etc. Dotés d'attributions et de juridiction. Il y a des structures semblables dans le cadre régional (Union Européenne – UE, Organisation des États Américains – OEA, Union Africaine – UA, Ligue Arabe – LA) (RABOSSI, 1990, p. 163).

Afin de tracer les contours des droits humains, Eduardo Rabossi partage les axes en « synchroniques » et « diachroniques ». Les premiers sont : a) le système normatif positif (types de normes, types de droits) ; b) le système institutionnel positif (agences et cours) ; c) le système informel ; d) les forces idéologiques et politiques opératrices *dans* le système et *sur* le système ; e) le système universel face aux systèmes régionaux ; f) la fonctionnalité de tout le système ; g) les problèmes légaux et conceptuels qui affectent le système normatif (lacunes, incohérences, « modifications » conceptuelles). Dans les éléments diachroniques, se trouvent : a) l'évolution des droits récemment positivés (à partir de 1945) ; b) l'apparition et les possibles solutions de certains problèmes mondiaux vexatoires (décolonisation, discrimination, *apartheid*, autodétermination, désastres écologiques, éducation, faim etc.) ; c) l'évolution possible de tout le système les

années à venir ; d) les perspectives d'une communauté mondiale pacifique (RABOSSI, 1990, p. 163).

5. Conclusion

Face à tout cela, quelle est la transcendance du phénomène des droits humains ?

D'un point de vue légal : - la promulgation légale des droits humains : sa positivation ; - la reconnaissance légale (positive) des personnes individuelles (et de certains groupes) en tant que sujets propres de la loi internationale ; - l'établissement d'un système d'inspection sur les États (concernant les violations des droits humains) ; - la création d'agences internationales ayant leur propre juridiction ; - l'existence de sanctions (dénonciation publique, blocus économique, « pression » politique etc.) ; - le fonctionnement d'une confédération mondiale ; - la création d'un système normatif positif ayant divers niveaux de généralisation.

D'un point de vue politique : - la modification substantielle de l'idée traditionnelle de souveraineté d'État comme étant illimitée et libre de tout contrôle externe ; - une avancée progressive vers la construction réelle d'une communauté mondiale ; - une avancée graduelle vers un contrôle international des relations internationales (politiques et économiques); - la « diffusion » de l'idée « vivre dans une communauté mondiale ».

D'un point de vue théorique : - la reconnaissance consensuelle d'une série de fins et de valeurs universelles ; - l'affirmation, par le biais d'une promulgation légale, de cette série de valeurs et de fins ; - la « confluence » de tendances opposées d'une tradition humanistique commune (RABOSSI, 1990, p. 164-165).

La reconnaissance légale est condition nécessaire, mais non suffisante, à la pleine jouissance des droits (RABOSSI, 1990, p. 171). Même ainsi, de nos jours il n'est pas nécessaire de recourir à des arguments moraux comme uniques raisons pour dénoncer l'illégitimité de quelque législation et de certaines décisions d'État. L'ouverture à des discussions relatives aux meilleures méthodes pour organiser les sociétés politiques et civiles est le signe essentiel à la promulgation légale des droits humains. La question de la nécessité d'argumentation pour le fondement des droits humains est une thèse sans intérêt pour le phénomène des droits humains. Selon Rabossi, il est possible que les fondamentalistes avancent dans un fait du monde dépassé. Cette posture ouvre un espace à un autre champ de la perspicacité philosophique : a) le dessin d'une borne opératoire conceptuelle ayant pour finalité de décrire et de valoriser le phénomène des droits humains ; b) l'aide pour éclaircir le contenu des mots-clés, les difficultés normatives et les

problèmes de création ; c) l'élaboration de l'importance philosophique du « point de vue théorique » etc. (RABOSSI, 1990, p. 174).

Les débats concernant les méthodes politiques conflictuelles au moment d'organiser les sociétés, et la distribution des libertés et des biens sont importants au sein du phénomène des droits humains. L'abstraction des droits humains, tout spécialement la caractéristique universelle, ne doit pas être paralysée devant la notion péjorative d'idéologie. Il est indispensable de vérifier ces contenus au regard des pratiques sociales et d'impulser le processus critique des idées. En ce qui concerne l'universalité, par exemple, on peut partir de la distinction utile entre universalité *dans* les droits humains et universalité *des* droits humains. L'universalité étant inhérente aux droits humains, encore faut-il centrer les efforts sur la tâche d'identification des idéologies arbitraires, négatrices d'humanité, et repenser la signification de l'extension de l'accueil de ces droits dans les ordres juridiques, en les confrontant constamment aux pratiques sociales. Même lorsqu'ils sont moralement fondés, les droits humains ont besoin d'être spécifiés et clarifiés démocratiquement (HABERMAS, 2012, p. 18).

Les droits humains qui devront prévaloir représenteront-ils toujours la protection d'un attribut universel présent en tout être humain ? Ou bien ces standards devront-ils dépendre de la culture ou du groupe social de la personne humaine ? Tandis que certains manifestent la préoccupation concernant la limitation des recours à la critique et à la justification de la diversité des codes moraux, d'autres jugent illégitime (et improbable) la recherche de normes extensives à tous – qui que ce soit, où que ce soit. Les normes morales ne s'acquièrent qu'au sein de la structure sociale, autrement dit, dans l'ensemble particulier des restrictions physiques et sociales ? Et les raisons qu'elles ont pour justifier leurs normes ne seront-elles impositives qu'à ceux qui partagent la même condition ? Nombreuses sont les questions concernant l'étendue des droits humains.

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Panor. Braz. law - Year 3 - Numbers 3 and 4 - 2015 - pp. 107 - 123.
ISSN 1075-1343 (print)
ISSN 2318-1516 (online)
DOI: http://dx.doi.org/10.17768/pbl.a3.n3-4.p107

MAJOR TRANSFORMATIONS IN CONTEMPORARY LAW AND THE TEACHINGS OF ROBERT ALEXY[1]

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Abstract: The text examines the three major changes of paradigm in contemporary law, seen in parallel to Robert Alexy's teachings. The author initially presents the phenomena of (i) the overcoming of legal formalism; (ii) the advent of a post-positivist legal culture; and (iii) the rise of public law and the centrality of the Constitution. The author then moves on to identify, in the work of Robert Alexy, the notion of the centrality of fundamental rights and of the Constitution, in contemporary law. The author also tackles the transformations in constitutional interpretation, focusing on (i) the recognition of the normative force of the Constitution; (ii) the expansion of constitutional jurisdiction; and (iii) the development of a new hermeneutics and of the new categories for a constitutional interpretation. Following this line, the notion of hard cases is approached against the background of ambiguity in language, reasonable moral disagreements and tensions in constitutional norms or fundamental rights. Alexy's theory of principles is then introduced to portray how law should be operated so as to solve relevant conflicts in modern society. Finally, there is an emphasis on the counter-majoritarian and representative roles of the Supreme Federal Tribunal, as well as on Alexy's writings about how constitutional tribunals carry out the argumentative representation of society.

Keywords: Robert Alexy - Contemporary Law - *hard cases*

1The translation was not reviewed by the author. The article was translated by Bruno Fernandes Dias, LLM candidate 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; and Christa Calleja, LL.M Energy and Environmental Law Katholieke Universiteit Leuven, 2012. Lawyer.

1. Introduction[2]

It is an honour and great pleasure to be here and to share with you some ideas and reflections on the topic of the major transformations of contemporary law. And, of course, on the influence of Professor Robert Alexy's teachings in these philosophical and conceptual changes. Speaking of an author's work in his presence has always been a risk. I clearly recall the following situation I experienced when I was still a lawyer before the Supreme Federal Tribunal. Throughout the oral statements I based my arguments on excerpts from a book by Professor Eros Grau, who at the time was Minister of the Court. However, he had a personal opinion different from the one I was arguing – it was a case regarding anencephaly, which involved a legal possibility for a woman to interrupt her pregnancy – and he made an *authentic* interpretation of what he had written, saying that that was not what he had meant to say.

Yet worse than that, I recall a shot of a Hollywood film based on the novel of a renowned author. Questioned about his opinion on the film adaptation, he stated: "The film adaptation of my novel inspired me to write another one". So as not to run such risks, I would like to briefly tell you how *I* have seen the transformations of contemporary law. And following that, I will aim to identify, how, in my opinion, Professor Robert Alexy's teachings have been an influence throughout this process. In doing so, I will give him the chance to say: "This fool could think what he likes, but I have nothing to do with it".

2. Three major changes of paradigm in Contemporary Law

Democratic constitutionalism was the winning ideology of the 20th century. In this institutional arrangement we find two different ideas which ran two distinct trajectories: *constitutionalism*, the heir to the liberal tradition which dates back to the end of the 17th century, and which expresses the idea of power limited by Law and respect to fundamental rights. *Democracy* brings the idea of sovereignty of the people, of government of the majority, which was only truly consolidated throughout the 20th century. So as to mediate the tensions which often exist between the two – that is, between fundamental rights and sovereignty of the people –, the greater part of contemporary democracies have instituted constitutional tribunals or supreme courts. Henceforth, the background within which this narrative develops includes: (i) a Constitution which guarantees fundamental rights, (ii) a

2 This text was prepared as written notes to an oral presentation, followed by a debate with Professor Alexy. The conference was held for the ocassion of bestowing of title of Professor *Honoris Causae* to Robert Alexy by the Federal University of Minas Gerais, on the 10th February 2014.

democratic regime and (iii) the existence of a constitutional jurisdiction.

Well, the 20th century saw the overcoming of certain conceptions of the classical legal thinking, which had been consolidated by the end of the 19th century. These transformations arrived in Brazil in the final quarter of the century, especially following the redemocratization. New winds started to blow this way, as much in the academic world as well as the world of tribunal case-law, especially that belonging to the Supreme Federal Tribunal. Hereafter I pinpoint three of these transformations that affected the way in which we think and we practice Law in the contemporary world, generally, and most recently in Brazil, in particular.

1. *The overcoming of legal formalism*. The classical legal thinking fuelled two fictions: a) that Law, as in the juridical norm, was an expression of reason, of an immanent justice; and b) that Law would be fulfilled by means of a logical and deductive operation, whereby the judge would make a subsumption of the facts to the norms, merely pronouncing the juridical consequence already held within it. Such methodological premises – actually, ideological – did not stand the test of time. Throughout the 20th century, an understanding was forming whereby a) Law is oftentimes not the expression of an immanent justice, but of interests which are dominant at a given place and time; and b) in a great number of situations, a solution to juridical problems is not ready-made within the legal system. It would have to be argumentatively construed by the interpreter.

2. *The advent of a post-positivist legal culture*. It was against this background where the solution to legal problems is not found wholly in the juridical norms, that a post-positivist legal culture flourishes. If the solution is not wholly found within a norm, then we must look for it elsewhere. And, that is how the great separation which juridical positivism had imposed between Law and Moral, and between Law and other spheres of knowledge, is overcome. So as to design a solution which is not carved out in a norm, Law needs to lean on moral philosophy – in search for justice and other values –, on political philosophy – in search for democratic legitimacy and for the fulfillment of public aims which promote the public welfare – and, to a certain extent, also on applied social sciences, as are economics and psychology.

The post-positivist doctrine is inspired by the return to practical reason[3], in the theory of justice and in democratic legitimacy. Within

3 The term remains inseparably linked to Kant's work, particularly, *Groundwork of the Metaphysic of Morals*, of 1785 and *Critique of Practical Reason*, of 1788. In succinct, practical reason deals with logical groundwork – but not mathematical – of principles of morality and justice, opposing itself to scientific reason, which perceives in this discourse a mere formulation of personal opinions unable of being controlled. In a more analytical form: it concerns the use of reason aimed for the establishing of logical standards for human action. Practical reason is conceived in contrast with theoretical reason. The theoretical use of reason is characterised by

this context, the search goes beyond strict legality, but does not scorn statutory law; one must undertake a moral reading of the Constitution and laws, but without resorting to metaphysical categories. In the summing up of rich and heterogeneous ideas which are sheltered by this paradigm in formation, we find the re-enthronement of values in juridical interpretation, with the recognition of normativity to principles and of its qualitative difference in relation to rules; the rehabilitation of practical reason and the juridical argumentation; the formation of a new hermeneutics; and the development of a theory of fundamental rights built upon the dignity of the human person. Within this context, we move closer to reconciliation between Law and ethics[4].

3. *The rise of public law and the centrality of the Constitution.* Finally, the 20th century has seen the rise of public law. The legal theory of the 19th century had been predominantly built upon the categories of private law. The Century, which began with the French Civil Code, the Napoleonic Code of 1804, ended with the promulgation of the German Civil Code of 1900. The protagonist parties of Law were the contractor and the owner. Throughout the 20th century we have seen a progressive publicization of Law, with the proliferation of norms of public order. Not only in the field of family law, as was the case traditionally, but also in areas typically held to be private, such as contract law – with the protection of the weaker side to juridical relations, such as employees, tenants and consumers – and property law, with the provision of a social function of property.

By the end of the 20th century, this publicization of Law resulted in the centrality of the Constitution. Any legal interpretation must be made in the light of the Constitution, of its values and its principles.

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the knowledge of things, not by the creation of norms. Positivism only accepted the possibility of theoretical reason. Therefore, positivist theories of law prescribed the role of science of law to be simply that of describing the law as established by the state, not of justifying norms, an operation which would not be possible by methodological rationalization. That is why, for example, according to Kelsen, it was not unto the science of law to distinguish which would be the best interpretation amongst those resulting from a determinate normative text. Such an activity would have an eminent political nature, and would always require a choice unfit for rational justification. Post-positivism, in rehabilitating the practical use of reason in juridical methodology, proposes precisely the possibility of rationally defining the norm in a concrete case by means of constructive rational artifices, which do not limit themselves to mere activity of knowing normative texts.

4 See Ricardo Lobo Torres, Tratado de direito constitucional, financeiro e tributário: valores e princípios constitucionais tributários, 2005, p. 41 (freely translated): "In the last thirty years to date, we have seen the return to values as the way to overcome positivisms. What is known as the "Kantian turn" (kantische Wende), that is, the return to the influence of Kant's philosophy, has resulted in a reconciliation between ethics and law, in the use of moral rationale to human rights and in the a search for justice based on categorical imperative. The book *A Theory of Justice* by John Rawls, published in 1971, constitutes a certificate of rebirth of such ideas".

Any legal interpretation is, directly or indirectly, a constitutional interpretation. The Constitution is *directly* interpreted when a claim is based on a constitutional text (a tax immunity, the preservation of the right to privacy); and the Constitution is *indirectly* interpreted when the ordinary law is applied, because prior to applying it one must verify its compatibility with the Constitution, and furthermore, the meaning and scope of the infraconstitutional norms must be demonstrated in the light of the Constitution.

3. The teachings of Professor Robert Alexy and the Transformations of Contemporary Law

Professor Robert Alexy's work has influenced, or reflected, many of these transformations, in memorable texts, becoming traditional works in various parts of the world, including in Brazil. His valuable and decisive contribution into the creation of a legal "non positivist" culture (as he calls it), deserves to be mentioned, as well as into the centrality of fundamental rights – and, consequently, of the Constitution – in contemporary law.

Indeed, at the core of Professor Robert Alexy's reflections is the thesis that Law holds a double nature, with a real (or factual) dimension and an ideal one. The factual dimension manifests itself in the formal validity of the norm and in its social efficacy. The ideal dimension is manifested in its moral correctness. In homing in on the idea of moral correctness as a tertiary element, at the side of the validity and of the social efficacy, we overcome the positivist concept of Law. In fact, the most visible boundary between positivism and non-positivism is precisely found in the relations between Law and morality: whilst positivists uphold a separation between the two, the non-positivists affirm that there is a necessary linkage between them.

Well, moral correctness, a characteristic idea of Alexy's thinking, is manifested in the world of Law in the form of justice. In his textual words: "Whoever affirms that something is right, always affirms, at the same time, that it is correct"[5]. In this vein, Alexy refutes Kelsen's idea that "any content could be lawful", which would thus give space for the possibility of a normativity without morality. Against this vision, we find the opposing and famous formula of Radbruch's, which in succinct is pronounced as follows: "Extreme injustice is not lawful". Following this line, Alexy thinks that what it is extremely unjust is all that which offends basic human rights[6]. And this basic justice has

5 Robert Alexy, *La institucionalización de la justicia,* 2005, p. 58.

6 Robert Alexy, *La institucionalización de la justicia*, 2005, p. 76: (…) [T]he legal norms duly promulgated and socially efficacious which are incompatible with the core of basic human rights are extremely unjust and, therefore, are not lawful".

universal validity[7].

Once these are incorporated into the Constitution, human rights become fundamental rights, and bind all state Powers and represent an opening of the juridical system before a moral system[8]. Fundamental rights enjoy a central position in the system, reflecting themselves in all other spheres of infraconstitutional law. This comprehensive or holistic vision of fundamental rights was originally developed by the German Federal Constitutional Tribunal, in the famous Luth case, commented by Alexy in many of his texts. In summary he states that a moral correctness of law and of legal decisions impose a binding between Law and morality. In Law, correctness equals to the idea of justice. The minimum reserve of justice corresponds to basic human rights. And these, transformed in fundamental rights by means of their inclusion in the Constitution, condition the understanding of the whole of the legal system.

4. The transformations in constitutional interpretation

Most especially following the end of World War II, constitutional law suffered many profound changes in the roman-germanic world, both in terms of institutional as well as dogmatic nature. Three main changes come to the fore:

a) **the recognition of the normative force of the Constitution**, with the overcoming of the traditional European model within which the Constitution is perceived as a political document, a summoning of the performance of the Public Powers, especially of the Legislative. In this model, the Constitution was not seen as a juridical norm, neither did it have direct or immediate applicability.

As we know, American and French constitutionalism (and by extension, European), despite being contemporary, gave birth to diverse constitutional models. In the United States, from the very beginning, the Constitution was considered a juridical document, endowed with supremacy and normative force, susceptible to direct and immediate application by the Judiciary. In *Marbury v. Madison*, decided in 1803, a judicial review was accepted with relative simplicity and reduced resistance.

b) **the expansion of constitutional jurisdiction**, as is the creation of constitutional tribunals in the greater part of democracies in the world, since the establishment of the German Federal Constitutional

7 Point in fact, in accordance with Alexy, human rights have five elements: they are universal, fundamental, abstract, they are moral rights and they establish a priority before all other types of rights. See Robert Alexy, Discourse theory and fundamental rights. In Agustín José Menéndez and Erik Oddvar Eriksen, *Arguing fundamental rights*, 2006, p. 18.

8 Robert Alexy, *Theory of fundamental rights*, 2008, p. 29.

Tribunal. For sure, even yet before the war the Austrian Constitutional Tribunal had already been created, however in another context and with another dimension. To a certain extent, there prevailed, in Europe, after the end of the conflict, the American model of supremacy of the Constitution and judicial control of the constitutionality of the laws (judicial review). This formula, indeed, means and to a certain extent is, a model of judicial supremacy, once that it is within the competency of a constitutional tribunal or a supreme court to ultimately interpret the meaning and scope of the Constitution.

It is in this manner that the traditional European model established in the centrality of law – not really the Constitution – and the supremacy of the parliament, is overcome. In fact, in the face of the inexistence of the control of constitutionality, the final say about the meaning and scope of the Constitution was that given by the parliament, whose performance was not susceptible to judicial control. Indeed, especially towards the mid late 20th century, what was confirmed, finally, was the expansion of the Judiciary in a general manner. Judges and tribunals no longer integrated that which was a specialised technical department of government – instead they became an effective political power, struggling for space against the rest of the powers.

c) **the development of a new hermeneutics and of the new categories for a constitutional interpretation.** In the recent decades, the belief in interpretation as an activity which is purely technical and mechanical was progressively being discredited. The idea of *hard cases* was developed to encapsulate those cases for which no ready-made solution was to be found in the legal order and thus required the creative performance of the interpreter.

5. The new constitutional interpretation and hard cases

1. The traditional constitutional interpretation

I shall briefly describe the traditional notion of constitutional interpretation. Constitutional interpretation is a juridical interpretation modality and, as such, takes refuge in traditional elements of juridical interpretation, namely: the grammatical, the historical, the systematic and the teleological. The specificity of the constitutional norms and of the constitutional interpretation have led to the development, in time, of some specific principles of constitutional interpretation, instrumental principles, which stand as methodological assumptions the interpreter should bear in mind: the supremacy of the Constitution, the presumption of constitutionality, the interpretation in line with the Constitution, reasonableness-proportionality and effectiveness. It is not the case to

delve into each of these principles.

In this universe of traditional interpretation, it used to be possible to define with precision the role of norms, of facts and of the interpreter. The *norm* should bring, in its abstract terms, a solution to juridical problems. The *facts* were already there ready to be framed into norms, thus allowing the syllogism which solved the problems: the law is the major premise; the facts a smaller premise; the decision a conclusion, the product of subsumption of facts to the norm; and, finally, the role of the *interpreter*: he carried out a technical function of knowledge, identifying the applicable norm and pronouncing the consequences of its incidence in the concrete case. An interpretation, therefore, as an act of knowledge and not of will.

2. The new constitutional interpretation

The new constitutional interpretation emerges to attend to those demands of a society that became much more complex and plural. It does not defeat traditional interpretation, but it comes to attend to necessities deficiently addressed by traditional formulae. It arises, among other reasons, to handle *hard cases*, which are those for which there are no ready-made solutions in the system. This is a crucial observation: it was not Law and the constitutional interpretation which, deliberately, have become more complicated. Life in itself became more complex, requiring more complex and subtle juridical categories.

This is how we come to the notion of *hard cases*. *Easy cases* are those for which there exists a ready-made solution in positive law. For example: a) the Constitution provides that at the age of 70 a public servant is forced to retire. If a judge, at the reaching of this age limit, files a case thereby postulating to keep his post, a solution would be given in a relatively simple manner: by mere subsumption of the relevant fact – implementation of age – in the express norm, which determines retirement; b) the Constitution lays down that the President of the Republic may only be candidate for a re-election once. If, for example, President Lula had intended to run a third mandate, the Electoral Justice would have denied to him, by a plain and simple application of the express norm. For better or for worse, not always is life as simple as that.

There are many situations in which there is no ready-made solution in Law. A solution must be created argumentatively, in the light of the elements of the concrete case, of the parameters laid down in the norm and of the external elements of Law. These are the hard cases. There are three major which bring them about:

A. *Ambiguity in language.* Law makes use of words which have multiple meanings or which, being indeterminate, could only be defined

in the light of the concrete case. E.g.: a) public servant; b) relevancy and urgency; c) social interest; d) general repercussion; e) environmental impact. Many a time, the language gives rise to more than one possible interpretation.

B. *Reasonable moral disagreements*. In the contemporary world, in pluralistic and complex societies, as the ones in which we live, educated and well-intentioned persons think differently about themes which are morally controversial. For example: a) Euthanasia and assisted suicide, the existence or not of a right to a dignified death; b) the issue of refusal to blood transfusions for believers of the religion of Jehova Witnesses; c) the debate about the decriminalisation of soft drugs. Evidently, the disagreement must be reasonable. If an individual declares: my existential choice is paedophilia… well, I'm sorry, but this is not a morally acceptable alternative. In such a case there is no disagreement, but a contrary consensus.

C. *Tensions in constitutional norms or fundamental rights.* The Constitution, being a dialectic document, shelters contradictable values. Example 1: when singer Roberto Carlos had sought to prevent the publicizing of an unauthorised biography about him, there was a tension between the constitutional norms of fundamental rights, such as that which protects the right to freedom of expression and that which protects the right to a private life. Example 2: in the construction of two hydroelectric plants in the Amazon Forest, two opposing constitutional norms were likewise at loggerheads, in that particular situation: the one which provides that one of the objectives of the Republic is national development, and the other which is devoted to the protection of the environment. It must be noted that the Justice Tribunal of the State of Rio de Janeiro, in deciding the possibility of a TV broadcaster to make a programme about a crime committed many decades ago, ruled contrary to what had been ruled by the German Constitutional Tribunal when it had decided the case of the Lebach soldiers.

It is not possible to arrive at a solution for these situations by traditional means of interpretation. There is more than one possible solution and, in principle, a reasonable one, contending the choice of the interpreter. In this brave new world of constitutional interpretation, various new juridical categories were developed and refined, including: (i) the recognition that principles are norms and are qualitatively distinct in relation to rules; (ii) the setting out of the phenomenon of collisions of constitutional norms, both in regards to principles as well as in regards to fundamental rights; (iii) balancing as a technique for solutions to these conflicts, overcoming the limitations of a purely subsumptive reasoning; and (iv) the rehabilitation of juridical argumentation, of practical reason, as groundwork to legitimate judicial decisions which are not based in the traditional logic of the separation of Powers, for

they bring about a tad of judicial creativity.

3. Professor Robert Alexy's teachings and the transformations in constitutional interpretation

It is in the domain of constitutional interpretation – and, notably, of interpretation of fundamental rights –, with its differing particular categories that Professor Robert Alexy's comprehensive and revolutionary contribution has been fashioned out.

The theory of the principles is one of the pillars of his theory on fundamental rights and, according to him, his system of democratic constitutionalism would be incomplete without it[9]. Firstly, an important observation is that principles are treated by him as a species of *juridical norm*. Although this would appear relatively obvious, this was an important achievement amongst us. In Brazil – and probably in other parts of the roman-germanic world – principles were thought of as a merely subsidiary source of Law, to be used only in those cases of normative lacuna and, yet so, following custom and analogy. Even those who would acknowledge constitutional principles as norms would attach to them the adjective *programmatic*, meaning that their effectiveness depended on a subsequent normative completion, generally the performance of the ordinary legislator. The simple acknowledgment of principles as norms, then, which emanates from Alexy's work, is readily important in itself.

Nevertheless, and yet more relevant, was the statement that the norms of fundamental rights have, oftentimes, the structure of principles. Therefore, the term *principle* could refer both to individual rights as well as to collective goods, that is to say, goals of public interest. And principles often collide. Consequently, we find conflicts between collective goods, between fundamental rights and between fundamental rights and collective goods. Well, in this general context, Alexy formulated his traditional qualitative distinction between rules and principles. The theme was explored to exhaustion, in academic works both in Brazil and abroad. I will hereby use the definition he used in one of his last published works in Brazil

> *"Principles are optimization mandates. They require that something be done in the greatest measure possible in regard to the factual and juridical possibilities. Its form of application is balancing. On the contrary, rules are norms which oblige, prohibit*

9 Robert Alexy, *Teoria dos direitos fundamentais*, 2008, p. 85; and Robert Alexy, Principais elementos de uma teoria da dupla natureza do direito, Revista de Direito Administrativa 25, 2010.

> *or allow something definitively. In this sense, they are definite mandates. Its form of application is a subsumption"*[10].

Yet in the scope of the theory of principles, Alexy brings out the issue of conflicts between principles and conflicts of rules, in brilliant insights. A conflict of rules could only be solved if an exception clause is introduced therein – that is to say, the rule would not be applicable in a certain case – or by the declaration of invalidity of one of them. The conflict of principles, on the other hand, is solved in quite a different manner. If two principles collide, one shall have to give in. This does not mean, however, that it is invalid. What happens is that under certain concrete and determinate circumstances, one of them would have precedence. Under other circumstances, the solution could be opposed. A weighing or balancing is necessary so as to determine which principle has the greater weight in the concrete case[11].

That brings us to another central issue in the debate concerning the constitutional interpretation: the role of balancing or weighing. Nowadays a good number of constitutional courts across the world have made use of this technique which has origin in the jurisprudence of the German Federal Constitutional Tribunal. In the German tradition, balancing is an aspect of the much more comprehensive principle of proportionality. One knows fully well that the principle of proportionality is divided into three subprinciples: adequacy, necessity and proportionality in the strict sense. Interpreting constitutional law or constitutional rights in the light of the principle of proportionality is implementing the optimization mandate inherent to the concretisation of principles. As referred above, this means carrying out each constitutional right, notably when in strain with other rights and constitutional juridical interests, in its greatest possible extension, in the light of factual and juridical circumstances to be taken into account.

Alexy clarifies that the principles of adequacy and necessity refer to the optimization within the limits of the factual possibilities, given by the specific situation. On the other hand, the subprinciple of proportionality in the strict sense refers to the juridical possibilities of optimization. Balancing ultimately involves a search for the ideal solution in view of concurrent principles. Proportionality in the strict sense gives way to what Alexy coined as "The Rule of Balancing", which could be enunciated as follows: "The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the

10 Robert Alexy, *Principais elementos de uma teoria da dupla natureza do direito, Revista de Direito Administrativo,* 25. (TN: the version referred by the author was the translation by Fernando Leal', which version was used in our translation).

11 Robert Alexy, *Teoria dos direitos fundamentais*, 2008, p. 92 and 105.

importance of satisfying the other"[12].

6. Judicialization of life. The counter-majoritarian and representative roles of the Supreme Federal Tribunal[13]

As stated earlier, democratic constitutionalism was the winning ideology of the 20th century throughout the greater part of the globe, defeating various alternative and authoritarian projects which competed with it. Such an institutional arrangement is the product of the fusion of two ideas which had two differing historical trajectories, but which came together to produce the ideal contemporary model. *Democracy* means people's sovereignty, the government of the people, the will of the majority. *Constitutionalism*, on the other hand, translates the idea of limited power and respect for fundamental rights, sheltered, as a general rule, in a written Constitution. In the traditional conception, people's sovereignty is incarnated through the elected public agents, that is: the President of the Republic and the members of the Legislative Power. On the other hand, the protection of the Constitution – that is, of the rule of law and of the fundamental rights – is attributed to the Judiciary, where at its apex, in Brazil, we find the Supreme Federal Tribunal – STF.

From this comes the duality, equally traditional, which established a rigid distinction between politics and Law, the relevance of which we discuss in this topic. In this sense, tribunals were independent and preserved from politics by means of various mechanisms (financial autonomy and the guarantees of judges, amongst others). On the other hand, they did not interfere with political concerns. For better or for worse, this time remained far behind us. Throughout the recent years, we have seen an increasing *judicialization* of life, a label which identifies the fact that innumerable questions of great moral, economic and social repercussions have had their final deciding instance within the hands of the Judiciary and, frequently, at the Supreme Federal Tribunal. With a critical eye, in academic or in the Parliament, many actors have reprinted the commentary made by Carl Schmidt, who was contrary to the idea of creating constitutional tribunals and spoke of

12 Robert Alexy, *Teoria dos direitos fundamentais*, 2008, p. 167. Amongst the main scholars in Alexy's thinking in Latin American we find, in Brazil, Virgílio Afonso da Silva (see *for e.g., Direitos fundamentais – conteúdo essencial, restrições e eficácia*) and, in Colombia, Carlos Bernal Pulido (see*, for e.g.* The rationality of balancing, accessible at http://www.upf.edu/filosofiadeldret/_pdf/bernal_rationality_of_balancing.pdf). Both were translators into Spanish and Portuguese, respectively, of the traditional works of Alexy, as referred within this note.

13 The ideas expressed within this topic were originally presented in: Luís Roberto Barroso and Eduardo Mendonça, *STF entre seus papéis contramajoritário e representativo*, 2013. Available at http://www.conjur.com.br/2013-jan-03/retrospectiva-2012-stf-entre-papeis-contramajoritario-representativo.

the risks of judicializing politics and of politicizing justice. This goes contrary to Hans Kelsen, who has defended those Tribunals. It is not the case to come back to this debate, which work has already been done in other academic works by this author[14].

It would be relevant to highlight at this juncture how the Court clearly carries out two distinct and apparently opposing roles. The first role is named, in constitutional theory, as the *counter-majoritarian*: on behalf of the Constitution, of the protection of the rules of the democratic game and of the fundamental rights, it is up to the Court to declare the unconstitutionality of laws (*i.e.*, the majoritarian decisions taken by Congress) and of acts of the Executive branch (whose head was elected by the absolute majority of citizens). This means: non-elected public agents, such as judges and Ministers of the STF, may superimpose their own reasoning to that of the traditional representatives of the political majority. Hence the term counter-majoritarian. The second role, less discussed in constitutional theory[15], could be referred to as *representative*. This emerges, as the name suggests, when the Tribunal attends to public demands and political ambitions not timely attended to by the National Congress.

This representative role of the Supreme Federal Tribunal has awoken great attention in recent times. It has imposed a reflection about the relations of the Court with society and with the other Powers. The capacity of a constitutional court to interpret and take into account the societal sentiment is positive and desirable. In a democracy, all power is representative; that means it must be exercised in the name and in the interest of the people, as well as must be accountable to society. For this reason, judges of whichever degree of jurisdiction must look through the window of their chambers and make an effort to understand the reality around them. But one must be cautious: the Judiciary cannot become yet another channel of the political majority, subservient to the public opinion or influenced by the media. Many times, the right solution is not the most popular one. And judicial populism is just as bad as any other.

In gleaning on the relations with the other Powers of the state, one must also be cautious. In Brazil, the Legislative branch is going through a difficult moment, a certain crisis of representativeness and functionality. Despite the clear perception of the phenomenon, the

14 See Luís Roberto Barroso, *O controle de constitucionalidade no direito brasileiro: exposição sistemática da doutrina e análise crítica da jurisprudência*, 2011, p. 74-5.

15 See, meanwhile, Corinna Barret Lain, Upside-down judicial review, *The Georgetown Law Journal 101:* 113, 2012; Thamy Pogrebinschi, *Judicialização ou representação: política, direito e democracia no Brasil,* 2011; and Luís Roberto Barroso, O constitucionalismo democrático no Brasil: crônica de um Sucesso Imprevisto. *In:* Luís Roberto Barroso, *O novo direito constitucional brasileiro*, 2012, p. 41.

political leaderships have not managed, as yet, to advance an agenda of reforms, particularly of political reform. This increases the pressure upon the Judiciary, many a time provoked by those very political agents in engaging on those controversial issues. Other times, entities of civil society or private parties postulate judicially certain claims of society which have gotten stuck in the middle of the political majoritarian process. Although an expansive position by the Court may, many times, seem inevitable, one needs to avoid judicial arrogance or any hegemonic claims. In this issue, as in everything else in life, it is essential to get things right at the proper degree.

On the occasion of my hearing before the Federal Senate, which took place on the 5th June 2013, I put forth my point of view on the matter. In the ideal world, politics is politics, law is law. They are different spheres. In the real world, however, the boundaries are almost never clearly delineated. And that is how inevitable tensions arise. When this happens, it is important to have criteria to set out the issue. I believe that here we could distinguish two situations: a) when there has been a performance of the Legislative or of the Executive in regard to the issue; and b) when there has *not* been such performance.

In the first scenario, therefore, we find the Legislative having effectively deliberated a determinate issue. For example: (i) the enactment of a law permitting and regulating research of embryonic stem cells; or (ii) the enactment of a law regulating affirmative action in favour of black people. In these two cases, despite there being a political controversy, the Judiciary must be deferent to the choices made by the Legislative. It is not unto the Judiciary to superimpose its own political assessment towards organs whose members have been baptised by popular representation.

A different situation arises when the Legislative would not have performed, either because it could not, or it did not want to or it did not manage to form a majority. In such a case there would exist a lacuna in the system. But the problems will take place and the Judiciary will have to deal with them. For example: a) Congress would not have as yet regulated strikes in the public service. Notwithstanding, strikes did take place, disputes arose and the STF had to establish rules to be applied until the Congress would provide some regulation on the subject. Or b) the case of homosexual relations. They exist. They are a fact of life, irrespective of what each person may think on the matter. There is no law in its regard. Well, the State must take a position about the existence or not of the rights of these couples to be recognised as a familial entity, for the moral importance of this acknowledgement and for a series of practical questions (inheritance, alimony, division of common assets). When Congress does not furnish a reply, it is obvious that those affected will bring their claim before the Judiciary, seeking a judicial affirmation

of that which the political end failed to discuss.

It is natural that a constitutional court could also, in principle, review a legislator's choice, but this would obviously involve a higher argumentative onus. This is why the Judiciary's role, when a political deliberation is lacking, is more comprehensive than what would have taken place should there be such a deliberation. If there is a law, the STF could only invalidate it if it is unequivocally at loggerheads with the Constitution. If there is no law, the Judiciary could not abandon the case due to normative omission. In such a case, its power expands. Therefore, deep down, the power over the greater or minor degree of judicialization is of no other than Congress itself: when it performs, judicialization reduces; and vice versa.

7. Professor Robert Alexy's teachings and constitutional jurisdiction: the Constitutional Tribunal as Argumentative Representation of society[16]

Constitutional jurisdiction is a manifestation of state power, of political power. In a democracy, as we have already mentioned, all political power emanates from the people, and naturally, must be exercised in its name. Consequently, all legitimate political power is a representative power. But members of a constitutional court are not elected, as are congressmen, neither are they subject to control, considering there is no option to refuse to re-elect them. The only manner to reconcile constitutional jurisdiction with democracy is to conceive it, also, as a popular representation. To reach this, there are two obstacles to overcome: it is necessary to (i) untie representation from election; and (ii) to demonstrate why the representation by the constitutional tribunal must have precedence upon the representation based on the elections.

In Alexy's view, the key to the solution of these problems and, consequently, to the general problem of constitutional jurisdiction, is the concept of argumentative representation. As a matter of fact, it is possible to sketch a model of democracy which is not exclusively based on the concepts of elections and of the government of the majority. A model of this kind would be purely decisional. But the adequate concept of democracy must include not only decision, but also argument. With the inclusion of the idea of arguments, the democracy is converted into a deliberative democracy. In this sense, the representation of the people by the parliament must be decisional as much as argumentative

16 The ideas presented in this topic where gathered in Robert Alexy, Balancing, constitutional review and representation, *International Journal of Constitutional Law 3:*572, 2005, p. 578 *et seq*.

or discursive. On the other hand, the representation of the people by a constitutional court is purely argumentative. One must see how the adequate concept of representation must be connected with some *ideal value* [17]. Representation must intend to be correct.

The critique which is made of the constitutional jurisdiction and of the role of the constitutional courts is that this is an idealisation. And that, ultimately, a simple claim of representation of the people would turn any argument a legitimate one, without limit or control. Such objection could be counter-argued on showing two points: a) there are arguments which could be considered solid and correct; and b) rational people are capable to accept solid and correct arguments. Once these conditions exist, it can be made out how discursive constitutionalism is a project of institutionalisation of reason and of correctness. This means: if there are solid and correct arguments, as much as there are rational people, reason and correctness are best institutionalised with the existence of constitutional jurisdiction, much more than in its absence.

8. Conclusion

Intention for moral correctness, principles as optimisation mandate, rule of balancing, fundamental rights as minimal content of the idea of justice, the constitutional court as argumentative representation of society: both the grammar and the semantics of contemporary constitutional law, as well as the language of a great number of constitutional courts in the world, include the categories and terminologies of Professor Robert Alexy. Few authors have the projection and influence as the one he has reached. All this without any marketing, without political or economic interest, unpretentiously and without arrogance, but solely for the virtue of which he has been made a symbol: the virtue of rationality and of the quality of argument. And since Professor Robert Alexy was a person who contributed to universalise proportionality and balancing, I would like to conclude my presentation with an excerpt from the Chinese philosopher Lao-Tsé, taken from his classical work *Tao Te Ching*, written over 2,600 years ago, and which makes justice to our honoured guest:

> *"An excess of light blinds the human eye.*
> *An excess of noise ruins the ear.*
> *An excess of condiments deadens the taste.*
> *The effect of too much horse racing and hunting is bad,*
> *And the lure of hidden treasure tempts one to do evil.*

17 This expression is used by Alexy, who attributes it to Gerhard Leibholz. Robert Alexy, Balancing, constitutional review, and representation, *International Journal of Constitutional Law 3:*572, 2005, p. 579.

Therefore, the wise man attends to the inner significance of things,
And does not concern himself with outward appearances".

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Panor. Braz. law - Year 3 - Numbers 3 and 4 - 2015 - pp. 124 - 142.
ISSN 1075-1343 (print)
ISSN 2318-1516 (online)
DOI: http://dx.doi.org/10.17768/pbl.a3.n3-4.p124

IDENTITY IN LAW: THE SECOND MEDICAL USE AND THE DRUGS FOR NEGLECTED DISEASES[1]

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Abstract: This paper is dedicated to presenting a normative political institutional approach, which may creatively reconstruct the hermeneutics of the Brazilian Industrial Property Rights Act in the specific case of the second medical use of known substances in the matter of drugs for neglected diseases. However, the fact of having the same chemical substance, as a point of departure, might signify that the incremented drug does not fulfil the requisites of patentability according to the traditional legal deduction practised in Brazilian courts. Methodologically, the theoretical reference here applied consists of the fusion between the ideas of law as integrity, developed by Dworkin, and law as identity, complemented by Taylor's social theory of identity and Bankowski's proposal of living lawfully. In fact, this methodological approach proposes the reconstruction of a system of analytical concepts based on contemporary legal theory in order to legitimatise public decisions whose purpose is to foster the research and development of drugs for neglected diseases. In this context, the legal concepts of novelty, non-obviousness and industrial application listed in the Brazilian Industrial Property Rights Act are reinterpreted according to the theoretical reference of identity in law.

Key words: Law as identity - second medical use drugs - drugs for neglected diseases.

1. Introduction

The theoretical basis of this paper is dedicated to the presentation of a normative political institutional approach, which may creatively

1 This paper has the financial support of Fundação de Amparo da Pesquisa do Estado de Minas Gerais (FAPEMIG) and Conselho Nacional de Desenvolvimento Científico e Tecnológico (CNPq).

reconstruct the hermeneutics of the Brazilian Industrial Property Rights Act. The object of study here is the legitimacy of patentability of the second medical use of known substances as a means of fostering the development of drugs for neglected diseases. According to the Médecins Sans Frontières (2010), the problem of neglected diseases is related to the lack of economic interest on the part of pharmaceutical industries in developing more effective drugs to treat diseases, such as, malaria, Chagas disease, leishmaniasis, and tuberculosis. These are known as neglected diseases, for there is no direct market interest in investing large sums of money to develop drugs which may contribute to the prevention and cure of these diseases.

The hypothesis which structures the study of the legitimacy of second medical use drugs is based on the possibility of legally analysing if the patent for a second medical use drug may directly influence the process of innovation, considering the aim of the Brazilian Industrial Property Rights Act, i.e., implement the right to scientific and technological development. However, the fact of having the same chemical substance, as a point of departure, might signify that the incremented drug does not fulfil the requisites of patentability according to the traditional legal deduction practised in Brazilian courts. In this vein, different scholars consider the second medical use of a known substance an illegal attempt to extend the duration of the patent, disregarding other social impacts of the second medical use as well as the fundamentals of industrial property rights.

Methodologically, the theoretical reference here applied consists of the fusion of the theory of law as integrity, developed by Dworkin, and the idea of law as identity, complemented by Taylor's social theory of identity and Bankowski's proposal of "living lawfully". Integrity plays an essential role in the reconstruction of a methodological tool for understanding the double dimension of the right to patent a second medical use drug. The idea of law as integrity reinforces that law is an interpretive practice, which requires the intertwining between legal rules per se and institutional morality. However, in order to concretise the moral dimension as a relevant criterion of legal interpretation, it is important to shed light on an old debate between legalism and legality. In this context, Bankowski demonstrates that the tension between love and law affects the interpretive legal practice. Going beyond the Dworkian theory of law as integrity does not mean abandoning his theoretical presuppositions but reinserting them into a context of identity in law.

This new theoretical perspective serves as a trigger to methodologically analyse the possible inconsistency in the argument that second medical use drugs are illegal per se or they represent an illegal attempt to monopolise the use of patented drugs for a longer period of time. A basic question arises: is it legally valid to patent second

medical use drugs, according to the Brazilian Property Rights Act? In this vein, two other questions need to be answered immediately after the first one already stated: is there a legal gap in the specific legislation that might be morally inconsistent? Is it legally and logically coherent through ordinary interpretation to validate the second medical use as an incentive to develop and produce drugs for neglected diseases?

In fact, this methodological approach proposes the reconstruction of a system of analytical concepts based on contemporary legal theory in order to verify if public decisions whose purpose is to foster the research and development of drugs for neglected diseases are viable through mere interpretation by administrative agencies, taking for granted the way the actual legislation is conceived. The limits of the Brazilian administrative agency, National Institute of Industrial Property Rights (INPI), responsible for analysing and approving requests for patenting innovative products or processes submitted as a means of acquiring the legal monopoly over them for twenty years, must be tested and verified. The methodology of data analysis in the qualitative research here designed is formerly constructed based on the assertion that law, in its best light, has to be conceived as an interpretive practice. The interpretive practice requires working on the tension between legalism and love (solidarity). Once data related to the development of second medical use drugs is collected, it is methodologically accurate to conclude that there is no logical relationship between the second medical use drugs and the drugs for neglected diseases. The interpretive practice of the Brazilian Industrial Property Rights Act is invariable in spite of the kind of disease the second medical use drug can be applied to.

Stemming from this methodological approach, the paper will be divided into three major parts. First of all, the theoretical reference and the qualitative methodology will be structured as a point of departure for reconstructing the essence of legal interpretation that may be applied to the case of second medical use drugs. Secondly, the patentability of the second medical use of a known substance, considering the case of drugs for neglected diseases, will be analysed taking into account, not only the Brazilian Industrial Property Act, but also the theoretical reference based on a normative political institutional perspective. Finally, the constructive interpretive approach is applied as a means of reconfiguring the legal coherence of patentability of second medical use drugs in a social context of inclusiveness and technological innovation which are the basic principles derived from the Brazilian constitutional system.

2. Integrity and identity in law: a methodological approach

The methodology applied to this research consists of an unobtrusive analysis of interpretive practice, whose aim is to unveil the

underlying meaning of the patentability of second medical use drugs as far as innovation and scientific development are conceived as the primary goals of the Brazilian Industrial Property Rights Act. The method of content analysis is utilised to revisit, not only the industrial property rights rules, but also the administrative interpretation of these rules, taking the patentability of second medical use drugs as a unit of analysis.

The focus of this investigation is to evaluate as well as criticise the interpretive practice of administrative officials in the terms of analysing the legitimacy of approving second medical use drugs, considering the idea of identity in law. Relevant scientific data concerning the nature of second medical use drugs already patented will serve as a means of extracting the latent content of the interpretive practice applied by administrative officials. Obviously, in this specific case, the object of research is indirect data, which can be found on official governmental or scientific websites.

Following the dynamics of unobtrusive research, according to Babbie (2000), firstly, data analysis will be limited to written information publicly available referring to the state of art of second medical use drugs. Secondly, a qualitative data analysis will be conducted in order to either confirm or discard the initial hypothesis without disregarding the theoretical references elaborated. Thirdly, the process of interpretation of specific legal rules and official administrative agency action will be criticised so that inconsistencies between real facts and ideal normativity can be, at least, unveiled.

Identity in law as a synthetic theory, which fuses the ideal of integrity and the perspective of "living lawfully", indicates the most adequate interpretive practice for dealing with cases involving second medical use drugs. Methodologically, the legal dimension of this discussion involving the case of drugs for neglected diseases as well as the perspective of second medical use drugs has to be analysed taking into account, first of all, the actual state of art in this specific scientific field and the interpretation of up-to-date data regarding second medical use; secondly, the politics of legislation in terms of patent rights; thirdly, the interpretation of the Brazilian Industrial Property Rights Act; finally, the institutional interpretive prognosis of an effective and legitimate change in the attribution of legal monopoly to second medical use drugs in accordance with the Brazilian Industrial Property Rights Act.

The first step here before analysing the case of second medical use drugs is to conceptualize the theory of law as identity. It is relevant to consider as the first point of departure of identity in law the theory of law as integrity. Basing the argument of taking rights seriously on the Dworkian project of law as integrity, it is consistently articulated to add an institutional moral component to the traditional "dimension of fit" in order to reconstruct the process of legal interpretation in

judicial and legislative practice. Obviously, Dworkin (1986, p. 189-90) intends to define integrity, taking as a major value, the idea of a personified community, which means that morality is a qualifier of legal interpretation:

> *"Integrity, in contrast, insists that each citizen must accept demands on him, and may make demands on others, that share and extend the moral dimension of any explicit political decisions. Integrity therefore fuses citizens' moral and political lives: it asks the good citizen, deciding how to treat his neighbour when their interests conflict, to interpret the common scheme of justice to which they are both committed just in virtue of citizenship".*

This extract suggests that a personified community requires sharing moral values as a means of reconstructing the idea of politics and justice. Integrity is founded on the idea of how the ideal of a community must be universalised to reveal the essential moral values which define, not only each individual as an independent identity, but also an institutional political background shared by each member of a community. Integrity in law demands a real commitment to intertwining moral values and the dimension of fit in the interpretive practice when applying the law. In fact, the process of interpreting the law, according to Dworkin (1986), can be compared metaphorically to the chain novel model which means that every decision, although taken at different times, is supposed to guard relative coherent relationship to previous ones so that the original plot is not corrupted. Succinctly, law as integrity represents an initial effort to reconfigure and conceive law as an interpretive practice, which is shaped and forged in the tension between legality and fraternal attitude. However, Dworkin (1986) does not indicate how this tension is supposed to promote relevant change in interpretive practice. Therefore, it is important to acknowledge the idea of identity from a social point of view so as to complement the moral dimension of Dworkin's theory.

According to Taylor (1989, p. 47), "our lives exist also in the space of questions, which only a coherent narrative can answer. In order to have a sense of who we are, we have to have a notion of how we have become". This narrative, which is conceived in the relationship with others, in a dialogical process, is paramount in understanding the formation of human identity. The identity of a self derives from a "web of interlocution" which grows in depth only if there is space for strong moral evaluation. In Taylor's social theory, morality incorporates not only what is right to do but also what is right to be. It is inconceivable

to make qualitative distinctions of worth based, exclusively, on a guide to action. This qualitative distinction of worth requires a profound understanding of what kind of role righteousness plays as an essential component of the moral evaluation of a self. Thinking about the kind of life that is worth living is a relevant step towards the formation of a moral attitude of a self. Taylor's study of the making of modern identity serves to enlighten what is known as the moral dimension of Dworkin's idea of integrity in law. In order to elaborate legal interpretive practice beyond the exclusive dimension of fit, it is essential to think about what kind of individual you want to be as well as what kind of community you intend to have (DWORKIN, 1986). However, this is possible only if individuals are capable of reflective thinking, which consists of pondering about what is right to do and what is right to be. The quest for this moral dimension necessitates a real commitment to always being reflexive about the kind of human being a personified community values. Here lies the beginning of a legal practice based on identity. Following this reasoning, living lawfully will represent the last piece of this legal puzzle.

Living lawfully, according to Bankowski (2001), needs a truthful commitment to what is righteous. In order to achieve this ideal, it is, first of all, paramount to understand the rules under which humans live; secondly, it is essential to pay attention to the story that is told, to the particularity of each case presented to the jurist; thirdly, it is fundamental to reconstruct the meaning of legislation through, what Bankowski himself denominates, "parabolic reasoning"; finally, law and love will structure bridging institutions based on the possibility of going beyond a semantic interpretive legal perspective without disregarding the relevance of legality. A structural question arises: how can this theory be effectively applied in legal practice?

Parabolic reasoning is a methodological tool, which logically explains the underpinnings of Bankowski's theory. In spite of having been based on a Christian belief system, parabolic reasoning is easily conceived as an interpretive practice applied to Ancient Law. Bankowski (2001) exemplifies this specific reasoning, taking as a model of interpretive practice, the parable of the Good Samaritan. He relates Jesus's explanation given to the lawyer when asked what the content of Ancient Law was and what "acting in a neighbourly manner to people" meant. As a matter of fact, the lawyer wanted to put Jesus in a difficult position for he was suspected of disregarding Ancient Law. Nonetheless, Jesus responded to the lawyer showing a thorough understanding of the law as well as demonstrating the ability to interpret the law beyond a strict semantic approach. Jesus reconstructs the meaning of "neighbour" by telling the story of the Good Samaritan. According to the proposed interpretation, acting in a neighbourly manner signifies that you should

leave your comfort zone so as to help someone in need. It means that the reason why help is granted is not because the other is vulnerable and wounded but it is because the helper grasps the true meaning of being at the same time autonomous and vulnerable in a risky society. According to Bankowski (2001), the other is not the Jew fallen among thieves but the Samaritan who runs the risk of putting himself in a vulnerable situation by helping the other on a dangerous road, as the road from Jericho to Jerusalem was known. Succinctly, parabolic reasoning can be constituted as a methodological instrument to execute critical reconstruction of legality by going beyond the law "within the context of the inside" (BANKOWSKI, 2001, p. 177).

Identity in law consists of a new line of legal reasoning for it encompasses the fraternal attitude of law as integrity and turns it into a methodological instrument for re-establishing a new rule of law under the risk of love. This tension between law and love, explored by Bankowski (2001), summarises an advanced level of methodological expertise in re-evaluating the nature of legal interpretation in contemporary societies. Here lies the encounter between the methodology of content analysis and the methodology of identity in law. No matter what type of data one is dealing with, the process of extracting specific data from a certain context and re-interpreting the data in a new context of theoretical basis validates new traits of significance whose meaning could not have been constructed in a different context. So as to make the argument clearer, the act of interpreting legal rules, such as, the legitimacy and legality of second medical use drugs, is built under the methodological concept of extracting the original meaning of a certain rule and reconstructing it in a context of inclusiveness, social solidarity and love. Identity in law overcomes the theoretical obstacles of living lawfully and integrity in law by elucidating how legal rules are transformed and turned into a new law by taking into account the context of their application.

Metaphorically, Dworkin (1986) compares this aforementioned process with the chain novel, whereas Bankowski (2001) utilises for the same purpose the idea of a soap opera with new episodes being added. However, the best-updated metaphor for better describing this idea of identity in law is the remixing of different types of music. Although sampling without proper license is considered to be illegal by the lobby of the copyright music industry, it is a way of preserving the original source of a specific song, however, executed in a totally different manner. A good example is the Brazilian concept of "tecno-brega" which can take an entire original song, such as, "Crazy", from Gnarls Barkley, subsequently adding specific beats that will essentially transform the old song into a renewed expression of art which is more relevant to the social context in case. It is not nonsensical to say that this new song produced by Brazilians maintains the source of the

original one, nonetheless with fragmentary elements of locality and specificity. Thus, a new identity for a song originally produced by an American band is creatively transformed. This sense of identity implies the possibility of creative reconstruction taking into consideration the interests, the needs and the prospects of a specific community. The quest for empirical fragments which complement the meaning of a legal rule can be compared to the quest for a specific beat that might change the sound of a song without discarding its original melody. In this sense, it is possible to see a strong similarity with parabolic reasoning and, above all, the possibility of formulating, in law, the differentiated unity, proposed by Bankowski (2001). The original song is re-contextualised, is not annihilated at all but is indeed merged in a context of a new beat. Identity in law is this possibility of managing the essence of a legal rule in a new context of social inclusiveness. Each individual of the community can recognise himself in the process of applying legal rules to others. Here lies identity in law as a methodological concept, which includes every single member of the community in the mechanism of creative legal reconstruction.

3. Second medical use and drugs for neglected diseases

3.1. The case of second medical use

Before analysing the relationship between second medical use and drugs for neglected diseases, it is relevant to verify the nature of the specific case of patent right of second medical use in the pharmaceutical field. It is important to reiterate the first basic question of this research, i.e., is it legally valid to grant exclusivity to second medical use components, according to the Brazilian Patent Rights Act?

Obviously, official data on the website of the National Institute of Industrial Property Rights (INPI) reveals a direct answer to this question (BRASIL, 2012). According to the INPI, the second medical use fulfils the legal requisites of patentability. The basic argument of officials from INPI is that whenever it is possible to apply the Swiss formula to the incremented drug derived from an original component already patented, legal monopoly ought to be granted. The WHO (2012), in accordance with its data basis, defines the Swiss formula in the following statement: "Use of X for the manufacture of a medicine to treat Y". This signifies that the drug is only considered to be fulfilling the requisite of novelty if and only if the same substance already patented in another component yields a new medicine to treat a new disease. Utilising this basic argument for attributing the right to patent to the inventor of a newly incremented drug, the officials from INPI believe that the original ground of a patent

right is preserved, for the ideas of novelty and non-obviousness are fully respected by strict logical deduction. However, the formula does not express the adequate moral density of legal requisites, such as, novelty and non-obviousness. As a matter of fact, the officials are validating an instrumental methodological tool, which may simplify the process of legal interpretation in the field of Industrial Property Rights. It is a simplistic way of analysing an intricate case that might jeopardise the basic fundamentals and underpinnings of patent rights.

Observing the methodological tool developed above, it is logical to assert that the identity of industrial property rights is forged in a context of social inclusiveness and scientific development (innovation). Searching for the original fundamentals of patent rights signifies unveiling the idea of exclusivity as a means of fostering innovation in contemporary societies. Moreover, it means the regular process of attributing a right to the person responsible for a theoretical and practical effort to innovate in the field of science and nature. The Swiss formula does not add any kind of moral evaluation to the fundamentals of patent rights. It is necessary to reformulate the concept of novelty and non-obviousness as different facets of the same structure. Both criteria are intertwined. They should not be analysed separately. In terms of law as identity, a second medical use component ought to be legally valid if it represents an immaterial result derived from a theoretical and practical effort in the construction of something new added to the actual state of art. The logic here is the same as the idea aforementioned about the remixing of original songs. It orientates the interpreter to verify the validity of a certain invention based on the fact that the originality of legal rules is preserved, even though it is subjected to a new context of application. The result of this process of invention, if originally conceived to create a new product in a different environment of application, fulfils the basic grounds of industrial property rights, i.e., the protection of innovative ideas and products. The fundamentals here are not to reinforce the legal monopoly of pharmaceutical industries, but they consist of an archaeological procedure of detecting the novelty of an immaterial result derived from a substantial theoretical effort in order to add new elements to medical science.

3.2. The relationship between second medical use and drugs for neglected diseases

Once it is demonstrated that the new component, although derived from an already patented drug, ought to be patented due to the substantial theoretical and practical effort to elaborate something new as far as the state of art is concerned, it is important to face the second relevant question raised during the research, i.e., is it legally

and logically coherent through ordinary interpretation to validate the second medical use as an incentive to develop and produce drugs for neglected diseases?

According to data extracted from the work of Chong and Sullivan Jr. (2007), it is neither logical nor juridical to affirm that there is a relationship between second medical use and drugs for neglected diseases. In order to exemplify the argument, a supplementary table developed by the authors served as indirect data to evaluate the possibility of using a second medical use mechanism as a means of fostering the development of drugs for neglected diseases. The supplementary table contains interesting examples of incremented drugs. Methodologically, data from the supplementary table was checked against the official website of WIPO (World Intellectual Property Organisation) so as to confirm its legal validity. Furthermore, the purpose of this was to verify if there had been any granting of patent rights to the second medical use drugs in case.

The existence of second medical use drugs for global diseases, as shown in the table, reinforces the necessity for creating new public incentives for the development of drugs for neglected diseases, as the market itself will not mechanically and organically structure new forms of drugs for these diseases. There is no economic interest in the production of these kinds of drugs. In this context, it is necessary to reconfigure the nature of industrial property rights legislation. Innovation is not taken as a primary goal in the specific case of drugs for neglected diseases. The latent content of the data expressed in the supplementary table emphasises the need for new legal practice in the pharmaceutical field.

This research pinpoints the inconclusiveness of evaluating cost reduction in the development of drugs for neglected diseases in the case of utilising second medical use as a means of reducing transaction costs[2]. There is no evidence in the latent content of the data collected that can in any way confirm any type of cost reduction in the development of these drugs. As a matter of fact, it might be too costly to, first of all, evaluate all the different costs involved in the process of research, development and production of drugs for neglected diseases, and secondly, relate all the costs involved to the case of second medical use. Thus, it is questionable to affirm that second medical use is a relevant mechanism to reduce transaction costs in the production of drugs for neglected diseases. In fact, the argument of transaction costs demonstrates the infeasibility of calculating all the possible costs involved in the process of research and development of drugs for neglected diseases. Furthermore, from a juridical and a moral point of view, this kind of argument does not

2 Coase (1993) defines the expression "transaction costs" when conceptualizing the nature of the firm.

prove to be effective in the process of relating second medical use to the development of drugs for neglected diseases. Once a number of second medical use drugs developed for global diseases can be spotted in the supplementary table above, it is possible to assert that second medical use drugs has neither economic nor social efficacy in the process of fostering new research and development of drugs for neglected diseases.

It must be noted that the prohibition of patenting the second medical use drugs, as the majority of the Brazilian National Congress intends to do (BRASIL, 2012a, b, c), does not suffice to optimise the development of drugs for neglected diseases. This change in the politics of legislation is rather inconsistent as well as incoherent as far as identity in law is concerned. Indeed, abolishing rights already consolidated in the Brazilian Industrial Property Rights Act is not an adequate mechanism to implement the right to effective health care, through more efficient and less expensive pharmaceutical drugs. In fact, the basic fundamentals of the Brazilian Industrial Property Rights Act are constitutionally oriented. In this sense, the prohibition of second medical use ought to be interpreted as a constitutional offence taking into account the fundamental underpinning, which informs the moral density of legal rules, i.e., the right to innovate and the right to scientific development. Deliberately excluding the legal possibility of patenting the second medical use drugs represent the corruption of a constitutional principle that is based upon the tension between economic and social rights. Therefore, this constitutes a radicalisation of legality as the only possible via for reconfiguring the juridical system so as to achieve social aims. The interpretive practice, based on the theory of identity in law, rejects any attempt to criminalise or prohibit certain behaviours as a result of legislative politics in order to achieve a better quality of life. It is not morally justifiable to implement social goals in detriment of constitutional rights.

SUPPLEMENTARY TABLE (extracted from Chong; Sullivan Jr. (2007))

Drug	Original disease	New disease
Amphotericin	Antifungal *Interferes with fungal membranes by binding to cell membrane sterols*	Leishmaniasis
Arsenic	"Oldest drug in the world [1]" *Used in early 20th century to treat tuberculosis and syphilis*	Acute promyelocytic leukemia [1] *Degrades PML-RAR fusion protein*
Ceftriaxone	Antibiotic *-lactam inhibits bacterial cell wall synthesis*	Amyotrophic Lateral Sclerosis [2] *Increases glutamate transporter expression*
Dapsone	Leprosy [3] *Inhibits folic acid synthesis*	Malaria *Combined with chloroproguanil in LapDap; approved by UK for treatment of malaria [4]*
DB289	Pneumocystis [5]	Malaria and early stage African Trypanosomiasis [5].
Eflornithine	Cancer *Suicide inhibitor of ornithine decarboxylase, blocking polyamine biosynthesis. Failed in clinical trials [6].*	African trypanosomes *Inhibits protozoan ornithine decarboxylase but is specific for African trypanosomes due to low blood polyamine levels [6]. Established treatment.*

Fosmidomycin	Urinary tract infections *Inhibits isoprenoid synthesis* [7].	Antimalarial *Nonmevalonate pathway of isoprenoid biosynthesis identified in* P. falciparum *using genomic techniques* [3]. *Currently in clinical trials alone and in combination with clindamycin*[8,9].
Fumagillin	Antiamebic *Unknown mechanism.*	Anti-cancer angiogenesis inhibitor *Blocks endothelial cell growth by inhibiting type II methionine aminopeptidase* [10]. *TNP-470, a fumagillin analog, is currently in Phase III clinical trials for brain, breast, cervical and prostate cancer* [11].
Miltefosine	Cancer *May induce apoptosis by inhibiting lipid biosynthesis* [12].	Visceral leishmania *Unknown mechanism. Registered for use in India in 2002* [13].
Minocycline	Antibiotic *Blocks entry of the aminoacyl tRNA into the ribosome.*	Amyotrophic lateral sclerosis *Inhibits cytochrome C release from mitochondria. Delays disease onset and extends survival of ALS mice* [1].
Non-steroidal anti-inflammatory	Anti-inflammatory *Cyclooxygenase inhibitor*	Alzheimer's disease *Reduce brain Aβ levels and amyloid plaque burden* [14]
Paromomycin	Amebicide [15] *Oligosaccharide antibiotic*	Visceral leishmaniasis [12] *Administered by injection*

Pentamidine	*Pneumocystis carinii* pneumonia	Early stage trypanosome infection and antimony resistant leishmaniasis [16]
Quinacrine	Antimalarial *Interferes with heme crystallization* [17]	Prion diseases *Potently inhibits prion formation [18]. Anecdotal reports of improvement in patients with Creutzfeldt-Jakob disease [19].*
Retinoic acid	Acne	Acute promyelocytic leukemia *Activates transcription of genes involved in differentiation* [20]
Serotonin receptor antagonists	Antipsychotic	Progressive multifocal leukoencephalopathy *Inhibit human polyomavirus (JCV) infection of glial cells* [21]
Thalidomide	Sedative *Potent teratogen*	Cancer [22] *Inhibits angiogenesis*

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Finally, identity in law demands a remix of old legal standards with new contexts of social inclusiveness. This methodological analysis of legal reasoning substantiates the need for a change in the interpretive practice of industrial property rights. So as to re-adequate the traditional legal standards to the social needs of development of drugs for neglected diseases, it is relevant to orient public financial support to policies towards, not only the scientific development of drugs for neglected diseases, but also the serial production of cheaper drugs for the poor who suffer from neglected diseases. State intervention ought to be reconstructed in order to create an environment of social inclusiveness without jeopardising the attribution of individual rights. Indeed, identity in law requires an attitudinal respect of administrative officials and legislators towards the implementation of the Dworkian axiom, i.e., taking constitutional rights seriously.

4. Conclusions

From a methodological point of view, it is crucial to conclude that the analysis of latent content related to second medical use substances revealed the actual scientific state of medical science. According to the data extracted from scientific medical research, it is logical to consider that there is no evidence that second medical use drugs can be used as an instrument to induce the research and the development of drugs for neglected diseases. However, it cannot be denied the legitimacy and the legality of second medical use drugs according to the interpretive practice derived from the proper legislation.

As far as the analytical system of concepts founded on the idea of identity in law is concerned, the qualitative research here developed demonstrated that state intervention in the field of drug research and production ought to be structured in order to coherently articulate public policies, which can induce the pharmaceutical market to produce drugs for neglected diseases. Nevertheless, the process of state intervention should not jeopardise the attribution of rights in the case of second medical use drugs.

Finally, it is not legally and logically coherent through ordinary interpretation to confirm the second medical use as an incentive to develop and produce drugs for neglected diseases. Drugs for neglected diseases can be obtained from second medical use experiments. Nonetheless, this does not prove that second medical use is an efficient mechanism to promote the development of drugs for these diseases. In fact, new kinds of inducement of public policies towards the importance of providing scientific effort for the production of drugs for neglected diseases should be elaborated in order to achieve balance between the constitutional right to patent and the constitutional right to proper health care. It is a hard case of conflicting values, which ought to be resolved taking into account the original fundamentals of individual rights without threatening the social right to health care.

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Panor. Braz. law - Year 3 - Numbers 3 and 4 - 2015 - pp. 143 - 169.
ISSN 1075-1343 (print)
ISSN 2318-1516 (online)
DOI: http://dx.doi.org/10.17768/pbl.a3.n3-4.p143

NEW TRENDS IN MIGRATORY AND REFUGEE LAW IN BRAZIL: THE EXPANDED REFUGEE DEFINITION

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Abstract: This paper aims to explore new trends in Brazilian refugee and migratory law in the last 20 years. In doing so it addresses the evolution of the definition of "refugee" in Brazil, expanding the eligibility grounds provided by the 1951 Geneva Convention on the Status of Refugees (1951 Convention). Reviewing international and regional refugee law, the article analyzes the broader understanding of the notion of "refuge" and its complexity expressed in regional and national legal frameworks, taking account of lawyers, scholars and activists who criticize the narrow scope of the classical refugee definition from 1951 which has become distant from current refugee voices and struggles. At the domestic level, although the 1980 Aliens Statute (Act. n. 6815/80) is still in effect, there have been important changes in refugee law in Brazil since the implementation of the 1997 Refugee Statute (Act n. 9.474/97), influenced by the 1984 Cartagena Declaration (a regional soft law instrument) regarding the definition of "refugee". Exploring the interconnection of the Refugee Statute and complementary forms of human rights protection which fall outside the scope of international refugee law, the article concludes that in the

specific case of Haitians in Brazil, the broader protections of Brazilian refugee law should be available rather than the complementary system of humanitarian visas.

Key-words: Refugee - Migration - Brazil - Complementary protection - Human rights law

1. Introduction

We have seen in Latin America and especially in Brazil some of the most important developments in refugee law[1] in the last several decades, especially regarding the definition of "refugee"[2].

1 It is important to clarify that some terms have different meanings in Latin American compared to the US and the EU. The term "asylum" (*asilo*) as applied in international refugee law is not used in the same way within Latin America. *Asilo* is a different legal instrument, regulated by the 1889 Montevideo Treaty on International Criminal Law. Asylum was also mentioned in the 1982 Asylum Convention, signed in Havana; the 1933 Convention on Political Asylum; and the 1954 Convention on Diplomatic Asylum. The instrument had its apex during the dictatorships in the Southern Cone in order to protect individuals who were being persecuted because of their political opinions. It can be argued, therefore, that territorial asylum is currently a Latin American institution due to its frequent usage within the region.

Countries outside the continent do apply territorial asylum sporadically, but they do not recognize it as an international law norm equal to refugee law. DUBLAN (2004, p. 242) explains that *"In the case of some countries of the Southern Cone, although the situation of many political dissidents fully corresponded to the definition of the american conventions [the 1889 Montevideo Treaty on International Criminal Law, the 1982 Asylum Convention, signed in Havana, the 1933 Convention on Political Asylum and the 1954 Convention on Diplomatic Asylum], this framework did not exist in the ability of governments to materially face a situation of massive persecution which were happening in other countries of the continent, or to organize the orderly expatriation of those affected by military dictatorships. It is, for example, the case of Chile, which traditionally granted political asylum (asilo) following the traditional american standards and was not part of the 1951 Convention, the government requested support to UNHCR in 1971 to properly care for a string of refugees from Bolivia."*

In Brazil, "asylum" and "refuge" (*asilo e refúgio*) also have different meanings. The instrument named as "asylum" is known as territorial or diplomatic asylum and is provided in the domestic and the regional conventions cited above. Asylum will be granted even when the applicant in not in the territory of the requested State. The asylee in Brazil is subject to the 1980 Aliens Statute, not to the 1994 Refugee Statute; the reverse is true for refugees. Asylum constitutes the exercise of a sovereign act of the State, a political decision whose fulfillment is not subject to any international body. Refuge is a conventional institute negotiated and established at an international level by States, under the auspices of an international organization. Asylum is granted only for those who are persecuted because of their political opinion. Refugee status, on the other hand, is multifactorial, and it is granted for a person who has a well-founded fear of persecution on the basis of his/her race, nationality, religion, membership in a particular social group, or political opinion.

2 Even before Latin America, the Organization of African Unity implemented in 1969 the OAU Convention Governing the Specific Aspects of Refugee Problems that adopted in its article 1(2)

The classical definition[3], provided by the 1951 Convention, adopts five grounds for granting asylum[4] to an individual who has a well founded fear of persecution on the basis of his/her race, nationality, religion, membership in a particular social group, or political opinion. These categories are seen today as limited, outdated and not effective in dealing with contemporary forced fluxes of people (CHIMNI, 1998, p. 7).

The principle of *non-refoulement*, cornerstone of refugee protection, prevents states from *returning a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, particular social group or political opinion* (REFUGEE CONVENTION, 1951)[5]. This principle has acquired a *jus cogens* nature[6] and a broader application since the implementation of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that no *"State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture*" (CONVENTION AGAINST TORTURE, 1984). In this sense, a person persecuted for reasons not encompassed by the 1951 Convention still cannot be sent back to a place where he or she is at risk of facing torture by the *jus cogens* nature granted to *non-refoulement*[7] in the 1984 Convention Against Torture. This principle is recognized and respected in Europe and elsewhere.

Conscious of the *jus cogens* nature of the principle of *non-refoulement*, Latin America has negotiated and established its own regional legal instrument on refugee protection. The 1984 Cartagena

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an enlarged refugee definition, providing that "*The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality*"

3 In this paper the expression "classical definition" of refugees refers to the 1951 definition of "refugee", expressed in Art. 1 of the Convention.

4 For an explanation on the differentiation of refuge and asylum in Latin America see footnote 1.

5 For more on the 1951 Geneva Convention Related to the Status of Refugees see: http://www.unhcr.org/3b66c2aa10.html. Accessed on 5 Sep. 2015.

6 As to torture, the *non-refoulement* principle is has acquired a *jus cogens* nature. As noted by Allain (2007, p. 535): *"beyond the States party to the 1951 Convention, all States are bound to respect the obligation not to* refoule *individuals, either unilaterally or in cooperation with other States, bilaterally or multilaterally."*

7 For more on the *jus cogens* nature of *non-refoulement* see: ALLAIN, Jean. The *jus cogens* nature of *non-refoulement*. p. 533-588; BYRNE, R. and SHACKNOVE, A., The Safe Third Country Notion in European Asylum Law, p. 187, and the Case of *M.S.S. v. Belgium and Greece* at the ECHR (Application no. 30696/09), 21 Jan 2011. pp. 71-5.

Declaration on Refugees[8] has expanded the refugee definition and granted protection to people who did not fall within the classical definition framework, but could not be *refouled* to countries where they would be at risk of facing torture. In order to address this problem some states have created complementary protection systems[9] which are not regulated by international refugee law.

A number of Latin American countries have been influenced by the broader refugee definition expressed in the Cartagena Declaration and have either adopted it directly or enacted laws which adopt it in whole or in part. The expanded definition of refugee was adopted in part when Brazil implemented its own Refugee Statute in 1997. This law repeats the most important aspects of the 1951 Convention as well as part of the Cartagena Declaration's enlarged refugee definition. It creates the possibility for individuals to apply for refuge in situations of *"serious and widespread violation of human rights"* in their country of origin.

In spite of the fact that Brazil has adopted a more generous definition of refugee in its domestic law, the eligibility process still prioritizes the classical definition provided by the 1951 Convention for granting refugee status, justifying the concession on the well-founded fear of persecution for race, nationality, religion, political opinion or membership in a group. How the refugee definition is applied in recent practice is illustrated by the case of Haitians in Brazil. Since 2010, Brazil has received a continued influx of migrants, especially from Haiti, after the catastrophic earthquake that displaced thousands of people in that country. However, Haitians are not recognized as refugees in Brazil under the Refugee Statute.

Instead, the country established an *ad hoc* complementary protection system to address this emergency situation and protect Haitians who arrive in Brazil. The Brazilian system adopted a

8 Cartagena Declaration on Refugees, available at www.oas.org/dil/1984_Cartagena_Declaration_on_Refugees.pdf, accessed 5 Sep. 2015.

9 Cançado Trindade sees International Refugee Law, Humanitarian Law and Human Rights Law as complementary branches of human protection; he argues that the compartmentalized approach adopted in the classical doctrine of International Law has been criticized currently and gradually replaced by a more holistic view. (CANÇADO TRINDADE, 2004, p. 1). The complementary protection system adopted in Europe and in Latin America is based in the assumption of complementarity among these three branches of human protection and utilizes legal instruments from International Humanitarian Law, such as the Geneva Conventions on the Law of War, and Human Rights Law, such as the Convention Against Torture, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights among others, in order to offer a more comprehensive protection to forced migrants not protected by International Refugee Law.

"humanitarian visa" instrument[10] that covers forced migrants[11] who do not fulfill the requirements of the 1951 Convention definition of refugee. It was necessary to do this because the 1980 Aliens Statute does not provide for visas on humanitarian grounds in Brazil. Brazilian authorities were thus challenged to develop an effective system of protection for refugees and forced migrants, a system in compliance with international human rights and humanitarian law, designed to address local problems. However, the new migratory law which is being discussed in the Congress[12] to replace the 1980 Aliens Statute has been criticized for being an instrument that was not the product of the public consultation organized by the Brazilian government in 2014, the National Conference on Migration and Refuge (COMIGRAR).[13] In addition, commentators argue that the new migratory law now in Congress is not as comprehensive as the COMIGRAR proposal in significant ways described below and that the project misses the opportunity to create a specialized civilian agency to deal with migratory issues in Brazil.[14]

10 Humanitarian visas, in Brazil, have acquired a broader meaning than the traditional meaning in international humanitarian law. For the International Committee of the Red Cross, "*International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict.*" (ICRC, 2007, p. 1). In Brazil, humanitarian protection can be granted not only for individuals coming from displacement caused by wars and conflicts, but also for those fleeing natural disasters and other types of generalized violence and serious human rights violations.

11 It is important to note that refugees are a category of the broader term migrant. A person can migrate voluntarily or involuntarily. As the 1951 Convention provides, a refugee is a forced migrant who migrates due to a well-founded fear of persecution *"because of his/ her race, religion, nationality, membership in a particular social group or political opinion"*. A refugee is always a forced migrant, but a forced migrant does not always fulfill the requirements above mentioned to be qualified as a refugee. On the matter of the refugee definition, see, e.g., GOODWIN-GILL, LAMBERT (2010, pp. 26, 36, 38, 39, 43-47, 51 and 72) and HATHAWAY (2005, pp. 7, 61 and112).

12 The Draft Articles N. 288/13 (in Portuguese, Projeto de Lei Nº 288/13) were proposed on 11th July 2013 by Senator Aloysio Nunes Ferreira. On the 2nd of July 2015 the draft was voted and approved by the Foreign Relations Commission at the Senate, in Brasilia. It is now waiting for approval in the Congress. The project is likely to be approved since the government and the opposition reached an agreement on the necessity of implementing a new migratory framework in Brazil. The process is currently at the Chamber of Deputies, in Brasilia under the number PL 2516/2015. (RODRIGUES, 2015). For the whole text of the Draft Articles N. 288/13, see http://www25.senado.leg.br/web/atividade/materias/-/materia/113700 .

13 For information on COMIGRAR see http://www.participa.br/comigrar#.VeR2wXi5ucc; and footnote 28.

14 Although advancing in many aspects, the Brazilian Migration Statute (Draft Articles 288/13) *"establishes the [migrants] rights vaguely, without acting on structural conditions that promote*

This article attempts to provide a panoramic view of the developments in refugee and migratory law in Brazil in the last 20 years. In doing so it will briefly present the international and regional refugee protection framework and analyze how those systems influenced Brazil in the establishment of its own refugee and forced migrant protection framework. Part 1 will address the classic definition of refugee expressed in the 1951 Convention and its limitations. Part 2 will provide a background for the Cartagena Declaration in order to present its enlarged refugee definition and its system of updates. Finally, Part 3 will analyze the definitions provided by the Brazilian Refugee Statute and complementary protection systems of humanitarian visas in order to examine the practices Brazil is applying to new influxes of forced migrants such as Haitians, and the eligibility mechanisms adopted by national law and regulations.

2. Background and Definitions of International Refugee Law

Refugee law was a creation of European political culture, first designed after World War II by European countries in order to protect refugees from Europe (HATHAWAY, 2010, p.70). However, even before that, as governments were interested in pursuing their own goals, displaced persons used to be seen as enriching society. There were, therefore, incentives for people to move to some countries which were in need of an enhanced labor force. This view had partially changed by the beginning of the twentieth century (HATHAWAY, 2010, p.71), when the international refugee framework was created between two opposing ideas: the principle of sovereignty and self-preservation of the State, and humanitarian principles advocated in international legal instruments (GOODWIN-GILL; MCADAM, 2007, p.1). It has been stated, however, that "current refugee law does not fully embody either humanitarian or human rights principles [and] refugee law in fact rejects the goal of comprehensive protection for all involuntary migrants and imposes only a limited duty on states, far short of meeting the needs of refugees in a comprehensive way" (HATHAWAY, 2010, p.71). States, thus, have developed policies to control borders and prevent "undesirable" people from settling within their territories. This view has made states see refugees as "unwanted children" or as a "burden"(BYRNE; SHACKNOVE, 1996, p.187) that needs to be shared among them.

Accused of being limited in its scope, the 1951 Convention definition[15] provides that a refugee is any person

effective change. It does not create, for instance, a civilian agency responsible for processing migrants claims" (GUMUEIRO et. al., 2015).

15 The Convention initially applied its definition to those persons whose reasons for flight or

> *who is outside his/her country of nationality or habitual residence; has a well-founded fear of persecution because of his/ her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail himself/her self of the protection of that country, or to return there, for fear of persecution.*

The five categories defined in the 1951 Convention come from negotiations and the *travaux preparatoires* that preceded its entry into force. Lawyers, scholars and activists criticize the narrow scope of the classical refugee definition, arguing that currently international refugee law has become distant from refugee voices and struggles (CHIMNI, 1998, p. 6). Furthermore, the 1951 Convention does not address contemporary causes of displacement such as environmental disasters, sea level rise and other effects of climate change, and different forms of persecution which are not contemplated by the Convention, such as homophobic persecution of individuals based on sexual preference or gender identity.

Those people who fall within the scope of the Convention[16] are entitled to a set of rights which states signatories to the Convention must observe, such as non-discrimination, freedom of religion, gainful employment (Chapter III), welfare (Chapter IV), etc. A large number of displaced persons are not entitled to the 1951 Convention's protection as they do not fulfill the requirements of the classical refugee definition. To solve this problem states have implemented in their national legislation the so-called "complementary protection instruments". In Europe, for instance, two Directives constitute the complementary protection framework, the Qualification Directive[17] and the Temporary Protection

displacement lay in events occurring before 1 January 1951; this limitation was later removed through the adoption of the 1967 Protocol to the 1951 Convention. "Protocol Relating to the Status of Refugees," 1967: 606 UNTS 267.

16 Some individuals are affected by exclusion grounds provided in the 1951 Convention. Articles 1D, 1E and 1F of the 1951 Convention provide exclusion clauses for people who, although they are within the definition of refugee, *"may be excluded from international protection because they are receiving protection or assistance from a UN agency other than UNHCR or because they are considered undeserving of international refugee protection on account of certain serious criminal acts"*. See United Nations, United Nation High Commissioner for Refugees, Department of International Protection. Refugee Status Determination. Who is entitled to refugee status? Geneva, 2005. p 76.

17 EUROPEAN UNION. Council Directive n. 2005/85/EC of 1st December of 2005. European Council. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF. Accessed 25 jul. 2015. Before 2004, the year of the implementation of the Qualification Directive, Member States operated under *ad hoc* criteria for granting subsidiary protection. The necessity of harmonization in the Common European

Directive[18]. In Latin America, as the integration process is not at the EU level, each State may develop in domestic law its own instruments for complementary protection of forced migrants not recognized as refugees[19]. In Brazil, as it will be seen below, the government has established a visa granted on humanitarian grounds for people entitled to complementary protection. MCADAM (2007, p. 57) highlights that:

> *however properly the refugee definition contained in the 1951 Convention may be applied, there are*

Asylum System led to the implementation of the Qualification Directive. It also aimed to create a common definition for refugees within the scope of the 1951 Convention.

18 EUROPEAN UNION. Council Directive n. 2001/55/EC of 20 July 2001. European Council. Available at: http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33124_en.htm. Accessed 25 jul. 2015.

19 The year of 2014 marked a dramatic increase in massive flows of migrants to European shores, especially those fleeing the Syrian conflict. In order to deal with this protracted situation, Europe has implemented the European Agenda on Migration of 13 May 2015. The Agenda supports the aim of establishing a common approach among Member States to deal with migration and refugee flows. It states that: "*This [Agenda] calls for a set of core measures and a consistent and clear common policy. We need to restore confidence in our ability to bring together European and national efforts to address migration, to meet our international and ethical obligations and to work together in an effective way, in accordance with the principles of solidarity and shared responsibility. No Member State can effectively address migration alone. It is clear that we need a new, more European approach. This requires using all policies and tools at our disposal – combining internal and external policies to best effect. All actors: Member States, EU institutions, international organisations, civil society, local authorities and third countries need to work together to make a common European migration policy a reality."* (EUROPEAN COMMISSION, 2015, p. 2).

The New York City Bar Association and its European Affairs Committee expressed support for the European Migration Agenda in a letter to EU and UN officials dated July 22, 2015, where they *"strongly support these emergency measures and urge Member States of the European Union to accept responsibilities and make new commitments for these provisional measures. We also urge implementation of the European Agenda on Migration. Longer-term changes in the system for receiving and processing asylum applicants in a more humane, consistent and transparent manner are necessary. A better structure for dealing with those seeking refuge inside the European Union who are in clear need of protection, and assisting in their integration into European society, is essential. Furthermore, the Committee is of the opinion that the Agenda's focus on EU-wide standards and procedures, rather than the current differentiated approaches in Member States, is both consistent with fundamental rights in the European Union and necessary to address a problem that cannot be solved at the Member State level. Such a solution is consistent with the principles of solidarity, subsidiarity, proportionality, and fair sharing of responsibility."* It is important to note that this letter from a respected bar association with a long record of involvement in international law highlighted an EU-wide common approach towards migration as a solution to the disastrous effects of the lack of harmonization on subjects such as reception conditions, qualification as a refugee, processing of asylum applications, procedural and other issues. (THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 2015, p. 2).

> *some categories of persons in need of protection who do not fall under the strict scope of these instruments. Such refugees of concern to UNHCR include, for example, those fleeing the indiscriminate effects of violence arising in situations of armed conflicts with no specific element of persecution. UNHCR has accordingly promoted the adoption of complementary or subsidiary regimes of protection to address their needs.*

As to the above mentioned assumption, it needs to be clarified that persons falling outside the scope of the 1951 Convention are not technically considered refugees in the view of the United Nations High Commissioner for Refugees (UNHCR). Complementary or subsidiary systems of protection are based on the assumption of complementarity among human rights, humanitarian and refugee law (CANÇADO TRINDADE, 2004, p. 5). Those systems are within the scope of national legislation, designed to protect individuals who cannot be sent back to places where they are at risk of being tortured, due to the principle of *non-refoulement*, but who do not qualify as refugees.

Whatever the level of sovereignty states possess in deciding immigration issues within the limits of their territory, when dealing specifically with asylum seekers and refugees[20] they are bound by the principle of *non-refoulement*, which provides that *no person should be expelled or returned to a country where she or he is at risk of facing torture*, *degrading or inhuman treatment.* Established at the international level by Art. 33 of the 1951 Convention and its 1967 Protocol and by Art. 3 of the 1984 Convention Against Torture, and at the regional level by the 5th Conclusion of the 1984 Cartagena Declaration, the principle of *non-refoulement* has partially mitigated state sovereignty and has granted protection to individuals who do not possess refugee status. *Non-refoulement* has acquired a *jus cogens* nature, especially when it comes to protection and prevention of torture, by virtue of Art. 3 of the Convention Against Torture (ALLAIN, 2001, p. 537). The growing importance of *non-refoulement* in international human rights and refugee law has influenced the creation of complementary protection systems by states, since a person at risk of suffering torture in his or her country of origin or in a third country cannot be returned even if the person does not qualify as a refugee.

There is a tension between the idea of creating complementary

20 "Asylum seekers" are defined as individuals who have already applied for refuge whose proceeding is still pending a final decision. A refugee, on the other hand, is an individual whose application has been decided and who has been recognized as a refugee. Both asylum seekers and refugees are "people of concern" of the UNHCR.

systems of protection on the one hand and expanding the definition of refugee on the other hand. Currently, states may adopt complementary or subsidiary mechanisms even when the individual is entitled to international protection granted by the 1951 Convention regime. Complementary protection systems are accused of impairing the application of the classical definition of refugee. Some countries are accused of interpreting the Convention definition extremely narrowly in order to provide subsidiary protection to the majority of applicants for international protection, since complementary protection systems are regulated outside any international law regime, are subject to greater domestic discretion, and frequently provide a lower level of protection (MCADAM, 2006, p. 55).

3. Latin American Refugee Framework and the 1984 Cartagena Declaration

Latin America has faced waves of migration during the past. The Colombian violence, for example, has led to the flight of millions of people, some of whom have crossed international borders, and others of whom have moved to safer regions within the territory of the country where they currently constitute 5.7 million internally displaced people (IDPs)[21]. The Latin American context, therefore, demanded a rethinking of the refugee law and the types of protection granted individuals in the context of forced migration, since the classical definition of refugee could not properly address regional waves of migrants due to its limited scope.

ARBOLEDA (2006, p. 185) states that:

> *The internationally accepted refugee definition has proven inadequate to deal with the problems posed by the millions of externally displaced persons in the third world. African and Central American countries, in particular, have experienced massive influxes of people fleeing to neighboring countries, owing to combinations of war, political instability, internal civil strife, economic turmoil, and natural disasters.*

The classical definition, as ARBOLEDA notes, is inadequate as it does not provide protection for people persecuted for reasons

21 "According to official figures of 30 June 2014, more than 5.7 million people have been internally displaced in Colombia since the start of recording official cumulative registration figures; more than 64,500 people were officially declared displaced during the first half of 2014 and were awaiting registration; and almost 24,000 people were officially registered by the national Victims Unit." UNHCR. *2105 UNHCR country operations profile – Colombia | Overview* |. Available at: http://www.unhcr.org/pages/49e492ad6.html. Accessed on 22 jul. 2015.

different from those provided in the 1951 Refugee Convention. It does not encompass, for example, cases where individuals have to leave their countries due to natural disasters, effects of climate change, gender-based violence or internal conflicts, among other reasons.

Broader definitions have been adopted in different regions, mainly in the global South, in order to deal with local issues on migration and refuge. The first continent to adopt an expanded concept of refugee was Africa. In 1969, the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa was adopted, the definition of refugee provided in Art. 1 of that binding legal instrument states as follows:

> The term 'refugee' shall also apply (*in addition to the 1951 Convention)* to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. (OAU CONVENTION, 1969).

This definition was adopted as it more closely reflected the realities of Africa during a period of violent struggle for self-determination and national development (ARBOLEDA, 2006, p. 186). The OAU Convention created a binding legal instrument designed to deal with refugee problems arising from the African reality. It added to the grounds for protection granted by the 1951 Convention and made explicit the necessity of reviewing refugee protection at the international level. The OAU Convention influenced states in other parts of the world to elaborate legal instruments that could better address the plight of refugees in today's world.

Inspired by the OAU Convention, Latin American states also discussed the enlargement of the definition of refugee within their region. The 1981 Colloquium on Asylum and International Protection of Refugees in Latin America[22] discussed the inadequacy and incongruencies of refugee law and protection in the context of the Central American crisis. The displacement produced in the continent did not have the same nature as the European displacement due to World War II, which gave rise to the classical refugee definition in the 1951 Convention. Latin American refugees were fleeing situations of generalized violence, massive human rights violations, situations of aggression and internal conflicts.

22 The Colloquium was convened by the Mexican Secretary of Foreign Affairs in co-operation with the Institute for Legal Research of the National University of Mexico under the auspices of the UNHCR, aiming to address the Central American crisis and its displacement of people.

In 1984, Latin American countries agreed to implement a soft law[23] non-binding instrument that expanded the definition of refugee[24]. The third conclusion of the newly adopted Cartagena Declaration provided that in addition to the protection granted by the 1951 Convention, the definition of "refugee" would include persons against whom there

> *exist a threat to life, security, or liberty; and that the threat result from one of five factors: generalized violence; foreign aggression; international conflicts; massive violations of human rights; or circumstances seriously disturbing public order. (OAS, 1984 Cartagena Declaration, 1984)*

The enlarged refugee definition expressed in the Cartagena Declaration highlighted the generous tradition rooted in Latin American law regarding the granting of asylum, as well as a pragmatic approach resulting from the analysis of migration flows in the continent (ARBOLEDA, 2006, p. 199).

Since the circumstances and nature of refugees and migration fluxes change and evolve, the Cartagena Declaration was designed so it could be updated every ten years. In 1994, the San José Declaration, celebrating the 10th anniversary of the Cartagena Declaration, paid special attention to the idea of complementarity among three strands of international human rights law: human rights law, humanitarian law and refugee law. In this light, the tenth conclusion established that "both refugees and people who migrate for other reasons, including economic ones, have human rights which must be respected at all times, circumstances or places" (OAS, San Jose Declaration, 1994). It also reaffirmed the relation of complementarity in the Latin American refugee framework and the rules of international humanitarian law and

23 "Soft law" refers to declarations of international conferences, resolutions of the United Nations General Assembly, decisions and resolutions of human rights bodies, and other groups of civil society and governments which is technically not binding international law but which represents a level of consensus on what the law should be and is becoming. Soft law may become binding international law through its use by states and be recognized as customary law or be used in treaty language, which is binding on all states parties. Soft law represents a certain understanding of new law responsive to changing circumstances which carries its own moral authority and can be cited as an expression of the will of the international community in the broadest sense. (TINKER, 2015, pp. 81-93).

24 From 19-22 November of 1984, experts and representatives from ten governments (Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela) met in Cartagena, Colombia, and held a Colloquium named "Coloquio Sobre la Protection Internacional de los Refugiados en America Central, Mexico y Panama: Problemas Juridicos y Humanitarios". This Colloquium culminated in the implementation of the 1984 Cartagena Declaration on Refugees.

human rights law.

Ten years latter, the Mexican Plan of Action, established in 2004, drew attention to "durable solutions": local integration, voluntary repatriation and resettlement of refugees. As to resettlement, Brazil presented a proposal accepted by the other Latin American states: the creation of a regional system of protection, based on the principles of solidarity and burden sharing. The "Solidarity Resettlement Programme" started by protecting only those refugees who originated in the region, intended especially for Colombians; in 2007, it was extended to protect refugees from other parts of the world (WHITE, 2012, p. 7). Although the Programme is still small in scale, it has been considered an important regional tool to deal with protracted situations of displacement (OAS, San Jose Declaration, 1994).

The Brazilian Declaration (OAS, The Brazilian Declaration, 2014), established in 2014 at the "Cartagena+30" meeting, has raised important aspects as to the current causes of displacement, especially those related to persecution arising from discrimination against "lesbian, gay, bisexual, transgender and intersex people (hereinafter referred to as "LGBTI")*"*. It is important to highlight that sexual orientation is not a ground for protection under the 1951 Convention, but the Cartagena Declaration and its enlarged definition offer a framework which encompasses this possibility.

The dynamic of the Cartagena Declaration and its process of expansion of the scope of protection of refugees has offered states the possibility to extend the 1951 Convention's classical definition of refugee to grant refugee status within Latin America to individuals persecuted on grounds other than those provided by the 1951 Convention. The next section will address how Brazil implemented the Cartagena Declaration in its domestic legislation and how the protection of refugees is interrelated with migration law in that country.

4. Brazilian Migratory and Refugee Framework and the Definition of "Refugee" in Domestic Law

In 1997, Brazilian legislators enacted the new Refugee Statute. This legislation, based on the 1951 Convention, contained important innovations, especially regarding the refugee definition. Article 1 of the Statute provides that:

> *Will be recognized as a refugee every individual who:*
>
> *I - due to well-founded fear of persecution for reasons of race, religion, nationality, social group or political opinion find themselves outside their*

> *country of nationality and can not or will not rely on the protection of that country;*
>
> *II - not having a nationality and being outside the country where once had his habitual residence, is unable or unwilling to return to it, under the circumstances described in the preceding item;*
>
> **III - due to serious and widespread violations of human rights, is obliged to leave their country of nationality to seek refuge in another country.** *(BRAZIL, 1997) [emphasis added]*

Item III of Art. 1 of the Statue includes in the Brazilian framework a new ground for protection in addition to those provided in the classical definition of refugee. The expression "serious and widespread violations of human rights" was taken from the enlarged definition in the Cartagena Declaration and included in Art. 1 of the Brazilian Refugee Statute. By adding this important element to domestic law, Brazil has given binding legal force to the non-binding Cartagena Declaration on this point. The UNHCR representative in Brazil, Andres Ramirez, has stated in an interview (SILVA, 2012, p.170) that the Brazilian Refugee Statute is:

> *one of the most advanced. It is a very important tool for the protection of refugees in Brazil [...] I've worked in many countries and recognize that the law is one of the most advanced in the world, it is cutting edge [...] the Brazilian law has incorporated the 1951 Convention and important aspects of the 1984 Cartagena Declaration for [...] the widespread violation of human rights.*[25] *(our translation)*

It is true, indeed, that Brazil has enlarged the definition of refugee giving binding force to an section of the Cartagena Declaration. It can be argued, however, that Brazilian legislators lost the opportunity to expand the refugee definition even more within its territory. Important

25 "A lei foi pioneira sobre refúgio, uma das mais avançadas em nível internacional. É uma ferramenta de grande importância para a proteção dos refugiados aqui no Brasil [...]eu que já trabalhei em muitos países do mundo, reconheço que a lei é uma das mais avançadas no mundo, é de vanguarda [...]. o Brasil incorporou na lei a Convenção da ONU de 1951 e aspectos importantes da Declaração de Cartagena de 1984[...]como a violação generalizada de direitos humanos." SILVA, Cesar Augusto Silva da. A Política Brasileira para Refugiados (1998-2012). p. 170.

aspects of refugees' realities presented in the Declaration's definition, such as generalized violence, foreign aggression, international conflicts and events seriously disturbing public order, were not included in the Brazilian Refugee Statute of 1997.

Although Brazil has one of the most advanced legislations in the world on refugee protection, its framework on complementary protection for people in situations of forced migration who do not qualify as refugees is rudimentary at best, especially if compared to the European system as noted above. It lacks consistency and binding force and relies heavily on the discretionary power of administrative bodies.

The complementary protection mechanism was developed in 2010 in Brazil to address the massive influx of Haitians across the northern border of Brazil. The country established an *ad hoc* mechanism for granting humanitarian visas through the National Immigration Council (CNIg). The process is discretionary and the analysis made by the CNIg members emphasizes the needs of the Brazilian labor market instead of prioritizing humanitarian issues[26].

This system was designed to address those migrants who could not be sent back to their countries of origin due to humanitarian reasons based on the principle of *non-refoulement*, but who would not otherwise be recognized as refugees[27]. Resolution n. 97, implemented in 2012,

26 It is important to consider the structure and composition of CNIg, as it is decisive for the kind of analysis it makes of the humanitarian visa applications. This body is within the Brazilian Ministry of Labor and Employment and is chaired by its representative. The members of CNIg are representatives of the Ministries of Justice, Foreign Affairs, Agriculture, Science and Technology; four representatives of the Workers Unions; four representatives from the employers; and a representative of the scientific community. According to its charter, the body's duties are, among others: I. To formulate goals for the development of immigration policy; II. To coordinate and guide the immigration activities; III. To promote studies related to immigration issues; IV. To analyze periodically the need for foreign qualified labor force; V.To establish immigrant selection rules. (our translation). Since the body (CNIg) has the competence to design and implement immigration policies, it has the prerogative to establish rules on the selection of migrants who will be accepted in the country. This context makes the decision, which should be taken mainly regarding humanitarian values, to be fundamentally taken to meet the domestic labor market needs. The relationship between immigration law and the labor market ("modern-day slavery") has been critiqued by US scholars such as Chantal Thomas. See THOMAS (2013, p. 13-86).

27 The humanitarian visa provided by Resolution n. 97 may be renewed for the same period (five years) if the migrant can prove he is legally working in the country. For further information see: CHAGAS, Marcos. CNIg prorroga prazo para a concessão de visto humanitário aos haitianos. Agência Brasil. dez. 2014. Available at:http://www.ebc.com.br/cidadania/2014/12/cnig-prorroga. Accessed on 20 Oct. 2015. The PLS N. 288/13 provides the humanitarian visa would be granted for a period of 1 (one) year only, renewable for 1 (one) year, if the humanitaria reasons for the concession persist. For further information see: art. 5º of the Draft Articles PLS N. 288/13. Available at http://www25.senado.leg.br/web/atividade/materias/-/materia/113700.

provided that:

> *Art. 1 Individuals from Haiti will be granted a permanent visa provided in Art. 16 of the 6.815 Statute, of August 19, 1980 (The Aliens Statute) for humanitarian reasons, for a period of 5 (five) years, pursuant to Art. 18 of the same law, a circumstance which will be mentioned in their Foreigner Identity Card.*
>
> *Single paragraph. Humanitarian reasons, for the purpose of this Resolution, are those resulting arising from the deterioration of the living conditions of the Haitian population as a result of the earthquake in that country on January 12, 2010. (our translation)*

This Resolution in 2012 established the complementary system in Brazil, which was necessary since the 1980 Aliens Statute[28] did not address that possibility. The Resolution imposed numerical and geographical limitations for granting humanitarian protection in Brazil, such that only 100 visas per month would be permitted for Haitians. This measure resulted in a huge number of individuals coming to Brazil from Haiti and elsewhere with no valid documents, often being smuggled in by *coyotes* and illegal networks of traffickers (SILVA, 2013, p. 221).

Finally, in 2013, the CNIg implemented a new Resolution ending the numerical limitation. Resolution n. 102 was based on the presumption that the Haitian migration would not be a limited phenomena and should be addressed in a more comprehensive way. It is important to explain the refugee protection system in Brazil, as it is closely related to the humanitarian visa, which is an embryonic complementary protection scheme for forced migrants who do not

Accessed on 12 Aug. 2015.

28 In 1980, during the final years of the dictatorship in Brazil, before the establishment of the 1988 Brazilian Constitution, the government enacted the 1980 Aliens Statute. This legislation was heavily based in the National Security Doctrine, a theory that presented aliens as enemies of the State and provided no guarantees for those individuals. *"The axiology of the Aliens Statute supports the recurrent ideology of authoritarian regimes, seeing the alien as someone who undermines social cohesion, brings anarchy and subversion, an individual considered dangerous to the country. For this reason, the arrival and the stay of foreigners in the country has become an exception, depending on the needs of the labor market and on national security ideas."* (MILESI, 2009, p. 58) (our translation).

qualify as refugees under the Refugee Statute. The humanitarian visa protects Haitian migrants from forcible return to their country of origin by recognizing the principle of *non-refoulemen*t, but does not grant them full protection as refugees, as explained below.

The governmental body responsible for the reception of migrants in Brazil is the Federal Police, and an individual seeking to apply for refugee protection should make a formal request to the Federal Police as soon as he or she enters into Brazilian territory. This request is forwarded to the National Council for Refugees (CONARE), an agency created by the 1997 Refugee Statute and linked to the Ministry of Justice, which has jurisdiction to decide applications for refugee status in Brazil. As an applicant, the person will receive temporary documents that guarantee the enjoyment of some rights such as the right to work, public health benefits, and the right to free movement within the country's territory, among others[29]. CONARE and the UNHCR will then conduct the eligibility interview with the applicant and grant a first instance decision[30]. The applicant may appeal from a negative decision to the Ministry of Justice, which will grant a final decision on the matter. A denial of refugee status will require the migrant to leave the country in fifteen days. This is the ordinary procedure for refugee applications in Brazil, and CONARE's decisions on the applications will basically follow the 1951 Convention and the Brazilian Refugee Statute.

With the massive influx of Haitian migrants in Brazil[31], a new form of protection had to be designed to encompass this situation since, according to CONARE's understanding, the classical definition of refugee did not apply to Haitians. As in Europe, when policies that made up the complementary system in that continent were formulated, also in Brazil there was a risk of violation of the principle of *non-refoulement* if migrants were returned to the Haiti because of the situation of generalized violence[32] existing in that country.

29 BRAZIL, 1997, Refugee Statute , Art. 6º.

30 Ibidem, Art. 12, II.

31 The earthquake in Haiti in 2010 killed around 200.000 people and displaced nearly 10 million, in a country that was already struggling economically and socially. The disaster only worsened the living conditions of citizens, especially after the earthquake destroyed the capital of Port-au-Prince. The UN reported that in only 35 seconds the whole country was destroyed, more than 300.000 buildings collapsed including many governmental buildings and the UN headquarters, and all the infrastructure of the country disappeared. (UNITED NATIONS, 2015).

32 For more on the concept of generalized violence see: GENEVA ACADEMY. What amounts to "serious violations of international human rights law?" An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty, Academy Briefing, n. 6. August, 2004. Available at: http://www.geneva-academy.ch/docs/publications/Briefings%20and%20In%20breifs/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20

The violation of human rights in Haiti was serious and widespread, institutions were destroyed and much of the population lost their houses and most of their livelihoods. Short term solutions were implemented and shelters were built, but after five years people are still homeless. Amnesty International published a report in 2014 stating that internally displaced people were being evicted from the displacement camps[33]. The Haitian influx to Brazil showed that the country needed an update to its Aliens Statute, which did not properly address this situation.

In 2014 the Brazilian government put a lot of effort into the construction of a new law for migrants, calling on civil society, academia, non-governmental organizations and migrants themselves to participate in the 1st National Conference on Migration and Refuge (COMIGRAR)[34], held from 30 May to 1st June 2014, in São Paulo. This Conference was a landmark in addressing migration and refugee issues in Brazil both for the wide range of people and organizations involved in the discussion and for the diversity of issues addressed during the conference. An innovative on-line discussion platform allowed persons from most parts of the country to have a say in the development of the law and policies on migration in Brazil.

At the end of the COMIGRAR, a group of specialists on migration invited by the Ministry of Justice presented a draft of the new legislation that would replace the controversial Aliens Statute (BRAZIL, 2014). This draft provided for an institutionalized regime of complementary protection. Chapter X of the draft provided for a mechanism of "humanitarian reception". It mentioned that:

> *Art. 27. In addition to the protection offered by asylum and refuge, it may be granted a visa for humanitarian purposes in cases where public order or the social peace is threatened, in countries of*

rights%20law_Academy%20Briefing%20No%206.pdf . Accessed in 13 jul 2015..

33 *"It is estimated that more than 170,000 people still live in more than 300 camps for displaced people , in most cases in appalling conditions , without access to essential basic services such as clean water , sanitation or waste disposal . While the disastrous sanitary conditions leave them at risk of cholera and other diseases , lack of adequate shelter makes them vulnerable to flooding and other adverse weather conditions, especially during hurricane season."* (AMNESTY INTERNATIONAL, 2015, p. 21).

34 The national phase of COMIGRAR was attended by 788 people, including 232 observers, 556 delegates from 30 nationalities of 21 Brazilian states, 65 volunteers and 22 media outlets. Delegates were elected among migrants, refugees, scholars, public servants and professionals involved in the subject. Before the national phase of Comigrar, 202 preparatory conferences were held, with the participation of organizations and social movements (45%); the academic community (16%), Brazilians living abroad (13%); the government (11%); foreigners in Brazil (5%) and others (10%). A total of 2,840 proposals elaborated by 5,374 participants were referred to the national phase. (UNODC, 2014).

> *origin, by*
>
> **I - serious and imminent institutional instability;**
>
> **II - disaster of major proportions;**
>
> **III - serious human rights violations.** *(BRAZIL, 2014) [emphasis added]*

This provision would take humanitarian protection away from the *ad hoc* mechanism and provide more efficiency and efficacy in the application of this new system in Brazil. It would address the situation of Haitians in Brazil as well as individuals from other nationalities when they apply for humanitarian protection. It would also create a net of protection, in addition to the mechanisms for refuge and asylum, in order to encompass a diverse range of individuals in need of assistance. Most important, this law would establish a civil border agency which would replace the Federal Police in the reception of migrants and refugees.

This draft, however, was never discussed in the Congress. It was replaced by another draft, which also creates a humanitarian visa, but designs it as a temporary protection scheme and does not formulate any grounds for protection, leaving the decision solely up to the discretion of the migration authorities. On the 2nd of July 2015 this second draft was voted and approved by the Foreign Relations Commission at the Senate in Brasilia. The most important aspect of this draft is the provision for a humanitarian visa for individuals from any nationality, eliminating the limitation applied in the *ad hoc* system which granted humanitarian visas intended when it was adopted for Haitians only.

Despite the crucial importance of the development of a complementary protection scheme, its application to Haitians in Brazil illustrates the preferences of states and international organizations in granting weaker subsidiary protection rather than recognition of full refugee status for individuals. It is important to reiterate that refugee status is based on a binding legal instrument, the 1951 Convention, and guarantees of protection provided by the UNHCR, since refugees and asylum seekers are "persons of concern" of the agency. In addition, refugee status is permanent, unless the causes that gave rise to the individual's flight from his or her country of nationality cease, or unless there are serious reasons for considering that he or she has committed one of the crimes provided in Art. 1(f) of the 1951 Convention. There is, thus, a strong protection regime for refugees and asylum seekers under international law. The complementary systems, on the other hand, are granted by national Resolutions. States have discretion in deciding on the numbers and the nationalities of persons who will be granted

complementary protection. States are responsible for providing social assistance and integrating those individuals within the receiving society. Once states have determined to offer complementary protection to individuals, they are not "persons of concern" of the UNHCR and are not otherwise protected by international refugee law.

Article 1(III) of the Brazilian Refugee Statute, inspired by the Declaration of Cartagena which extended the definition of refugee in Latin America, defines a refugee as one who "due to serious and widespread violations of human rights" is obliged to leave his or her country of nationality to seek refuge in another country. Accordingly, a refugee in the Brazilian system is not only a person protected by the 1951 Convention, but also a person who is in a situation of widespread violence in his or her home state. Haitian migrants, in the scenario described above after the earthquake, qualify as refugees under Brazilian law according to the Refugee Statute, but the political choice of the Brazilian authorities has been to grant complementary protection to migrants from Haiti instead.

One must restate the necessity of a framework of complementary protection in a situation where the classical definition of refugee, the only one universally accepted and binding, has such a narrow content. Modern forms of displacement, such as those caused by environmental issues and those which have grounds of persecution other than the five categories provided by the 1951 Convention, must be matched by new grounds for protection, such as the complementary system which takes into account human rights instruments as well as humanitarian law in order to protect more people from violations of human rights and generalized violence. CANÇADO TRINDADE (2004, p. 27) argues that these three branches of public international law have had, until recently, a compartmentalized application to the subject of human protection. Further, the modern doctrine of human rights seeks a convergence in normative, hermeneutical and operational levels in order to provide a broader protection for those who are in a situation of forced migration but do not fall into the category of refugees, forcing a rethinking, both nationally and international, of the limits of the definition of refugee.

Those systems of complementary or subsidiary protection should not, however, void the international refugee protection regime created by the 1951 Refugee Convention and the most progressive domestic regimes. In other words, an individual should not be granted subsidiary protection if he or she qualifies as a refugee, especially because refugee protection is more robust and permanent than the non-harmonized complementary protection systems dependent on national rather than international law.

5. Conclusions

Refugee law and protection requires a rethinking, especially regarding the classical definition of refugee provided in the 1951 Convention. Modern forced flows of people are not protected by the restricted categories defined in the 1951 Refugee Convention. There is now a growing consensus on an enlargement of the definition of "refugee" at the international level.

Regional agreements and domestic law have implemented expanded definitions of "refugee" and have created a framework of complementary protection for forced migrants who do not otherwise qualify as refugees. The OAU Convention on Refugees was the first regional instrument to enlarge the refugee definition and it is still the only binding regional convention to do so.

Latin America has also expanded the definition of refugee. The 1984 Cartagena Declaration has provided for an extremely generous refugee framework, following the regional tradition of protecting people in need. Another innovation in the Cartagena Declaration is its dynamic system, requiring an update every ten years. Since its creation, the Declaration has had three updates which have addressed some of the most current problems of refugee protection. The Cartagena Declaration also focuses on local issues, such as the problems of refugees in Central America and the protracted conflict in Colombia.

Inspired by the Cartagena Declaration, Brazil established its Refugee Statute in 1997, which implemented in domestic law important concepts from the Cartagena Declaration such as adding the *"serious and widespread violation of human rights"* as a ground for refugee protection to those provided in the 1951 Refugee Convention. Seen as creating one of the most advanced refugee protection regimes in the world, Brazil has nevertheless been criticized for its migratory framework which can be used to grant humanitarian visas to persons who better fit Brazil's expanded definition of "refugee" and who are thus denied the full protection of the Refugee Statute.

Brazil's Aliens Statute of 1980, a law created during the dictatorship, does not address issues such as torture as grounds for humanitarian protection of migrants. More recently, Brazil has administratively designed an *ad hoc* framework of complementary protection for forced migrants who do not qualify as refugees, such as Haitians who have migrated to Brazil since the disastrous 2010 earthquake. This framework is based on humanitarian factors and respects the principle of *non-refoulement,* a cornerstone of the refugee protection regime. In July 2015 the Senate in Brazil approved the new Migratory Law and, should it be approved by the National Congress, it will replace the 1980 Aliens Statute. This law, among

other modifications, will create an institutionalized complementary protection regime based on humanitarian protection grounds, which include serious and imminent institutional instability, armed conflicts, calamities of great proportions, serious human rights violations and humanitarian law violations. These grounds were proposed to cover situations not encompassed by the 1997 Refugee Statute and to address the legal limbo generated by the limitations of the narrow classical definition of refugee.

The complementary protection regime is extremely important in cases where the narrow classical refugee definition found in the 1951 Convention and the enlarged but non-binding definition provided by the Cartagena Declaration are not enough to protect forced migrants who cannot be *refouled* to their countries of origin. However, sometimes it can jeopardize the more robust international protection afforded refugees when some states categorize as humanitarian migrants those who would otherwise qualify as refugees. This distinction matters because, as seen above, different rights are granted to each group.

The case of Haitian migrants in Brazil is an example of the dubious implementation of complementary regimes of protection of forced migrants which grant temporary humanitarian visas in lieu of recognition of refugee status. The circumstances in Haiti since 2010 have created an environment of constant and serious violation of human rights in that country. Recognizing Haitians as meeting the definition of refugee under the 1997 Refugee Law is appropriate, since Item III of Art. 1 of the Refugee Statute includes *"serious and widespread violations of human rights"* as grounds for granting refuge in Brazil. Should Brazil apply its Refugee Statute to Haitians, the international community will be enabled to act through the UNHCR, which can provide assistance and international protection only for persons recognized as refugees. While Haitian migrants in Brazil cannot be returned to Haiti under Brazilian law, which recognizes the principle of *non-refoulement,* they should more properly be classified as refugees and given greater protections.

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Panor. Braz. law - Year 3 - Numbers 3 and 4 - 2015 - pp. 170 - 196.
ISSN 1075-1343 (print)
ISSN 2318-1516 (online)
DOI: http://dx.doi.org/10.17768/pbl.a3.n3-4.p170

ECONOMIC CRISIS, DEGLOBALIZATION AND HUMAN RIGHTS: THE CHALLENGES OF THE COSMOPOLITAN CITIZENSHIP IN THE VIEW OF DISCOURSE THEORY

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Abstract: This article 'Economic crisis, deglobalization and human rights discusses the challenges of the cosmopolitan citizenship in the perspective of discourse theory, reflecting on the devices and perspectives of human rights culture in the contemporary changing legal paradigms.

Keywords: Human Rights - Cosmopolitan Citizenship – Deglobalization

1. GLOBALIZATION IN CRISIS

> *"...globalization may very well express the acknowledgment of new parameters in the relationship between States, removing previous monetary transfer barriers; yet, in no respect does it achieve global integration of human societies and national groups as one world population belonging to one single State."*[1]

In the chapter "*One single world, integrated by globalization," of the book The Future of the State*, Dalmo de Abreu Dallari notes that globalization, far from offering a path for the integration of peoples, is

1 DALLARI, Dalmo de Abreu, *The Future of the State*, Saraiva, 2010, p. 156.

characterized by a form of pseudo global integration. In fact, and in agreement with the diagnostics extracted from his reflections, one can say that globalization has caused serious changes to world economies, and that it persists in causing new injunctions in a critical framework that will be analyzed, considering the complexity of past phases and stages of integration, alongside trends indicating the growing isolation of economies within their boundaries, leading to protectionist measures against increasing market instability. Therefore, if the crisis is a consequence of the historical expansion of a model, dialectically, the crisis harbors opportunities and potential for social change. The crisis of globalization puts an end to the ideology of an era, to the economic hegemony engendered in favor of the international expansionism of late capitalism, but it does not signal the end of history, only the end of a particular history, or even the end of an ideology in history.

If 'globalization',[2] viewed as an expansion process of capitalistic action borders,[3] is responsible for a series of problems prompting the rearrangement of global relations to the beat of capitalist movement beyond national borders,[4] and if the term 'globalization' may harbor, according to Habermas, in *The Postnational Constellation*, a 'process,' and not a 'final condition,' then, the globalization crisis calls for a mid-way reassessment.[5] It all takes place as if a traveler, with all bags packed, were obliged to rechart his course en route.

In this manner, one meaning of 'globalization' is compromised and damaged; however, this is not true for all meanings of the term, or yet, for all 'potential' meanings contained in 'globalization.' Globalization does not simply point to the structuring of integrated markets; rather, it simultaneously involves improved communications, exchanges and movements transcending Nation-State borders.[6] The point of no return has been reached in this respect; the traveler may rearrange the position of wagons, but he may not change the direction taken on the tracks.

Therefore, on the global landscape, in view of current economic

2 FARIA, José Eduardo, *The Law in a Globalized Economy*, São Paulo, Malheiros, 2004, ps. 59 a 64. IANNI, Otavio, *The Era of Globalism*, 8. ed.,Rio de Janeiro, Civilização Brasileira, 2004. LEWANDOWSKI, Enrique Ricardo, *Community Law and Sovereinty: some reflections*, in Revista da Faculdade de Direito da Universidade de São Paulo, São Paulo, 1997, ps. 231-242. LINDGREN ALVES, José Augusto, *Citizenship, Human Rights and Globalization*, in Human Rights, Globalization, Economy and Regional Integration (Piovesan, Flávia, Coord.), São Paulo, Max Limonad, 2003, ps. 77-96.

3 ADORNO, Theodor, *Lessons in Sociology*, Lisboa, Edições 70, 2004, p. 63.

4 BARROS, Sergio Resende de, *Dialectic Contribution to Constitutionalism*, São Paulo, Millenium, 2007, p. 71.

5 NEVES, Marcelo, *Symbolic Constitutionalization*, 2.ed., São Paulo, Martins Fontes, 2007, p.192).

6 Cf. HABERMAS, Jürgen, *The Postnational Constellation: political essays*, São Paulo, Littera Mundi, 2001, p. 84.

instability, first-world crisis, and a slowing global economy, recharting one's course to new global destinations may come as a daunting challenge for first-world economies, not to mention for developing economies. 'Economic sustainability' has become an issue of global importance, affecting global economic power in all its interconnected forms of expression.[7]

The economic crisis, along with its cascading effects, is capable of generating widespread and continuous imbalances, both simultaneous and contagious, causing the world economies to oscillate between ominous instability and unemployment, and mild euphoria and intermittent stabilization, accompanied by disseminated social violence.[8] The trend towards economic protectionism, the menace of pandemic unemployment, the imbalance of national economies, volatile speculative capital, as well as economic social disorders provoked by neglected social rights – often pressured to conform to international agendas of State reform – make for very difficult social conditions on a global scale. These ghosts loom menacingly over Nation-State economies affecting decision-making, threatening security structures, and influencing markets and economies.

In this sense, views of the 'world economy' embracing continuous contradictions are confirmed with the global financial crisis of 2008-2011; however all elements were available for an early diagnosis: "Instead of a symmetrical, harmonious, equal distribution of competencies, tasks, responsibilities, roles, functions and conditions for the generation of knowledge, jobs, profitability and wealth, the 'world-economy' stands out, in this analytical perspective, in view of its deep inequalities and distortions in commercial dealings, in the flow of payments, in the transference of technology, in the exchange of information, in the relationships between national economies to their regional blocks, in the interaction between central, semi-peripheral and peripheral countries and in the articulations between mercantile, financial, productive and investment capitals. Therefore, the 'world-economy' is a far cry from featuring consensual confluences, synchronies and accommodations. On the contrary, in all its complexity, not merely economic but social, political and even cultural, the world-economy is stigmatized by profound contradictions, by permanent conflict and continuous tension."[9]

These questions underscore the need to reassess our current

7 BRESSER-PEREIRA, Luiz Carlos, *The Global Financial Crisis and beyond: a new capitalism?* in Revista Novos Estudos CEBRAP, n. 86, março, 2010, p. 51-72.

8 PINHEIRO, Paulo Sérgio; ALMEIDA, Guilherme Assis de, *Urban Violence*, São Paulo, Publifolha, 2003.

9 FARIA, José Eduardo, *The Law in a Globalized Economy*, 1ª. edição, 4ª. tiragem, São Paulo, Malheiros, 2004, p. 94.

models of economic sustainability, job creation, social organization and, also, to discuss the meaning of strictly economic globalization.[10] If there has been an uptrend in growth and if countries have come to depend on each other economically, numerous other questions fail to be addressed, such as the resulting conditions of humanity, devoid of itself. This owes to the fact that globalization does not allow diverse realms of life to be categorized in contained national realities since it is increasingly evident that everything is connected in a complex and mutually interdependent reality. Other factors, such as natural cataclysms, ecological issues, sustainable development, the use of scarce energy resources, productive interchange, mutual interests, cultural exchanges… become the language of a time that begins to experience the coalescence of horizons, prompting a new awareness of what is common to all as opposed to what is local, even in the sense of preserving what is local. Hunger in Africa, millions of youth enlisted as militias, educational needs and barely no access to institutions, hunger and abyssal economic differences, generalized unemployed and famine of people in less fortunate countries, environmental consequences of global warming on a local scale, the results of generalized instrumentation of nature affecting rudimentary economies and traditional forms of life – these remain unsolved in view of the globalization of solutions addressing the needs and indispensible elements of human rights. Here, we notice the *continuous* in the *discontinuous*. And more, we notice that the process of globalization and its ensuing circumstances "…divides the world," but simultaneously, "…challenges it, as a community at risk, to act cooperatively."[11]

2. Deglobalization and economic deceleration

The shock resulting from neoliberal doctrines, which seemed to reign for two decades as an untouchable doctrine and a hegemonic economic ideology, is open not only criticism, but to reassessment and relegation. The task of economists through economic policies, considering current risks and the impending urgency of economic priorities, envisioning structure for the economy of the future, and allowing it to rise to higher levels, seems to be a matter closer to the philosophical sphere than to economic competence.

The 'world-economy' still suffers under the aftermath of the US national crisis of 2008, and the American economy, due to its importance, continues to generate ripples of insecurity affecting

10 TOSI, Giuseppe, *War and Law in the Debate about the Conquest of America*, in Verba Iuris: Anuário da Pós-Graduação em Direito, Ano 5, n. 05, ps. 277-320, Paraíba, jan./dez. 2006, p. 318).
11 HABERMAS, Jürgen, *The Inclusion of the Other: studies in political theory*, São Paulo, Loyola, 2002, p. 206.

economies on a worldwide scale. In an interview to *Die Zeit*, following Obama's victorious presidential election, Jürgen Habermas noted: "The US are presently in a profound state of insecurity owing to the failure of the unilateral adventure, to the self-destruction of neoliberalism and also to its failure to act on its perception of atypical circumstances.[12]

More recent studies of political theory point to the idea of a multilateral globe and also to a scenario in which the Western hegemony will disappear. Therefore, in face of the crisis and the challenge of establishing a new global governance model, the US will maintain a strong influence on the global scene, though it will have company. Unilateralism may fail, along with neoliberal logic. These issues will demand that all economies and global societies join in charting new courses, creating instigating spaces for new ventures, similar to those in emerging economies, an omen of transformation in the political roles of great global deliberations, recognizing that these experiences may well provide the seeds for new global growth towards common destinies and the interests of all.

The 'deglobalization' era, referred to as such after British Prime Minister Gordon Brown used the term, conveys the idea of an era marked by economic deceleration, by market apathy, with clearly identifiable consequences from a macro-economic point of view, as from a political point of view. Examples show nationalism, trends towards economic protectionism, the strengthening of anti-immigration politics, a growing rejection of foreigners with xenophobic reactions, heightened tensions resulting from local politics and religious narrow-mindedness, conservative votes and the dissemination of calls for fanaticism and fundamental religious doctrines, all expressions of a time of disorientation in which the enemy is rapidly identified in the face of the other, an altered projection of all fears of a troubled society suffering a material crisis. Zygmunt Bauman notes that: "The fate of freedom and democracy of any given place is decided on the global arena – and it only has a sporting chance of permanent success if defended on this arena."[13]

In respect to political and democratic instances of modern history, globalization has had a disruptive and disorganizing role, delivering feeble economies, at the threshold of the 2008 crisis, weakened from the point of view of judicial regulatory parameters and participative political structures. The delicate deconstruction caused by globalization, evidences the feeling of social abandonment. In the view of Günther Teubner: "Increasingly so, global private regimes establish material rights independently from the State, in the absence of national

12 HABERMAS, Jürgen, *Still a Power, in Caderno Mais!*, Folha de São Paulo, Nov 9th, 2008, São Paulo, 2008, p. 09.

13 BAUMAN, Zygmunt, *Europe: an unfinished adventure*, Rio de Janeiro, Jorge Zahar, 2006, p. 37.

legislation or international treaties. Everywhere, the metastasis of private regulations spreads, along with agreements, conflict resolutions, in other words: the construction of rights takes place 'in the absence of the State.'[14] The growing instability weakens on a global scale and strengthens the demands of self-affirmation and economic stability,[15] linking internal issues to international conjunctures. Based on this, Habermas asks: "How does globalization affect a) the judicial security and the effectiveness of the administrative State; b) the sovereignty of the territorial State; c) the collective identity and d) the democratic legitimacy of the Nation-State?"[16]

Threats to local traditions and arrangements, to national identity, to the territoriality of rights, to battles won in favor of social wellbeing,[17] to established cultures, among others, are the effects of a process of the internationalization of self-affirmation mechanisms of the developing economic system.[18] Therefore, globalization has not only given rise to the meeting between peoples, but it has created conditions for the development on a global postnational scale of forms promoting the use of man and nature to intensify prevalent production policies in international relations. Among other symptoms, to accompany the thoughts of Honneth, the reification of nature reveals a symptomatic phase of civilization that takes large strides towards unbearable and alarming natural processes as a result of the dominance of instrumental reasoning, impinging on the world the face of utilitarian barbarianism.[19]

The hazards brought on by the (de)intensification of capitalism on a global scale allow for the updating of warnings by the first generation of Frankfurt scholars concerning instrumental reasoning. Razing human and natural spaces, globalizing machinism tends to establish relationships that place an exaggerated emphasis on gathering wealth while it devalues human elements. Here too, the topic is the formation of a hegemonic language, capable of producing and intensifying a condition of instrumentation of everything, leading to dehumanization. In this respect, the consideration of instruments that promote human elements becomes vital, enabling a place to promote greater levels of democratic

14 TEUBNER, Gunther, *Justice, System and Polycontextuality*, São Paulo, Unimep, 2005, p. 109.

15 FARIA, José Eduardo, *Justice in a Globalized Economy*, São Paulo, Malheiros, 2004.

16 HABERMAS, Jürgen, *The Postnational Constellation: political essays*, São Paulo, Littera Mundi,2001, p. 87.

17 (AVELÃS NUNES, Antonio José, *The European Constitution and Fundamental Rights*, in Verba Iuris, v. 5, n.5, UFPB, João Pessoa, 2006, ps. 426-427).

18 SANTOS, Boaventura de Souza, *Socialism in the 21st Century*, in Folha de São Paulo, 07 de junho de 2007, São Paulo, A 3.

19 (HONNETH, Axel, *Reification: a study in the theory of recognition*, Buenos Aires, Katz, 2007, p. 104).

participation in decision making regarding a common destiny for all humanity, from the perspective of an intensified, awareness-promoting dialog, capable of realizing the macro-ethics of responsibility, taken from the perspective of Apel's warnings.[20]

If previously, from the perspective of the Nation-State, borders drew the lines connecting State, society and economy, globalization managed to destroy these lines. Of course, it is precisely as a result of the disassemblage of a once-solid structure that it is possible to understand the extent to which the damage to this structure is responsible for the balances and imbalances that characterize our present day, the birth of a postnational constellation.[21] The adjustment of these tectonic plates in motion causes tremors and decompositions, which takes away the superficial sense of stability, balance, order, continuity, and solidity. If the smoldering magma of the interior plates of history have never truly coalesced, and if history corresponds to this continuous flow of uncontainable dialectics, humanity is generated and regenerated over experiences, traditions, values, concepts and models that offer a perception of relative stability, over the transitory nature of a historical-herculean flux. Here, once again, we verify the extent of the Nation-State experience as a mere episone, fundamental and defining, though no more than *another* page in the great history of humanity itself.

The late 20th century brings an awareness of the crumbling of the very elements that defined the historical condition which had propelled existing institutions up to that point. The ensuing transformations challenge previous convictions established in the interpretations of the Nation-State culture dragging with it, in its demise, a set of certainties, models, practices, institutions and values acknowledged during this period.[22]

Therefore, the globalization process has brought with it a series of effect that have not retreated or disappeared, resiliently remaining in evidence: 1. the loss on the part of the Stated of the capacity to control through its internal politics, considering the presence of new pressures from spontaneous sources (organized crime, epidemics, international trafficking, etc.) and intentional measures (international economic decisions, international legislation, international economic sanctions, etc.) of the globalization process; 2. the lack of legitimacy that spreads within internal decision grounds, in the sense that decision making has moved to beyond national borders, and the new political venues

20 APEL, Karl-Otto, *Studies of Modern Morals*, Petrópolis, Vozes, 1994, p. 194.
LINDGREN ALVES, José Augusto, *Citizenship, Human Rigths and Globalization*, in Human Rights, Economic Globalization and Regional (Piovesan, Coord.), São Paulo, Max Limonad, 2003, ps. 77-96.
21 HABERMAS, Jürgen, *The Era of Transitions*, Rio de Janeiro, Tempo Brasileiro, 2003, p. 103.
22 (IANNI, Octavio, *The Era of Globalization*, Rio de Janeiro, Civilização Brasileira, 2004, p. 87).

lack any type of matured popular legitimacy or any form of access or transparency in terms of its decisions; 3. the State's growing incapacity to render essential legitimizing services, considering that national arenas have become vulnerable parking facilities for volatile international capital agendas, certainly weakening the liberating potential of internal measures in terms of its autonomy, since international capital is always open to seeking new and more favorable arenas catering to the interests of international investors.[23] If sovereignty (*super omnes*), as a concept developed over modern history persists, even in terms of political means, as an element of State self-definition and a form of interaction in international relations, this is not to say that our current experience concerning this concept remains untouched.[24]

As a result, all attempts to break loose from the global net may be described as 'difficult or downright impossible."[25] This is also the opinion expressed by Habermas in *Era of Transitions*, where he states: "Even if we take into account the rational core of these defensive reactions, it is easy to understand why the Nation-State is unable to reclaim its former power by simply closing itself off."[26] This failure to reestablish an entity's lost sovereignty, in terms of its values and meanings, turns political and economical autonomy and independence measures into elusive facades for transformations imposed to a model, along with the attempts to rescue it, relegating Nation-States to increasingly marginal conditions relative to the decision-making centers of a globalized arena.

Our present-day situation, concerning a global space, presents an immense expansion of international capital, guided by the explosive force of mercantile parameters which reaches new dimensions, once freed from the entrails of the Nation-State. In this respect, the strong tranforming potential of capital is undeniable in its role of discovery and guidance. The real problem of giving capital free reign in an international globalized environment is its complete anomia, in other words, its full disposition to cause whichever effects intenationally. As a consequence, capital stimuli only reacts, according to Habermas in *The Era of transitions*, "…to codified messages in the language of pricing. This means that they are deaf towards the external effects that they themselves cause on *other* spheres."[27]

One cannot bestow credibility on a mode of international

23 HABERMAS, Jürgen, *The Era of Transitions*, Rio de Janeiro, Tempo Brasileiro, 2003, ps. 106/ 109.

24 BARROS, Sergio Resende, *Dialectic Contribution to Constitutionalism*, São Paulo, Millenium, 2007, ps. 38-39).

25 IANNI, Octavio, *The Era of Globalization*, Rio de Janeiro, Civilização Brasileira, 2004, p. 90.

26 HABERMAS, Jürgen, *The Era of Transitions*, Rio de Janeiro, Tempo Brasileiro, 2003, p. 112.

27 HABERMAS, Jürgen, *The Era of Transitions*, Rio de Janeiro, Tempo Brasileiro, 2003, p. 101.

relations based exclusively on this criterion, economic power, without the necessary justice counterpoint in the international landscape.

Under an antagonistic and mutually competitive paradigm between Nation-States, acting becomes a mere form of strategic positioning and unilateral imposition of forces in relations which only become equal in terms of the demands inherent to the process of exchange itself. The idea of justice demands more from international order since, under the bastion of unleashed and out-of-control globalization, the security of the international community and human dignity are at stake. The ship has sailed in terms of considering circumstantial and private matters since the surfacing of the current logic of international exchanges has become a survival issue for the human race.[28]

When instability and fear have become the catchphrases of international debates, and when 'security' represents an uncomfortable issue for the majority of Nation-States, one sees clearly the extent to which international order is defined by interests and ideas that debunk any possibility to follow rational premises, besides instrumental reasoning, as a form of action and engagement in international relations. With this, we must weigh the consequences, in other words, we must recognize that all other habits, trends and conquests that pointed towards a democratic version of the world are discarded. In fact, what we have nowadays is a landscape determined by an increasing level of intolerance, of egocentrism, of protectionism, of competition, of xenophobia, of arms races… which, once again, close the cycle of conquests leading to a cosmopolitan culture demanding the end of xenophobia and nationalistic hostilities.[29] This process was sparked by the intensification of a global agenda focused on terror and security. The process of 'deglobalization' is also marked by a series of effects which reverberate in these same fields, once economic efficiency is directly associated to the concrete condition of citizens lives in a number of Nation-States; unemployment, social disorder, the fear of social guarantees, the reduction of public investments in social development sectors, unbalanced money exchange rates and political instability form a landscape where the combination of explosive factors allow for an international forecast of rain and thunder.[30] It is clear that changes have been made in the latest efforts in the so-called Obama Era, with positive indications towards the construction of a unified global agenda based on premises which include multilateral participation.

28 Cf. BAUMAN, Zygmunt, *Europe: an unfinished adventure*, Rio de Janeiro, Jorge Zahar, 2006, p. 47.

29 SAID, Edward, *Humanism and Democratic Critique*, São Paulo, Companhia das Letras, 2007, p. 26.

30 ÁVILA, Sergio, *Displaced Nations*, in Folha de São Paulo, São Paulo, Caderno Mais!, Domingo, São Paulo, 15 de fevereiro de 2009, p. 5.

In this sense, a series of historically established rights (opinion, privacy…), freedoms - established through the suffering of generations, and fights for equal rights (race, origin, social condition…) are revoked in name of a one-size-fits-all global logic: security.[31] Bush's security in terms of terror and Obama's security in terms of the financial crisis – no difference – in both cases, the fight for security seems to be a common theme for the past decades in terms of establishing internationally cultivated values. Therefore, when territorial financial insecurity is accompanied by international market insecurity, still haunted by the fight against different forms of terrorism, the mixture becomes even more volatile.

Actually, according to Habermas, on the solid grounds of democratic experience which has consolidated itself since early modernity, State, society and economy seemed to intertwine with relative commitment, representing a coexistence in which interdependence and a mutual control were established in a relatively stable manner. The postnational constellation, however, has been consuming the potential of this relationship and, stealing the State and sovereignty, handing autonomy to the economy, breaking the "natural" order of things established over the past centuries. The increased flow of people, the greater circulation of merchandise and information, the intensified flux of relations provokes a dismemberment of the previously victorious "unity" which seemed to establish itself over the "natural" phenomenon of nationality. This represents the demise of a foundation over which certain experiences were structured, making room for a new foundation that has yet to be clearly defined. In this respect, there is a loss of previously established political practices, especially because "… the State, increasingly entangled in the world's economic and societal interdependencies, is set back not only in terms of autonomy and competency for action, but also in terms of democratic substance."[32]

It is undeniable that the policies of Nation-States suffer the influence of outside factors determined by pressures arising on a global scale, but they are also affected adversely by globalization-related problems on the home front.[33] The dismantlement of the internal politics of Nation-States comes as a direct consequence, since the pressure of globalized capital determines and guides government actions, stripped of their identities under the risk of losing massive sums in international finance agreements, foreign investments and speculative monies. As a result, internal politics become subservient and vulnerable in the face

31 BAUMAN, Zygmunt, *Europe: an unfinished adventure*, Rio de Janeiro, Jorge Zahar, 2006, ps. 36/ 37).

32 HABERMAS, Jürgen, *The Era of Transitions*, Rio de Janeiro, Tempo Brasileiro, 2003, p. 106.

33 Cf. HABERMAS, Jürgen, *Beyond the National Stat*e, Méxio, Fondo de Cultura Económica, 1998, p. 173.

of daunting obstacles to the establishment of an independent political entity in each Nation-State. This notion is attributed to Habermas in *The Era of transitions*, in which he states: "Capital in search of new investment and speculative profit opportunities does not submit to any obligation to settle in any nation, roaming freely from here to there. Therefore, whenever a government makes demands affecting social standards or work stability, generating a burden on the market or on the government itself, capital can react with threats to leave the country."[34]

Certainly, the States will not cease to exist, nor should they. However, it is also certain that in an hiererarchic society, the correlation between norms and validation are profoundly altered, creating the need for structural answers based on the capacity of approximating realities on the political, economic and judicial spheres, according to terms used by Teubner.[35] These are the decisive, definite and fundamental protagonists in building a new operative logic for a cosmopolitan culture. Diluted borders, compromising national traditions in terms of world organization, affect society, culture and economy, but the Nation-State "…continues to be, nevertheless, the source of the most important collective agents for the political landscape."[36] What is new in all of this is not only the participation of Nation-States in the international arena, considering it is forcefully chared by other global players, among which we find multinational corporations, non-governmental organizations seeking to influence decisions through their clout, money or argumentation.[37] The fact is that the State will not be alone in the task of establishing a cosmopolitan arena in order to build, following pragmatical guidelines, a society capable of creating its own criteria of cosmopolitan justice, which shall necessarily observe ethical-discursive presets in the production of its institutional and axiological profile.

Between pure and simple nationalism of modern traditions and globalism as a new and manifold erupting and transforminig force, emerges an intermedite element in the form of regionalism, an alternative force born from precicely from the pressure of the latter and as a mediating agent between it and nationalism. In part, the survival, in midst this transition, of Nation-States depends on the mediation process in face of globalization, established though regionalism, leading in its political-judicial-economic structure to an improved capacity of interaction and integration of the Nation-State on larger scales than

34 HABERMAS, Jürgen, *The Era of Transitions*, Rio de Janeiro, Tempo Brasileiro, 2003, ps. 106/ 109.

35 TEUBNER, Gunther, Justice, *System and Policontextuality*, São Paulo, Unimep, 2005, p. 114).

36 HABERMAS, Jürgen, *The Era of Transitiions*, Rio de Janeiro, Tempo Brasileiro, 2003, p. 104.

37 HABERMAS, Jürgen, *O Ocidente dividido*, Rio de Janeiro, Tempo Brasileiro, 2006, ps. 183/ 184.

those previously limited to territorial borders established throughout modernity.[38] Thus, we observe that the experience of Nation-States in terms of modernity moves towards the transformation of interaction conditions on a greater arena of international relations, prompting, herewith, a series of new efforts towards adapting political organizations to a concrete reality in terms of satisfying the challenges that are projected in this field. Here, again, dialog and the capacity to build dialogal coexistence and politicizing mechanisms of the common space appear to be the best direction to follow in termos of the challenges that will arise along the 21st century.

3. New directions in global citizenship, cosmopolitanism and human rights

Economic decelleraton may spell out instability, may be a synonym of financial losses, may be the epicenter of institutional, political, economir and structural crises. However, economic decelleration may be followed by an accelleration of new social, political and cultural dynamics.

Historical periods of crisis are traumatic in that they evidence the need for rethinking current tried-and-true procedures of achieving goals. Therefore, the incubation of new alternatives may be triggered by a crisis in the old order of things. In order to closely follow Habermas' political philosophy on postnational issues one must peer through the fog to verify the accumulated potential and make a smooth and slow transition, meaning that, "…for a long time now, we have been in the midst of a transition from classic international law to what Kant foresaw as cosmopolitan."[39] Thus, all efforts towards the development of a dialog culture among cultures and peoples, of a consensus regarding common global needs, challenge political destinies of the international community in terms of the formation of a cosmopolitan society (*Weltbürgergesellshaft*). For this to take place, clearly, more than simple efforts towards the integration of markets is needed.

This brings up the discussion as to the important role that the development of a human rights culture may play in an international setting in terms of cultivating a common idea of human dignity,

38 "O globalismo tanto incomoda o nacionalismo como estimula o regionalismo. Tantas e tais são as tensões entre o globalismo e o nacionalismo que o regionalismo aparece como a mais natural das soluções para os impasses e as aflições do nacionalismo. O regionalismo envolve a formação de sistemas econômicos que redesenham e integram economias nacionais, preparando-as para os impactos e as exigências ou as mudanças e os dinamismos do globalismo" (IANNI, Octavio, *A era do globalismo*, Rio de Janeiro, Civilização Brasileira, 2004, p. 101).
39HABERMAS, Jürgen, *The Divided West*, Rio de Janeiro, Tempo Brasileiro, 2006, ps. 25/ 26.

positioning itself as the core and source of expression of global ethics.[40] If international law itself questions the fundaments of its reach and its capacity to adapt to modern-day needs, in part, facing the crisis of postmodernity carries the issue of human rights with it and the need to ponder its values and basic questions.[41] The theme that has been widely discussed in contemporary philosophical politics, philosophy of law and, in fact, international law of human rights,[42] is of special significance for the formation of an international community capable of a dialogal practice of the tolerance needed to fight for transformations and demand from sovereig of Nation-States conformity in safeguarding minimal parameters of human dignity. The question of human rights is of such paramount importance that it has become the crux of a world agenda, as long as conceived to form an international community capable of mirroring principles of justice. This is what motivated Sergio Vieira de Mello to say: "It must be understood that the time is ripe for all States to redefine global security, with human rights at the core of this debate."[43]

With its *human dignity protection* aspect, rights in this category should not be restricted to the dimension of fundamental rights as internationalized by the constitution of each Nation-State.[44] Furthermore, in respect to the validation process of regional experiences, as is the case in Europe, fundamental rights established on a community level may not fall short of those conquered and acquired by Nation-States, which would represent a regression in terms of these rights on an international scale.[45] The constitution itself of each Nation-State must be capable

40 AVELÃS NUNES, Antonio José, *The European Constitution and Fundamental Rights*, in Verba Iuris, v. 5, n.5, 2006, p. 395.

BARACHO, José Alfredo de Oliveira, *General Theory of Common European Constitutional Law*, in Revista Forense, v. 367, 2002, ps. 105-127.

BELLI, Beroni, *The Human Rights Council of the United Nations and Resolutions Concerning Countries: the end of politization and selectiveness?* LIII Curso de Altos Estudos do Ministério das Relações Exteriores, Instituto Rio Branco, Brasília, 2008, p. 98.

41 CASELLA, Paulo Borba, *Reading and Learning – in the context of judicial postmodernity*, in ABZ: didactic essays, São Paulo, Imprensa Oficial, 2008, p. 168

LEISTER, Margareth Anne, Theory in Practice, in Coleção Direitos Humanos, Osasco, Edifieo, n. 8, 2008, p. 16).

42 MAIA, Antonio Carlos, *Jürgen Habermas: philosopher of law*, Rio de Janeiro, Renovar, 2008, p. 32). ALMEIDA, Guilherme Assis de, Sovereignty, Cosmopolitanism and International Human Rights, in External Politics, São Paulo, Universidade de São Paulo; Instituto de Estudos Econômicos e Internacionais, São Paulo, Paz e Terra, v. 15, n. 01, jun./ ago. 2006, ps. 93-104.

43 MELLO, Sergio Vieira de, *Five Issues Regarding Human Rights*, in SUR, International Magazine of Human Rights, São Paulo, 2004, p. 172.

44 NEVES, Marcelo, *The symbolic force of human rights*, in Philosophy and social criticism, Boston, v. 33, n. 04, 2007,p. 416).

45 AVELÃS NUNES, Antonio José, *The European Constitution and Fundamental Rigths*, in

of, instead of being refractive, absorbing elements of a cosmopolitan culture of human rights. The importance of human rights must not be local in nature in the sense of being confined to a Nation-State, nor should it be restricted to perpetuating itself as an integrating element of Occidental culture.[46]

3.1. Universality, diversity and the recognition of the fundamentality of human rights

In approaching the theme in *The postnational constellation* Jürgen Habermas does not neglect to consider the cultural issues involving the human rights debate, especially in his admonition: "The discourse concerning human rights, based on normative arguments, is actually accompanied by the fundamental doubt in terms of whether a form of political legitimacy born in the West would be, generally, accepted under the premises of other cultures. In a radical approach, Western intellectuals actually support the statement proposing that behind claims of universal human rights validation (*Gültigkeit*) hide perfidious Western claims to power (Macht)."[47]

Human rights in this sense may not be confined in their significance to their European origin, as notes Habermas: "Western intellectuals must not confuse their discourse about their Eurocentric partiality while engaged in debates that others hold with them. Clearly, we also find arguments in intercultural discourse extracted from European power and reason critiques by representatives of other cultures to demonstrate that the validation of human rights remains, in spite of it all, tied to its European birth. But those critics of the West that obtain their self-awareness from their own traditions do not, in any way, reject human rights as a rule. One observes other cultures and regions on the planet exposed to the challenges of social modernity in a similar process to Europe's "discovery," in a manner of speaking, of human rights and the democratic constitutional State."[48]

The tension surrounding global issues also motivates an increasing shift of focus towards the theme of human rights,[49] in that the cleavages caused by globalization aggravate the propensity towards conflicts and the production of inequalities, placing the globe in a

Verba Iuris, João Pessoa, Paraíba, v. 5, n.5, 2006, p. 406).

46 NEVES, Marcelo, *Between Themis and Leviathan: a difficult relationship: the Democratic State From and beyond Luhmann and Habermas*, São Paulo, Martins Fontes, 2006, ps. 275/ 276).

47 HABERMAS, Jürgen, *The Postnational Constellation*, São Paulo, Littera Mundi, 2001, p. 151.

48 HABERMAS, Jürgen, *The Postnational Constellation*, São Paulo, Littera Mundi, 2001, p. 153.

49 MAIA, Antonio Cavalcanti, *Human Rights and the Discourse Theory of Justice and Democracy*,in Human Rights Archive Celso de Albuquerque Mello; Ricardo Lobo Torres, orgs.), Rio de Janeiro, Renovar, 2000, p. 65.

condition of one single community, driven to competition, but also a community of shared risks, which demands a stronger positioning of global actors in forming a cosmopolitan culture capable of supporting the effective implementation, application and development of human rights. "In face of the blatant social conflicts and injustice of a largely fragmented world society, disappointment grows with every failed attempt en route to the constitutionalization of international rights for the peoples (initialized after 1945)."[50]

Moreover, human rights offer the conditions for the only possible fundamentation of measures designed to govern a community of peoples and, therefore, they become the protagonists of international community integration. According to Habermas: "In the transition from an order marked by Nation-States to a cosmopolitan order, it is hard to determine the greater danger: the (waning) world of sovereign players of national rights who have long lost their innocence or the confusion and mix-up of supranational institutions and conferences that may generate questionable validation, but that remain subject to the goodwill of powerful States and alliances. In this delicate situation, it is true that human rights offer the only base of legitimacy among any applicable to the political community of peoples; almost all States adopted the content of the UN Declaration of Human Rights (meanwhile perfected)."[51]

Huma rights are, without a doubt, the only possible means for the integration and legitimation of an international entity that seeks to safeguard human dignity as a whole from the various possible forms of violation.[52] Its appropriate demeanor must necessarily mirror a transcultural outline that distances it from its European character, given that these rights, having originated in the West, should not remain confined to the West, since they offer a strong argument in emancipatory struggles. Human rights: "They represent nowadays – in spite of their European origins – a universal language as a means to regulate world relations. Also in Asia, Africa and South America, they are the sole language used by opponents and victims of murderous regimes and civil wars to raise their voices against violence, repression and persecution, against the violation of human dignity. However, as human rights are accepted as a transcultural language, the discussion is aggravated between cultures as to its adequate interpretation. As long as the transcultural discourse about human rights is subject to reciprocal recognition, it may also lead to a decentralized understanding in the

50 HABERMAS, Jürgen, *Between Naturalism and Religion: philosophical studies*, Rio de Janeiro, Tempo Brasileiro, 2007, p. 122.

51 HABERMAS, Jürgen, *The Postnational Constellation: political essays*, São Paulo, Littera Mundi, 2001, p. 150-151.

52 ROUANET, Sergio Paulo, *Jürgen Habermas: 60 years*, in Revista Tempo Brasileiro, Rio de Janeiro, v. 1 - nº. 1, 1998, p. 57).

West of a normative construction that no longer reflects the exclusive view of a single culture," as states Habermas.[53]

The universal aspects of human rights are what guarantee a structure capable of embracing diversity, though not meaning, therefore, a category that is capable of representing a mere local-global projection of power. Habermas' view, envoking the universality of human rights, roots itself in a universal and non-abstract perspective, based on cultural pluralism and in the belief in a dialog among peoples and nations, elements that may offer mobilized citizens forms of integration and mechanisms for the solution of legal procedures that allow for social coexistence.[54]

In this respect, a cosmopolitan society must, necessarily, incorporate this in the structural organization of its operations. Human rights are positioned as internal parameters of Nation-States, through their internal constitutional order, but they seem to enjoy, above all, a "super-positive validation," as notes Habermas in *The inclusion of the other*.[55] This super-positive validation, is not only rooted in international cosmopolitanism logic, but is mainly present in the dialogal meeting, mediated by law,[56] though linked to a minimal foundation of pressuppositions that allow for the defense and integrity of the human being. Even in cases involving war crimes, genocide, torture, crimes against humanity, these violations of human rights may not be judged by a cosmopolitan society from an exclusively moral point of view; they must be judged in accordance with established laws that especially safeguard unbiased judgement and the protection of distinctions that make up the human being.[57]

The universality (U) implied in the theory of discourse is not *a priori*; universality is *a posteriori*.[58] At its side, the principle of discourse (D), here, maintains its meaning of fostering procedures that favor a greater access, interpretation and generation of human rights in view of procedural demands founded in democratic criteria, since, as

53 HABERMAS, Jürgen, *A Dialog about the* Divine and the Human, in Israel o Atenas, Madrid, Trotta, 2001, p. 191.

54 MAIA, Antonio Cavalcanti, *Public Space and Human Rights: considerations on the Habermasian Perspective*, in Revista do Departamento de Direito da PUC-Rio, Rio de Janeiro, nº 11, ago./dez., 1997, p. 21).

55 HABERMAS, Jürgen, *The Inclusion of the Other: political theory studies*, São Paulo, Loyola, 2002, p. 213.

56 NEVES, Marcelo, *Transconstitutionalism, Tese para Titularidade*, São Paulo, USP, 2009, p. 107).

57 NEVES, Marcelo, *Transconstitutionalism, Tese para Titularidade*, São Paulo, USP, 2009, ps. 217-18.

58 MAIA, Antonio Cavalcanti, *Human Rights and the Theory of Discourse and of Democracy*, in: Celso de Albuquerque Mello; Ricardo Lobo Torres, Human Rights Archives, Rio de Janeiro, Renovar, 2000, p. 21).

noted by Apel, "… the pleas for Human Rights may be derived from the principle of discourse (in the sense of the transcendental-pragmatic fundamentation of the universal-moral aspect of Human Rights) and must be mediated by the interests of citizens, according to criteria of the respective reason of the State – that is, if it is possible to implement this through democratic means."[59] As a product of discourse, certain human rights norms are established, and these norms are recognized as the likely candidates to reach out in its efforts to all concerned.

3.2. Discourse theory, cosmopolitan citizenship and integration through human rights

The theory of discourse developed by Jürgen Habermas, concerning international politics, projects itself over the double debate that permeates the development of human rights on a global scale: the debate concerning the preeminent need to develop a human rights culture as a base element of communicative integration among people, centered in politically differentiated communities; the debate concerning the need to expand human rights to conciliate them with cultural elements from other parts of the world, allowing for the development of a discourse capable of bringing together the many perspectives on human dignity.[60] Habermas notes in *The postnational constellation*: "In the dispute concerning the adequate interpretation of human rights, it is not a question of wishing for a modern condition, rather an interpretation of human rights that is fair with the modern world *also from the point of view of other cultures*.[61] This clearly shows that Habermasian universalism is not an expression of a mere preconceived Eurocentric idea of the world; the recognition of diversity and pluralism is something that takes part in the protection and realization logic of human dignity, in view of the cultural condition of each people.

On the one hand, national rights should be capable of promoting the integration of liberal and communitarian perspectives and, on the other hand, cosmopolitan rights should be capable of developing conditions for providing a venue for a form of internal world politics

59 APEL, Karl-Otto, *The Dissolution of the Dircourse Theory?*, in: Luiz Moreira (org), With Habermas, against Habermas: justice, discourse and democracy, São Paulo, Landy, 2004, p. 313.
60 MARTÍNEZ, Gregorio Peces-Barba, *Human Dignity from the Perspective of the Philosophy of Law*, 2. ed., Madrid, Dykinson, 2003; SARLET, Ingo Wolfgang (org.), *Dimensions of Dignity: philosophical essays on justice and constitutional law*, Porto Alegre, Livraria do Advogado, 2005; LAFER, Celso, *The Reconstruction of Human Rigths: a dialog with the thoughts of Hannah Arendt*, São Paulo, Companhia das Letras, 2001; and, COMPARATO, Fábio Konder, *The Historical Affirmation of Human Rights*, São Paulo, Saraiva, 1999; SANTOS, Boaventura de Souza, *Recognize to Liberate: the paths of multicultural cosmopolitanism*, São Paulo, Difel, 2003.
61 HABERMAS, Jürgen, *The Postnational Constellation*, São Paulo, Littera Mundi, 2001, ps. 156-157.

(*Weltinnenpolitik*).[62] This implies in the need for human rights to be capable of embracing, in their core, perspectives of recognition of rights and of non-interference, but at the same time, perspectives offering material conditions of life that allow the conditioning of higher material conditions of world co-existence. Habermas points out this problem as an indication of a route to follow, on the path of victories on this plane, previously elaborated within the United Nations: "The protection of world citizens (*Weltbürger*), clearly stated on human rights pacts, no longer simply limits itself to fundamental liberal and political rights: it reaches far beyond to offer material conditions of life that allow the overwhelmed and suffering people of this world to effectively exercise their formally assured rights."[63]

Integration on the international sphere, especially considering the advances towards the formation of a cosmopolitan society, may not be effected based on traditions or even on religion. These are not factors that bring people together as brothers, but the condition of acting and speaking beings, therefore, empower them as authors of their own condition in history. Modernity, which is mostly limited to the Western world, causing the de-differentiation and secularization of culture, provokes disjunctures that can only be compensated through integrating elements founded in principles restricted by the human rights discourse. Therefore the European answer to modernity of life seems to also come as necessary response to a world society, as modernization distributes equal effects all over,[64] safeguarding respect, comprehension and solidarity as base norms of human rights.[65]

However, the difficulties to deal with these issues are many, and here we include a cultural struggle, in the sense that cultures established along religious outlines do not offer dialogal conditions towards the acceptance of secular alternatives as a political means for advances along the path of building mutually acceptable alternatives. Habermas is aware of this obstacle and notes: "Not only as an aspect of autonomy – the individualistic shortcut of subjective rights – the European idea of human rights offers a facade that is vulnerable to spokesmen of other cultures, however, by the same token, with a different focus – it offers the secularization of a political domain, disassociated from any religious or cosmological images. From the Islamic, Christian or Jewish point of view, seen from a fundamentalist perspective, the

62 NEVES, Marcelo, *Between Themis and Leviathan: a difficult relationship: the Democratic State From and beyond Luhmann and Habermas*, São Paulo, Martins Fontes, 2006, ps. 275.
63 HABERMAS, Jürgen, *Between Naturalism and Religion: philosophical studies*, Rio de Janeiro, Tempo Brasileiro, 2007, p. 361.
64 HABERMAS, Jürgen, *The Postnational Constellation*, São Paulo, Littera Mundi, 2001, p. 159.
65 HABERMAS, Jürgen, *The Postnational Constellation*, São Paulo, Littera Mundi, 2001, pp. 156-157.

quest for truth is absolute, also in terms of, when needed, the use of force and political violence. This idea brings consequences to the exclusivist character of the community; legitimization on religious bases or following similar views of the world is incompatible with an equalitarian inclusion towards members of other faiths."[66] However, the hurdles presented to the human rights discourse are founded, to a lesser degree, on the internal dynamics and, to a larger degree, on the revelation of a rejection to domination processes which have permeated conformity discourse itself with the interests of Western nations. In reality this represents a resistance towards accepting the human rights discourse involving criticism towards the westernization of traditional ways of life in the East, as well as criticism in relation to *modernization* as a form of access to and validation of human rights.

Wetern individualism is, in this sense, and at the root of human rights statements, shielded by the illuminist idea of autonomy and validated through the forging of modernization processes involving society and enlightment. If Westerners have few strong characteristics bonding them as a brotherhood beyond economic policies, business interests and a similar view of civilization. Eastern peoples, Eastern cultures, Eastern religions, such as Islam, all share strong collective identities which they do not want to relinquish.[67] In the case of Muslims, religious unity defines a single world community, linking all to Islam.[68] Differently from the West, Islamic culture does not simply express a commitment towards one's private faith in which religious issues are, essentially, a question of conscience and freedom; rather, Muslims embrace their religiosity as a full commitment in terms of life, permeating their existence in all dimensions, whether in their relationships with others, whether in terms of their social duties, in the definition of family roles, in education and in social interactions, in politics and public affairs, in justice, in the arts and in reflection. Therefore, its unifying cultural force has a considerable effect on each person.[69] However, this has not kept Muslim peoples from reaffirming the importance of human rights, as demonstrated by the interconnected religious values and the number of regionally published documents that demonstrate the proximity between the language of human rights and that of religion, which we can observe in the *Universal Islamic Declaration of Human Rights* (1981), in the *Cairo Declaration of Human Rights in Islam* (1990), and the *Arab Charter on Human Rights* (1994).

Only within a proficuous dialogal context, internalizing measures towards reducing cultural gaps, could an assimilation of mutually

66 HABERMAS, Jürgen, *The Postnational Constellation*, São Paulo, Littera Mundi, 2001, p. 160.
67 DEMANT, Peter, *The Muslim World*, Sâo Paulo, Contexto, 2004, p. 360).
68 DEMANT, Peter, *The Muslim World*, São Paulo, Contexto, 2004, p. 14).
69 DEMANT, Peter, *The Muslim World*, Sâo Paulo, Contexto, 2004, p. 35.

interesting issues be attainable to a cosmopolitan community. In this respect, Habermas notes: "However, not only to the fundamentalists, a profane legitimation of human rights, in other words, a break between politics and the divine authority, poses a provoking challenge. Hindu intellectuals, as well, as Ashis Nandy, issue "anti-secularization manifestoes." They expect reciprocal tolerance and influences between Islamism and Hinduism preferably through a mutual crossing of religious perceptions than a neutral cosmopolitan State-sponsored alternative. They remain skeptical in face of enlightened political neutrality that only neutralizes religion in its public meaning. In such considerations, this certainly confuses the *normative* question – how to find the common ground for a just political coexistence – with the *empirical* question. The differentiation between religion and State may in fact weaken the influence of privatized religious power; however, the principle of tolerance is not adverse to the authenticity and claims in terms of truth of creeds and forms of religious life; it must solely enable the equal existence of its members within a political community."[70]

In spite of the notion of human rights as a mere product of Western culture and the consequent uselessness of discussing human rights in its universal reaches, due to misconceived premises surrounding the issue, Habermas, nevertheless, believes in the possibility of developing a line of reflection that is amiable to intercultural dialog, since a cosmopolitan society is directly dependent, in terms of its formation, on a regulatory mechanism for international communities to define individuals as relevant actors on the international landscape. The cosmopolitan culture is that of the *Weltbürger*. "The innovative core of this idea lies in international law revisions pertaining to the rights of *States*, while cosmopolitan laws would affect *individuals*: These are not only citizens affected by the laws of their respective States, but also, members of an 'international cosmopolitan entity under one director.' Human rights and citizenship should also include international relations".[71]

In this respect, discourse theory's contribution should be understood as fundamental in that it resolves opposing forces of individualism (West) *versus* collectivism (East), conscious of the fact that both portray a unity focused on socializing the individual while individualizing society. The intersubjectivist concepts of the discourse theory, that convey legal process precepts regarding human rights within a context in which there are no legal rights prior to the mutual co-responsibility of reciprocally dependent agents towards a dialog, favor the fundamentation of basic processing cores that should be contained in the rules that determine the formation of a cosmopolitan society.

70 HABERMAS, Jürgen, *The Postnational Constellation*, São Paulo, Littera Mundi, 2001, ps. 160-161.

71 HABERMAS, Jürgen, *The Divided West*, Rio de Janeiro, Temp Brasileiro, 2006, p. 126.

Stepping back from the dicotomy that promotes the dicotomic threading of these concepts, discourse theory rejects the prevalence of collective considerations over thhose of individuals (Eastern thesis) and rejects the prevalence of the individual over the collective (Western thesis), in order to embrace the reciprocal and two-way dependency between the individual (subjectivity) and the collectivity (intersubjectivity).[72] It therefore states, "…human rights concepts must rid themselves of the metaphysical supposition of individuals existing before any form of socialization, entering the world with birth rights. Along with this "Western" notion, "Eastern" antithetic ideas positioning community interests above any individual rights must equally be discarded. The 'individualistic' versus the 'collectivistic' alternatives are voided when abridging fundamental concepts of rights concerning antagonistic forces of individuation and socialization. Because individual legal persons are only individuated on the path to socialization, the integrity of a private person may only be protected in the presence of free access to the interopersonal relations and cultural traditions in which it may maintain its identity. Indivitualism, taken in a correct perspective, remains incomplete without this dose of "communitarism."[73] In this respect, the elucidations of the philosophical position, extracted from the passage in *The Postnational Constellation*, are of fundamental importance to gauge the equidistance of Habermasian thought in relation to merely Westernizing elements, as well as to understand that the idea of *universalism* (law) is not incompatible with the idea of relativism (cultural).

In this line of thought, the intersubjectivist concept of human rights, focused on the formation of a cosmopolitan society does not embrace the jusnaturalistic fundamentation, neither does it withhold preliminary criteria on an international level, essential for the formation of a core of rights, and whithout which it would be impossible to coexist in this world: the dignity of human beings. Human rights, thus conceived, serve as a catalist in integrating and bringing cultures closer, in that it represents an outpost of support in protecting humans in face of the sistemic determinations of *power* and *money*. A human rights culture, developed along these molds, points to other fronts in the interchange between people and things. Therefore, human rigths practiced in terms of a dialogal process, constitute a support base for emancipatory practices and for cultural congruence, in contrast with unilateral and incisively dominating measures form a *military* or *economic* point of view.

72 ABED AL-JABRI, Mohammed, *Introduction to the Arab Critique of Reason*, São Paulo, UNESP, 1999, p. 54).

73 HABERMAS, Jürgen, *The Postnational Constellation*, São Paulo, Littera Mundi, 2001, ps. 158-59. ABED AL-JABRI, Mohammed, *Introduction to the Arab Critique of Reason* São Paulo, UNESP, 1999, ps. 153-166).

Cosmopolitanism is synonymous to and equilibrium in the international political tug of war and, precisely for this reason, it is the germ of a postnational identity of fundamental importance for the international community, blossoming under a defined set of principles, in spite of the fact that, "… cosmopolitan pluralism blossoms even in the core of those societies still subjected to strong traditions."[74]

4. Conclusions

The reflective tasks of the present article involve the understanding of the challenges brought on by the crumbling of the driving core of globalization, which have defined the prevailing form of equating world economy relations. If decelleration has projected a crisis, affecting various aspects of Nation-States, as well as more advanced economic regionalisms, simultaneously, it may represent a historical opportunity for the fulfillment of tasks yet to be engaged on a more extensive agenda of cosmopolitan rights and obligations. In this respect, globalization and its effects, and deglobalizaton and its effects, are analysed as provisional diagnostics of a historic moment. However, the task of reflection on this theme induces the need to face the idea that a *postnational culture of human rights* may represent a link of great significance for an equation of international *meta-economical* exchanges, fostering the formation of a *cosmopolitan citizenship*. Thus, systemic imbalance may be seen as a dialectic scission in history, but also as forms of expression of new global political action, in view of civilization processes focusing on a path of democratic and human rights parameters.

In spite of the great difficulties found in establishing a plan for human rights on an international scale, the philosophical stance that Jürgen Habermas proposes, clearly, that cosmopolitan identity does not occur in the realms of a national citizenship, neither does it occur in terms of narcissistic cultural validation, nor does it occur based on the dicotomy between individualism and collectivism. This means that the theory of discourse recognizes dialog as an instrument for closing the gap, enabling, after a revision on both sides of the discourse, the approximation between the diverse, the coexistence between differences and the crieation of links based on common needs and interests.

Beyond occasional ab-uses of the human rights discourse by the US, this cultural conquest of civilization, built with blood, hardship and fire, has signified, from north to south, east to west, the most potent instrument for a possible promotion and protection of rights. In this sense, phylosophically, the idea of subjectivity lacks intersubjectivity

74 HABERMAS, Jürgen, *The Postnational Constellation*, São Paulo, Littera Mundi, 2001, p. 161.

and vice-versa, klnowing that the quality of human interaction, in a world with diminishing borders, depends intrinsically of the form in which tensions resulting from coexistence will be handled, and the form in which strategic interests and comumicateve social actions will take place. If the living community increasingly depends on supra-national political deliberations, it is the responsibility of international entities to be more deliberative, transparent and democratic and permeated by human rights in economic and political decision making, or be at the mercy of businesses, corporations and nationalistic hegemonies.

From a political-economical point of view, where strategic interests subvert the order of political demands, the distortions caused by the unbridled stampede of hegemonic world politics are to be expected. In the combat against hunger, poverty, deficient schooling, infant malnutrition, common plagues and pests, and vulnerable in face of global warming catastrophies, the fact that they have yet to find an echo in global governance is a sign of being off-course in handling global responsibilities and obligations. If thise maledies persist, then critical thought must persist. Therefore, the task of sculpting the grooves along which cosmopolitan citizenship cultures will travel, between self-sentient critical and autonomous subjectivity and intersubjectivity materialized into solid, secure, democratic and participative institutions that are capable of promoting desirable forms of dialogal and cultural interaction, as well as catering towards human requirements, practicing a protective and caring spirit, reflecting a cosmopolitan culture, challenging horizons of peoples' concrete agenda and present-day perspectives, moving forward into the future.

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Panor. Braz. law - Year 3 - Numbers 3 and 4 - 2015 - pp. 197 - 221.
ISSN 1075-1343 (print)
ISSN 2318-1516 (online)
DOI: http://dx.doi.org/10.17768/pbl.a3.n3-4.p197

THE ROLE OF INTERNATIONAL LAW WITHIN NATIONAL LEGISLATION ON TOBACCO CONTROL

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Abstract: The present article, taking into account advances in international rights and the need for domestic implementation of Framework Convention on Tobacco Control (FCTC) standards, has the objective of analyzing the competence to bring domestic and international regulations to fruition, with the purpose of creating coordinated public policies for tobacco control. So, it is possible to argue that the FCTC, by means of its guidelines, laid down at the Conferences of the Parties (COPs) and which are binding to all members states of the convention, paves the way for international regulation. Domestically, such regulation has to observe DOP guidelines, there being leeway for organizations like Brazil's ANVISA to bring those guidelines into action, such as the one related to FTCT articles 9 and 10, which limit the use of flavour additives in tobacco products, as a way of implementing international standards within the country. There is also no conflict between free enterprise and tobacco control given that, as stated by the Constitutional Court of Colombia in a process involving the constitutionality of restrictions to tobacco advertising, this is a market that should not be stimulated, but rather merely tolerated.

Keywords: Tobacco Control - Administrative Law - International Law - Regulation

1. Introduction

There have been advances in International Law[1] and, as a

1 Cf. CONFORTI, Benedetto. *Diritto Internazionale*. 8ª. Ed. Napoli: EditorialeScientifica, 2010, p. 3: "In una prima approssimazioneildirittoInternazionalepuòesseredefinito come ildiritto (o

consequence, it has gained ground in areas which were previously clearly intended for domestic standards. This is what can be empirically observed when any specific field of the law is analyzed, which will, inevitably, lean on international standards, as international law is experiencing constant expansion though with variable intensity, a fact that is consubstantiated in the differences concerning the implementation of standards. Such expansion, indeed, isn't accompanied by homogeneity with regards to the enforcement of International Law. In other words, though it can be observed that the various aspects concerning an individual's life and the role of the state are experiencing international standardization, the imperative of these provisions is not uniform, achieving greater effectiveness in areas linked to international trade and to *jus cogens* standards, whilst presenting a significant decrease in areas such as environmental protection and certain aspects of human rights.

According to Shaw[2], as technology advances, in particular with regards to communication, the concept of sovereignty has been deeply altered due to the interdependence amongst states, which, in combination with "the tight organization of business corporations and contemporary politics at an international level", leads to all actions by the state, even those of a domestic nature, having repercussions in international relations and the internal decisions made by other states.

Therefore, Administrative Law was not rendered immune to International Law. In fact, a great number of international treaties require subsequent regulation, achieved through the Conference of the Parties, in a clear exercise of regulatory power, which allows for the creation of standards binding the nations involved[3]. Law, therefore, has to be altered to face the changes in reality, as made explicit by José Eduardo Faria[4], since the advent of the transnationalization of markets for inputs, production, capital, finance and consumption - which in just over a decade, has radically transformed the structures of political domination and appropriation of resources, it has subverted the notions of time and space, toppled geographical barriers, reduced legal and bureaucratic boundaries between nations, revolutionized production systems, structurally modified labour relations, turned investments in science, technology and information into privileged factors of productivity and competitiveness, created new and autonomous forms of power

ordinamento) della 'comunitàdegliStati'".

2 SHAW, Malcolm N. *Direito Internacional*. São Paulo: Martins Fontes, 2011, p. 101.

3 On International Administrative Law, STEWART, R. B.; SANCHEZ BADIN, M. R. The World Trade Organization:Multiple Dimensions of Global Administrative Law.*International Journal of Constitutional Law*, v. 9, n. 3-4, p. 556–586. doi:10.1093/icon/mor051, 2011, accessed on April 6th 2012.

4 Cf. FARIA, J. E. C. O. *O direito na economia globalizada*. 1ª Ed. 4ª Tiragem. São Paulo: Malheiros, 2004, p. 13.

and influence and, lastly, it multiplied the flow of ideas, knowledge, goods, services, cultural values and social problems exponentially and in a planetary-scale - legal thinking seems to be in a situation analogous to that in which it found itself during the economic thinking of the tumultuous late 20s, that is: faced with the challenge of finding alternatives to the paradigmatic exhaustion of its main theoretical and analytical models, such being the intensity of the impact generated by all these transformations within their conceptual schema, in their epistemological presuppositions, in their methods and procedures.

With the development of International Organizations and International Treaties, especially those that require further regulation, administrative law begins to surpass the boundaries of the state and to be influenced by international law to the same extent.

With regards to tobacco control - a field which received international regulation through the Framework Convention on Tobacco Control, created under the auspices of the World Health Organization-, administrative law will be instrumental in helping to define the legal nature of the guidelines and for the understanding of the competence of domestic regulatory agencies.

Therefore, what is currently being observed in the construction of international standards, is the division of the regulatory competence between domestic and international authorities, making possible the existence within the international stage of a growing interdependence and increasingly relevant[5], which is also identified within public health, further amplifying the relevance of the World Health Organization and the Conference of Parties of the Framework Convention on Tobacco Control[6].

The present article, taking into account advances in international human rights and the need for domestic implementation of Framework Convention on Tobacco Control (FCTC) policies, has the objective of analyzing the competence to bring domestic and international regulations to fruition, with the purpose of creating coordinated public policies for tobacco control,tobacco sales, consumption, marketing and

5 STEWART, R. B.; SANCHEZ BADIN, M. R. The World Trade Organization:Multiple Dimensions of Global Administrative Law.*International Journal of Constitutional Law*, v. 9, n. 3-4, p. 556–586. doi:10.1093/icon/mor051, 2011, accessed on April 6 th 2012.

6 Cf.TAYLOR, ALLYN L., A. L.; ROEMER, RUTH, R.; LARIVIERE, JEAN, J. Origins of the WHO Framework Convention on Tobacco Control. *SSRN eLibrary*.from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=818984, 2005, acessed on April 6th 2012:The growing number of public health concerns that are bypassing or spilling over national boundaries has ushered in a new era of global public health policy.Although there is a long history of multilateral cooperation in some limited areas of public health policy, particularly infectious diseases, public health has traditionally been viewed as being almost exclusively a national concern.However, with global integration has come a paradigm shift in which public health is now being recognized not only as a topic of global concern, but also as a global public ‘‘good’’.

other factors related to this worldwide epidemy.

Ergo, the construction of standards, both at a domestic as at an international level, bears importance to the increase in tobacco control, and as such, a dialogue among those in charge of enforcing the law [7] should initiated, which would enable a comparison between international and domestic provisions. The Framework Convention on Tobacco Control (FCTC) is an important element in building international standards on tobacco, restricting tobacco consumption, directly and indirectly.

To that end, we will conduct an incursion on International Law and tobacco control, focusing on the construction of the FCTC. The binding strength of the guidelines will also be discussed, exploring the legislative competence of the domestic regulatory agencies and the construction of global administrative law and how tobacco control is rooted on it.

The apparent conflict between the right of free enterprise, engraved in the Federal Constitution(in its article170 and in FCTCarticle 5, numeral 3, which prevents the participation of the tobacco industry in the construction of public domestic control policies[8]), will be given special attention at the end, before completion.

The selection of tobacco control by the World Health Organization (WHO) as the object of the first International Convention it presided, has its motivation based on the tobacco epidemic facing the globe. After a lengthy negotiation, the FCTC, arrived at its text and it was presented for signing between June 16th and 22nd, 2003[9].

2. International law and tobacco control - The framework convention on tobacco control

The need for the internationalization of tobacco control is not a recent discussion. As early as 1998, during the *Seminar on Tobacco Industry Disclosures*, at WHO headquarters in Geneva, Gro Harlem Brundtland declared that tobacco control cannot be left in the hands of individual efforts by domestic players; but rather, according to Brundtland,

7 CARVALHO RAMOS, André. O Diálogo das Cortes: O Supremo Tribunal Federal e a Corte Interamericana de Direitos Humanos. In: AMARAL JÚNIOR, Alberto do; JUBILUT, Liliana Lyra. (Org.). *O STF e o Direito Internacional dos Direitos Humanos.* São Paulo: Quartier Latin, 2009, p. 817.

8 On the interference of the industry in the construction of public policies, cf.GILMORE, A.; NOLTE, E.; MCKEE, M.; COLLIN, J. Continuing influence of tobacco industry in Germany. *The Lancet,* v. 360, n. 9341, p. 1255. doi: 10.1016/S0140-6736(02)11262-1, 2002.

9 VEDOVATO, Luís Renato . A Convenção Quadro sobre Controle do Uso do Tabaco. In: Clarissa Menezes Homsi. (Org.). *Controle do Tabaco e o Ordenamento Jurídico Brasileiro*. 1ª ed. Rio de Janeiro: LUMEN JURIS EDITORA, 2011, v. 1, p. 3-31.

what is needed is for this issue to be conducted at an international level[10].

In pursuit of greater effectiveness, tobacco control advanced towards the creation of international standards[11], in order to face the global epidemic that created interdependence among states, which join their efforts in the name of public health.The issue of tobacco has surpassed national borders to become a global concern.So much so that an International Treaty on Tobacco Control was celebrated in 2003, called the Framework Convention on Tobacco Use Control, of which Brazil became a definite signatory, through ratification on November 3rd, 2005, and which was published on January 2nd, 2006, under Presidential Decree. 5658.

The Framework Convention is a modality of international treaty in which state members proceed to structure comprehensive frameworks for standards[12], and it should be emphasized that the doctrinal texts regarding the terminology of the treaties make explicit the lack of significance to the name given to the treaty, as it is its content that defines it[13]. Therefore, what should guide the interpreterit is the content of the international text, rather than the conventional terminology.

The FCTC has more definitive ties (173) than signatures (168) because, despite the deadline for subscriptions having expired, there is room for the ratifications of those who have already signed, or further adhesion from those who have not yet signed, but who intend to follow international standards on tobacco control. In addition to this, the states that have signed the Convention have agreed to engage, in good faith, in ratifying, accepting or approving it, and to show the political commitment not to undermine the objectives defined therein.

The Convention became effective as of February 27th, 2005, as determined on article 36, 1st paragraph, of the Treaty. Under these terms, states are bound to abide by the provisions of the Treaty and its guidelines, created at the Conferences of the Parties, in accordance with article 5, numeral 4, of the FCTC text.

The role of the guidelines is, then, to determine the implementation of healthy public policies required for controlling the use of tobacco[14], which could stimulate the development of a global

10 Available in http://www.who.int/director-general/speeches/1998/english/19981020_tfi.html, accessed on April 6th 2012.

11 The long road towards the construction of the FCTC can be observed in YACH, D. From Framingham to the Framework Convention on Tobacco Control. *Progress in Cardiovascular Diseases,* v. 53, n. 1, p. 52–54. doi:10.1016/j.pcad.2010.05.001, 2010, accessed on April 6th 2012.

12 SOARES, Guido Fernando Silva. *Curso de Direito Internacional Público.* 2. ed. São Paulo: Editora Atlas, 2004, p. 63

13 REZEK, José Francisco. *Direito Internacional Público* - Curso Elementar. 13ª .ed. São Paulo: Saraiva, 2011, p. 38.

14 With regards to the promotion of healthy public policies, especially within urban areas,

uniformity in dealing with tobacco issues, in regards to local peculiarities. The combination of domestic and international standards is essential to make a full implementation of the Convention possible. To that end, it is necessary to count on both domestic and international involvement for the development of public policies and the reconfiguration of the legal system, including changes in its interpretation.

Seeking to implement FCTC standards, Conferences of the Parties (COP) were held, which, according to article 23 of the Convention, is the organ responsible for the coordination of actions for the execution of the WHO FCTC. All countries bound by the treaty are part of the COP, with meetings being held every two years.

Through article 23, numeral 5, of the FCTC, the COP will regularly review the implementation of the Convention, and make the necessarydecisions to promote an effective implementation of the Convention[15]. It should, therefore, promote and facilitate the exchange of information, guide the set up and periodic improvement of comparable methodologies for research and data collection that are relevant to the implementation of the Convention; promote, where applicable, the development, implementation and evaluation of strategies, plans and programs, as well as policies, legislation and other measures; reviewing the reports submitted by the Parties, adopting regular reports on the implementation of the Convention[16]; facilitate the mobilization of financial resources for the implementation of the Convention; establish such subsidiary organs as needed in order to achieve the objectives of the Convention; requesting, when appropriate, services, cooperation and information from

it's worth checking the work of Sperandio and Ana Maria GirottiLauroLuiz Francisco Filho, whose work is focused on promoting health and urbanism, developed in conjunction with the Laboratory of Urban Research (LABINUR) of the FEC UNICAMP.

15 Cf. MEIRELLES, R. H. S. A ratificação da Convenção-Quadro para o Controle do Tabaco pelo Brasil: uma questão de saúde pública. *JornalBrasileiro de Pneumologia*, v. 32, n. 1, p. 0–0.doi: 10.1590/S1806-37132006000100002, 2006, accessed on April 6th 2012: "The text of the FCTC provides measures for reducing demand, such as, for example, an increase in prices and taxes, protection from exposure to tobacco smoke, the promotion of smoking cessation, a restriction or ban on tobacco advertising, promotion and sponsorship and measures to reduce the supply of tobacco, such as, for example, the control of illegal trade (smuggling), banning the sale of tobacco by-products to minors and support for economically viable alternative activities to tobacco crops".

16 Cf.TAYLOR, ALLYN L., A. L.; ROEMER, RUTH, R.; LARIVIERE, JEAN, J. ob. cit.:"The WHO FCTC is designed to strengthen national and international coordination to combat the tobacco epidemic.Formally negotiated by WHO member states over a period of 4 years, the treaty incorporates a variety of measures to encourage state parties to curb the growth of tobacco production and use, including some measures that constitute concrete obligations and other commitments that are framed as goals or recommendations.For example, the treaty requires that state parties implement restrictions on advertising, sponsorship, and promotion and implement strong packaging and labelling requirements.The treaty also calls on countries to establish clean indoor air controls and strengthen legislation to combat tobacco smuggling."

UN organizations and agencies, and from other intergovernmental and non-governmental organizations and bodies, international and regional, competent and pertinent, as a means of strengthening the implementation of the Convention; in addition to considering further measures, where applicable, in order to achieve the objective of the Convention, in the light of the experience gained in its implementation[17].

For Hammond and Assunta, the main objectives of the FCTC are encouraging states to implement comprehensive bans on tobacco advertising, promotion and sponsorship; making compulsive the warnings on packages of tobacco, aiming to cover at least 30% of the main visible areas and which may include pictures or pictograms; prohibit the use of misleading terms like "light" and "mild"; protect individuals from exposure to tobacco smoke; combat smuggling and illegal trade, adding information about the final destination on the package itself, in addition to raising taxes on tobacco[18]. The FCTC encourages countries to create more advanced controls than those set in its provisions, which indicates that it only sets forth the minimum standards required.

This is what can be observed in article2, numeral 1, which states that "Parties are encouraged to implement measures beyond those required by this Convention and its protocols, and nothing within these instruments shall prevent a Party from imposing stricter requirements, consistent with their domestic provisions and conforming to International Law"[19].

It is therefore assumed, that domestic protection is more encompassing than the international. However, as FCTC helps by setting minimum standards, when compared with the domestic laws of a party state, it cannot be more advanced with regards to tobacco protection and control. In this way, it is subject to generating the international responsibility of the state in which the international protection is greater than the domestic.

Also, under conventional strength, guidelines and protocols (FCTC article 5, numeral 4), are part of international law aimed at tobacco control, which, however, possess an intrinsic component of international administrative law. Such acts can fit into fruits of the exercise of the Regulating Power[20] of public administration[21]. In this

17 Cf.HAMMOND, R.; ASSUNTA, M. ob. cit.

18 Cf.HAMMOND, R.; ASSUNTA, M. ob. cit..

19 Cf.HAMMOND, R.; ASSUNTA, M. ob. cit..

20 On the Regulatory Power, also called Normative Power, cf. COELHO, Paulo Magalhães da Costa. *Manual de Direito Administrativo* . 1ª. ed. São Paulo: Saraiva, 2004, p. 67; cf. also, onthesamesubject, BANDEIRA DE MELLO, Celso Antonio. *Curso de Direito Administrativo* . 15ª. ed. São Paulo: Malheiros, 2003, p. 309; . ARAUJO, E. N. . *Curso de Direito Administrativo*. 3ª. ed. São Paulo: Editora Saraiva, 2007, 466; DI PIETRO, Maria Sylvia Zanella. *Direito Administrativo*. 21ª. ed. São Paulo: Editora Atlas, 2008, p. 82.

21 Cf. CARVALHO FILHO, José dos Santos. *Manual de direito administrativo*. 24ª Ed. Rio de

case, however, the structure of the Convention and the COP play the role of public administration, with the advantage that they can be regarded as the authentic interpretation of the FCTC.

The authentic interpretation is that which is made by the body from which the normative text originated. So, in this case, the authentic interpretation is processed through the development of guidelines.

Therefore, states are bound by guidelines and protocols, which arise from the Convention itself and serve to explain the international interpretation of the provisions, removing the risk of the domestic interpretation of international standards. As such, the guidelines play the role of making them explicit and of guiding the actions of the members of the Convention, which is commonplace within the domestic law of those states, bringing a binding force to the guidelines identical to that of the standards in the FCTC text[22]. Such guidelines were originatedfrom the COPs held so far,as determined by the Convention.

3. The guidelines created at the conference of the parties

Following conventional prediction, with the objective of promoting the implementation of the provisions of the treaty, the FCTC allows for the creation of various instruments such as protocols and guidelines, making room for authentic interpretation of the provisions of the treaty to be made, in addition to detailing and taking actions for tobacco control further. At every COP, the Parties are called to report progress and any difficulties faced, which creates conditions for monitoring of States by the COP, helping ascertain in which areas lie the challenges for effective implementation of the FCTC.The reports presented by the member states also aid as educational tools for those involved.

The Secretariat of the Convention, the creation of which was determined in FCTC article 24, is established at the headquarters of the World Health Organization in Geneva. This provision also defines, in

Janeiro: Lumen JurisEditora, 2009, p. 51.

22 In addition to being an important reference to the works on Administrative Law, cf.VERDIER, P.-H. Transnational Regulatory Networks and Their Limits.*Yale Journal of International Law,* v. 34, p. 113-172, 2009, accessed on April 6th 2012: "Since the end of World War II, ambitious institutions and regimes have emerged to regulate international economic life. The General Agreement on Tariffs and Trade (GATT) provided multilateral legal guidelines for governing trade restraints; the World Trade Organization (WTO), as the new incarnation of the GATT's original institutions, has extended its jurisdiction to encompass intellectual property and services. The International Monetary Fund (IMF) initially wielded extensive authority over the international monetary system and, though its mission has been in flux since the 1970s, retains a leading role in the international financial system. Alongside these global regimes, numerous regional and bilateral treaties pursue greater trade liberalization and investment protection. Other treaty regimes control trade in specific goods such as nuclear materials, weapons, and cultural property."

its numeral 3, the functions of the Secretariat, looking to divulge the decisions made by the COP[23].

According to forecast of the Convention, the First Conference of the Parties (COP1) was held between 6 - 17 February, 2006, in Geneva, and ended with validation for 113 Parties. It defined the rules for its funding, by consensus, as well as determining the creation of the Secretariat, which is connected administratively to the Director General of WHO[24].

The Second Conference of Parties (COP2) was held between June 30th - July 30th, 2007, in Bangkok, Thailand, by then with 146 Parties having joined. At this meeting, the guidelines for the implementation of the artigo 8º da CQCT protection that comes from exposure to tobacco smoke and the adoption of 100% smoke-free environments, having also created an Intergovernmental Negotiating Body (INB), in order to develop a protocol on the illicit market in tobacco products, as according to FCTC article 15, which presented significant advances in March 2012[25].

The Third Conference of the Parties (COP3) was held between 17 - 22 November 2008, in Durban, South Africa, in which were approved guidelines for the implementation of article5, numeral 3, important with regards to the influence of the industry in the development of public policies; art. 11, concerning the packaging and labelling of tobacco products; in addition to article 13, concerning tobacco advertising, promotion and sponsorship[26].

The Fourth Conference of the Parties (COP 4) was held between 15 - 20 November, 2010, in Punta Del Este, Uruguay. During this meeting, the guidelines for the implementation of regulation of content and the dissemination of information on tobacco products, in a partial manner; of education, communication, training and raising public awareness; the measures for reduction of demand on related to tobacco dependence and tobacco cessation, respectively, relating to articles 9,

23 FCTC Art. 24, numeral 3: Secretariat functions shall be: (a) to make arrangements for sessions of the Conference of the Parties and anysubsidiary bodies and to provide them with services as required; (b) to transmit reports received by it pursuant to the Convention; (c) to provide support to the Parties, particularly developing country Parties and Parties with economies in transition, on request, in the compilation and communication of information required in accordance with the provisions of the Convention; (d) to prepare reports on its activities under the Convention under the guidance of the Conference of the Parties and submit them to the Conference of the Parties; (e) to ensure, under the guidance of the Conference of the Parties, the necessary coordination with the competent international and regional intergovernmental organizations and other bodies; (f) to enter, under the guidance of the Conference of the Parties, into such administrative or contractual arrangements as may be required for the effective discharge of its functions; and(g) to perform other secretariat functions specified by the Convention and by any of its protocols and such other functions as may be determined by the Conference of the Parties.

24 Cf. http://www.who.int/fctc/cop/sessions/first_session_cop/en/index.html

25 Cf. http://www.who.int/fctc/cop/sessions/second_session_cop/en/index.html

26 Cf. http://www.who.int/fctc/cop/sessions/third_session_cop/en/index.html

10, 12 and 14, were all approved.

This meeting also determined the creation of a *working group* aimed at creating guidelines on prices and taxes (Article 6) and to continue the support work regarding economically viable alternative activities and the protection of the environment and people's health.It also established that the negotiations on the Protocol on Illicit Market are still to continue for one more session in 2012, as well as setting up a group of experts in the field of cross-border advertising[27].

The Fifth Conference of the Parties (COP5) is scheduled to take place in November 2012, in South Korea[28].

4. International administrative law and the binding force of the guidelines

Hard and complex negotiations in all meetings go to show that there are many obstacles to the fulfilment of the Convention. The symptoms of the emergence of supercapitalism, as outlined by Robert Reich[29], may result in new configurations and challenges for the creation of healthy public policies. As Reich points out, the new capitalism drives companies to seek control of the regulation process, drawing them ever nearer to the state's decision-making centres[30]. Hence, the importance of the creation of internal networks for implementation of the Convention[31] is understood, but it also proves essential the implementation of the guidelines of FCTC article 5, numeral 3.

As the fruit of the Regulatory Power, with the advantage of also being an authentic interpretation of the Convention made by the individuals who created it, these guidelines gain an imperative binding stature.

What can then be observed is the international interpretation of international standards, which lessens the possibility of mistaken actions by states Parties.

There is a simple logic; the Convention, as the treaties in general[32], is signed by the Executive Power and approved by the Legislature[33], gaining

27 Cf. http://www.who.int/fctc/cop/sessions/fourth_session_cop/en/index.html

28 Cf. http://www.who.int/fctc/cop/sessions/fifth_session_cop/en/index.html

29 REICH, Robert. *Supercapitalismo.* Rio de Janeiro: Ed. Campus, 2008, capítulo 4, p. 139.

30 Idem,p. 150.

31 The Rede de Municípios Potencialmente Saudáveis (Network ofPotentiallyHealthyCounties) isimportantwithinBrazil, headedby Ana Maria G. Sperandio. Availableat: <www.rededemunicipios.org.br>.

32 Cf. ACCIOLY, Hildebrando; NASCIMENTO E SILVA, Geraldo Eulálio do. *Manual de Direito Internacional Público*. 19ª ed. CASELLA, Paulo Borba, atualizador. São Paulo: Saraiva, 2011, p. 233.

33 Taking as a reference what happens in Brazil, whilst being important, however to highlight the fact that it follows a complex path with the participation of the Legislature by constitutional

ground within the domestic legal system after the Presidential Decree[34], which is not required internationally, a ground in which it will be binding for the parties, as well as all guidelines created at the Conferences.

In Brazilian law, the treaty will come into being after the Presidential Decree, which forms the basis of validity for the guidelines originated as an interpretation of its text and as a product of what can be called the Regulatory Power of International Administrative Law.

The disseminated dialogue, as advocated by Carvalho Ramos[35], in the case of the guidelines, will be consolidated by public policies.

The fact that the guidelines resemble abstract judicial decisions, similar to those that occur in the concentrated control of the constitutionality of standards, cannot be discarded.

The COP would play the role of a "court" because it would act as a recognized interpreter, thus interpreting the FCTC and defining the standards to be applied by the parties.

Therefore, there is no way to remove the binding nature of the guidelines, which are a means of clarifying the conventional exegesis. The FCTC guidelines comprise the expressions of a network of transnational regulation, the so-called TRNs (Transnational Regulatory Network)[36]. The TRNs concern is focused on issues of international trade; however, it can be applied to public health as it is laden with interdependence and already structured in relation to tobacco, by international treaty. According to Verdier[37]:

> *The emergence of several major cooperative initiatives among national regulators began engaging the attention of international law scholars in the 1990s. The Basel Committee had successfully adopted an international accord on bank capital adequacy in 1988, and efforts were underway to strengthen the rulemaking activity of IOSCO and the International Association of Insurance Supervisors (IAIS).Networks of environmental and antitrust regulators were also cited to illustrate an*

order, as emphasized

34 In Brazil, for a treaty to become part of the Brazilian legal system, it is necessary for the act of the Executive Power to take place (by signature or the adoption of the text), in addition, the treaty is subject to internal approval by the Legislature, which is preceded by ratification, being finalized by presidential decree, as well defined in RE 466.343, adjudicated by the Supreme Court in 2008.

35 Cf. CARVALHO RAMOS, André. O Diálogo das Cortes: O Supremo Tribunal Federal e a Corte Interamericana de Direitos Humanos. In: AMARAL JÚNIOR, Alberto do; JUBILUT, Liliana Lyra. (Org.). *O STF e o Direito Internacional dos Direitos Humanos*. São Paulo: Quartier Latin, 2009.

36 Cf.VERDIER, P. -H. works previously cited.

37 Cf.VERDIER, P. -H. works previously cited.

> *emerging global trend toward soft law and informal regulatory cooperation.Early commentators expressed concern that these initiatives evidenced a shift toward disaggregated global governance by experts acting outside the constraints of domestic political structures and the normal foreign affairs process*

The advances in international administrative law set the ground for more in-depth dialogue and make domestic regulations follow international directives[38], rendering the guidelines binding and mandatory when setting domestic policy. The growth of this phenomenon is palpable within current law, as described by Stewart et al[39], when dealing fundamentally with the World Trade Organization, in the following terms:

> *As exemplified by the WTO, we are witnessing the pervasive shift of authority from domestic governments to global regulatory bodies in response to deepening economic integration and other forms of interdependency. The growing density of regulation beyond the state enables us to identify a multifaceted global regulatory and administrative space populated by many distinct types of specialized global regulatory bodies, including not only formal international organizations like the WTO but also transnational networks of domestic regulatory officials, private standard setting bodies, and hybrid public-private entities.*

Therefore, as they are standards proceeding from International Organizations, which define rules for the creation of guidelines for the parties they are applied by, it is possible to conclude that the binding comes from international administrative law, which adds to the fact that it is a form of authentic interpretation of the Convention.

5. Domestic regulation

In order not to run the risk of the international treaty suffering from a peculiar internalization of its interpretation and application, which could lead to its distortion, as every state could end up giving

38 The executive agreements which are only materialized through the participation of the Executive Power of the State, can be seen as modalities of the exercise of the international regulatory power, cf. REZEK, José Francisco. *Direito Internacional Público - Curso Elementar*. 13ª. ed. São Paulo: Saraiva, 2011, p. 86.

39 STEWART, R. B.; SANCHEZ BADIN, M. R. ob. cit.

the treaty a meaning it understood better, the international guidelines should be followed up by domestic actions, particularly in regards to the implementation of public policies, in a uniform manner by the parties. In this way, the guidelines would allow for all states to have a single interpretation of the conventional standards. Regulatory agencies[40], in those countries where they exist, are the domestic vehicle for the implementation of international guidelines.

In other words, there is no need to pass the act to make concrete the international guideline on the domestic front, in the legislature.

The domestic administrative body may, therefore, in the exercise of its regulatory capacity[41], create the rules necessary for more effective control of tobacco, which is strengthened by the domestic application of international standards and guidelines[42], as the international guideline is just for making explicit the international interpretation of the text of the treaty.

Regulatory Agencies have autonomy and must act to achieve the fulfilment of their goals, as according to Carlos Ari Sundfeld[43]:

> *The agencies have been endowed with some 'independence', referred to in legislation as an important characteristic of several of them. 'Independence' is certainly an exaggerated expression. Within the legal world, we prefer to speak of autonomy. But ensuring independence is to make a rhetorical statement in order to emphasize the wish that the agency becomes an autonomous entity in relation to the Executive Power, for it to act impartially and not waver its orientation due to oscillations that, by virtue of the democratic system itself, are characteristic to this Power.*

40 According to MOTTA, Paulo Roberto Ferreira, Regulatory Agencies make up the Brazilian option, though they are not pioneers in the domestic regulation of industries. *Agênciasreguladoras*.1ª. ed. Barueri, SP: Manole, 2003, p. 12, who expresses it in the following manner: "Although, for some, these independent entities, amongst regulators, may seem like a new legal institution or an innovation within our positive law system, it is necessary to stress that entities with the same functions have already existed within Brazilian Law for much longer than one might imagine, and which perform, concurrently, legislative, administrative and jurisdictional functions".

41 On the normative capacity, refer to ROCHA, Jean-Paul. Regulação Econômica e Separação dos Poderes: a Delegação Legislativa na Tradição do Direito Público Brasileiro. Revista de Direito da Associação dos Procuradores do Novo Estado do Rio de Janeiro, Rio de Janeiro, v. XI, p. 69-87, 2002.

42 RIVERO, L. R.; PERSSON, J. L.; ROMINE, D. C. et al. Towards the world-wide ban of indoor cigarette smoking in public places.*International Journal of Hygiene and Environmental Health.*1 v. 209, n. 1, p. 1–14. doi:10.1016/j.ijheh.2005.07.003, 2006, accessed on April 6th 2012.

43 SUNDFELD, Carlos Ari. Introdução às Agências Reguladoras. In SUNDFELD, Carlos Ari (Org.).*Direito Administrativo Econômico*. São Paulo: Malheiros, 2006, p. 23.

In March 2012, through the exercise of this autonomy, the Brazilian National Agency of Sanitary Surveillance determined a ban on marketing cigarettes with additives aimed at altering the original flavour of the cigarette, the so-called flavour additives.

Such resolution is in line with international provisions and in line with discouraging tobacco consumption, as determined by the COP4 guideline, regulator of articles 9 and 10 of the FCTC. Such a ban, in fact, is aimed at averting the masking of the bad flavour of tobacco, preventing flavours from being used as an incentive for experimentation and maintenance of addiction.

The question that has been asked is whether ANVISA acted within its jurisdiction. Therefore, it is worth relating this to other products. If there was a way to make an alcoholic drink taste like milk or yogurt, whilst retaining its other characteristics, such as alcohol content and addictive potential, ANVISA has the power to prohibit that such product is marketed, as it may facilitate use of the product by young people. The law from which ANVISA was created, Law number 9.782, of January 26th, 1999, comes with its list of competences, and it should act as an independent administrative entity, having the prerogatives necessary for the adequate performance of its attributions assured, pursuant to article 4 of the Law. The ban on additives in alcoholic beverages would be a natural response, as it would mask the flavour that can be an obstacle in reaching a wider audience, especially among younger people.

As for tobacco, something of the kind was done, i.e., consumption must be controlled and the product should not be made attractive to young people. Moreover, Brazil is committed to fulfilling the treaty and therefore is bound by its guidelines. In this case, the guideline was approved at the COP4 in order to give greater effectiveness to articles 9 and 10 of the FCTC.

Thus, the ban is entirely feasible, as it is in line with the aforementioned guideline and the purposes for which the Agency was created, which also has within its competence, according to Article 7, among other topics: coordinating the National System of Health Surveillance; to foster and conduct studies and research within its powers; to set standards, to propose, implement and monitor policies, guidelines and health surveillance actions; to set norms and standards on limits of contaminating substances, toxic waste, disinfectants, heavy metals and others that constitute a health risk; to intervene, temporarily, in the administration of manufacturing entities that are funded, subsidized or maintained with public funds, as well as the service providers and exclusive or strategic producers for the supply of the domestic market; to administer and collect the health surveillance tax; to interdict, as a measure of health surveillance, places of manufacture, control, import, storage, distribution and sale of products and services relating to health,

in the case of a violation of pertinent legislation or of imminent risk to health; to coordinate health surveillance activities conducted by all the laboratories that comprise the official network of laboratories for quality control in health; to coordinate and perform quality control of goods and tobacco-related products, through analysis under health laws, or through special programs for monitoring quality in health; to control, supervise and monitor, through the perspective of health legislation, the propaganda and advertising of products subject to the regime of health surveillance.

Furthermore, it is worth noting that the responsibility of regulating, controlling and monitoring products and services that involve a risk to public health falls upon ANVISA, pursuant to article 8 of Law 9.782/99. There is an express reference to tobacco as a product that involves health risk, in article 8º, § 1º, inc. X, and, as such, determining its competence. Cigarettes, cigars and any other smoking products derived or not from tobacco, are considered goods and products subject to health inspection and enforcement by the Agency.

In this capacity, ANVISA issued regulations on the subject, exercising its regulatory powers, which, according to Carlos Ari Sundfeld[44], it maintains full compatibility with the law in the following terms:

> *Is it true, as some fear, that the regulatory agency is perforce a usurping force of the legislative function? No. In modern times, the Legislature does what it always does: it edits laws, often with a high degree of abstraction and generality. Except that, according to the new standards of society, these norms are not quite enough, more direct and precise rules are needed for dealing with specifics, performing the planning of sectors, facilitating the intervention of the state in ensuring compliance and the fulfilment of these values : the protection of the environment and the consumer, the pursuit of national development, the expansion of national telecommunications, control over economic power - in short, all of those who nowadays we've come to consider fundamental and the prosecution of which we demand from the state.*

The state then created ANVISA and gave it the task of controlling tobacco use, which involves both health and control of economic power, in view of the performance of companies operating in the sector.

Therefore, ANVISA actions [45] serve to make the FCTC effective

44 SUNDFELD, Carlos Ari. Introdução às Agências Reguladoras. In SUNDFELD, Carlos Ari (Org.). *DireitoAdministrativoEconômico*. São Paulo:Malheiros, 2006, p. 27.

45 It is also worth noting that regulation is a duty of the Agency, as it should accompany the

and, through following conventional provision, to advance tobacco control, as according to FCTC article 2, numeral 1, which states that with "a view to better protect human health, the Parties are encouraged to implement measures that go beyond those required by this Convention and its protocols, and nothing within those instruments will prevent a Party from imposing stricter requirements, consistent with their domestic provisions and in accordance to international law.

6. The influence of the tobacco industry and free enterprise

According to article 5, numeral 3, of the Framework Convention on Tobacco Control, in defining and implementing their public health policies related to tobacco control, the Parties shall act to protect these policies against commercial and other vested interests guaranteed for the tobacco industry, in compliance with national legislation. At this point, the conflict between free initiative (article 170 of the Federal Constitution) and the right to health (article196 of the FC), emerges.

In Article 170 of the Federal Constitution, free enterprise is defined as one of the fundamentals of the Brazilian economic order.It is worth noting that the provisions are not contradictory and can be interpreted in conjunction,despite there being constant debates on the violation of free enterprise by state interference in the economy.In other words, in actions brought about in Uruguay regarding health warnings, and in Australia on the use of the whole packaging for health warnings, the tobacco industry has argued that state interference undermines free enterprise as it cannot act within the market in order to promote and sell its product.

First, however, it is highlighted that much progress has been made in tobacco control and, currently, it has an essentially economic significance within society, with the period where it enjoyed cultural and religious ties having already been overcome, as pointed out by Rivero et al[46], in the following terms:

> *In the past, certain religions have used smoking as part of rituals and ceremonies, but such practices have fallen into disuse. Muslims around the world stop smoking during the month of fasting of Ramadan.Native Americans have a cultural basis for using tobacco.Historically, some tribes have used tobacco as a "life affirming and sacramental substance that plays a significant role in*

principle of legality, it must regulate and follow the FCTC provision, which was incorporated into the Brazilian legal system, cf. SUNDFELD, Carlos Ari ; CÂMARA, JacinthoArruda . Dever regulamentar nas sanções regulatórias. *Revista de Direito Público da Economia*, v. n.º 31, p. 33-55, 2010.

46 RIVERO, L. R.; PERSSON, J. L.; ROMINE, D. C. et al. ob. cit.

> *Native creation myths and religious ceremonies" (Winter, 2001).Tobacco was not used for recreational reasons until after the arrival of the explorers from Europe.In the US, smoking has gained the status of cultural icon through the cinema, television and magazine media. Adolescents who observe smoking in the media have a more positive attitude toward tobacco use, and those who identify with celebrities who smoke are more likely to take up smoking (Sargent, 2003).Movie heroes are three–four times more likely to smoke than are people in real life (Sargent et al., 2001; Meyer, 2001).Ethnicity also has an effect in that white adolescents with friends that smoke are more likely to start smoking than Asian Americans, African Americans, Hispanics, and Pacific Islanders (Unger et al., 2001).The authors attribute this finding to the tendency in the latter three groups to prefer conforming to the roles that parents and mainstream adult society prescribe for them and may be less likely to mimic the minority of adolescents who take up smoking.*

The many difficult experiences in the implementation of policies met with resistance from the industry led to the creation of FCTC provisions (5.3) and its guidelines, as can be identified in MEJIA et al[47], in the following terms:

> *The transnational tobacco industry has followed closely the potential FCTC ratification process in Argentina. BAT hired the Argentinean public relations firm, Basso Dastugue&Asociados (BD&A) which specializes in corporate image and communications.Jorge Basso Dastugue was a NoblezaPiccardo executive in charge of the Public Relations area of BAT.As part of that involvement BD&A generated a detailed report to NoblezaPiccardo and BAT about newspapers articles regarding the FCTC.Tobacco industry representatives also held frequent meetings with national Deputies requesting not to ratify the FCTC because of supposed economic losses.*

According to the guidelines approved by the COP in FCTC article5, numeral 3, the fact that there is a fundamental and irreconcilable

47 Cf. MEJIA, R.; SCHOJ, V.; BARNOYA, J.; FLORES, M. L.; PÉREZ-STABLE, E. J. Tobacco industry strategies to obstruct the FCTC in Argentina.*CVD Prevention and Control*, v. 3, n. 4, p. 173–179. doi: 10.1016/j.cvdpc.2008.09.002, 2008, accessed on April 6th 2012.

conflict between the interests of the tobacco industry and the interests of the public health policy, has been defined as a guiding principle. Specifically due to the fact that the tobacco industry promotes and produces a product that is scientifically proven to cause addiction, disease and death, and that it gives rise to a variety of social problems, which include aggravating poverty.

As a consequence of this, the states must, according to the guideline, protect the formulation and implementation of public health policies for tobacco control within the tobacco industry, to the greatest possible extent.

There is a focus on the transparency of relations between the tobacco industry and the state. Thus, the Parties must ensure that any interaction with the tobacco industry on issues related to tobacco control or public health, be one of accountability and transparency, which should also be demanded of those who work within this industry.

According Eros Roberto Grau[48], the "reality of the economic power has been countered against the idealization of liberty, equality and fraternity."

So, in order for the objectives set in the constitution and in international human rights treaties to be achieved, action in the sense of protecting the individual and society against the excesses of the economic power becomes necessary. For that very reason, the guideline determined that the parties should demand that the tobacco industry and those who work to promote their interests, operate and act in a responsible and transparent manner,and also by demanding that the industry provide all the information necessary for the implementation of these standards.

It was also determined that, due to the lethal nature of their products, special or additional incentives for tobacco companies to get established or to conduct their business, should not be granted . In this way, any preferential treatment given to the tobacco industry would be in conflict with the tobacco control policy.

Within this guideline, there were several recommendations made in order that the state party may deal with the tobacco industry's interference in public health policies, among which the following can be mentioned:

> (1)To raise awareness about the addictive and harmful nature of tobacco products and the tobacco industry's interference in tobacco control policies implemented domestically;
>
> (2) To set provisions aimed at limiting interactions with the tobacco industry and to ensure the transparency of the interactions that take place;

48 GRAU, Eros Roberto. *A Ordem Econômica na Constituição de 1988*. 11ª Edição. São Paulo: Malheiros, 2006, p. 22.

(3) To refuse partnerships and non-binding or non-compulsory agreements with the tobacco industry;
(4) To avoid conflicts of interest on the part of official representatives and government officials;
(5) To demand that the information provided by the tobacco industry be transparent and accurate;
(6) To "de-normalize" and, where possible, to regulate the activities described by the tobacco industry as "socially responsible," including but not limited to activities described as "Corporate Social Responsibility."
(7) To not give preferential treatment to the tobacco industry.

There is still a list of measures that should be built up as public policy, adopted in order to control the actions of the tobacco industry, aimed at increasing awareness on the addictive and harmful nature of tobacco products and the tobacco industry's interference in the Parties' tobacco control policies;

In addition to that, there is the need to draw the attention of all sectors of government and the population to inform them and make them aware of the interference, past and present, of the tobacco industry in the definition and implementation of public health policies for tobacco control.

There is also express prohibition, within the guideline in FCTC article 5, numeral 3, for all parties to accept, support or endorse that the tobacco industry, organize, promote, participate or take any initiatives aimed at young audiences, for public education and other initiatives that relate directly or indirectly to tobacco control. In additionto not being acceptable for states to receive assistance or legislation proposals for tobacco control or policy made, by or in collaboration with the tobacco industry.

There is also a list of recommendations in order to avoid possible conflicts of interest on the part of official representatives and government officials.

Thus, questions may arise as to the possible violation of the principle of free enterprise, engraved in article 170 of the Federal Constitution as one of the fundamentals of the Brazilian economic order, by the provisions set in the directive, as, apparently, it would cause difficulties for the tobacco industry.

However, this contradiction is only apparent, and free enterprise is not violated either by the guideline or by the provision of the FCTC, as it guarantees freedom of enterprise, while not inducing the ability to be enterprising, and it does not require constant action directed at stimulating any productive activity. It is, therefore, possible to discourage activities that are harmful to public health.

It shouldn't be inferred that the market is open for people who want to invest and produce whatever they want. In fact, such freedom

does not exist.

It can be argued that the private economic initiative must be understood exactly in the form of a subjective right that guarantees the individual the possibility of organizing and exercising any mode of economic activity aimed at obtaining a return of capital, while it being necessary to remember that there isn't total freedom for economic exploitation.

This is limited by other constitutional principles. The protection of health and the environment, as well as social justice, may be taken as such limiters.

What is observed is that there should be a regulatory activity by the state, as described above. And the regulation by the state has the function of controlling and balancing economic agents operating within certain economic activities, which is done by the limitation of certain practices and the total inhibition of others.

According to CalixtoSalomãoFilho[49]: "Disparate when subjected to the logic of the market, these principles can be reconciled by coherent regulation."

On free enterprise, according Eros Grau[50], it is noteworthy that it has numerous meanings which can be envisioned within the principle, that it is two-sided, and it can be understood as the freedom of commerce and industry and as the freedom to compete. He goes on to affirm that

> *"Coupling this classification criteria onto another, leads to the distinction between public freedom and private freedom, we may equate the following chart of exposure of such senses:*
>
> *Freedom of trade and industry (non-interference by the state in the economic domain):*
>
> *a.1) the faculty to create and operate an economic activity in a private capacity - public freedom;*
>
> *a.2) non-subjection to any state restriction, except by virtue of the law - public freedom;*
>
> *b) Freedom to compete:*
>
> *b.1) the faculty to win over customers provided it is not by means of unfair competition - private freedom;*

49 SALOMAO FILHO, C. . *Regulação da atividade econômica*. 1. ed. São Paulo: Malheiros, 2001, p. 30.

50 GRAU, Eros Roberto. *A Ordem Econômica na Constituição de 1988*. 11ª Edição. São Paulo: Malheiros, 2006, p.204.

> *b.2) a ban on forms of action that would deter the competition - private freedom;*
>
> *b.3) the neutrality of the state before the competitive phenomenon, in equality of conditions of competition - public freedom.*

In this manner, the action of the state with regards to organizing, regulating and controlling economic activity, must seek a constitutional basis for limiting free enterprise. Therefore, it is the Constitution which may set the limits, as it is the Constitution which brings the guarantees. It also concluded that the limitation brought by the constitution requires regulation. In other words, health, having been constitutionally guaranteed, must pass through a regulation that gives it leverage, which is what ANVISA did, in the case of the ban on cigarette flavour additives, as a measure to encourage and promote health.

The Constitutional Court of Colombia leaned on the same topic, on October 20th, 2010, in Sentence C-830/10, Expedient D-8096[51]. To the Court, the tobacco sector is a liability market, and it should not be encouraged by the state[52], but merely tolerated in view of the implications it brings about, especially in relation to public health.

There isn't, therefore, an incompatibility between the guideline in FCTC article 5, numeral 3, and the principle of free enterprise, essentially, through it is possible, in principle, to put a limit to it. Moreover, transparency is already guaranteed in article 37 of the Constitution, as well as the protection of health.

7. Conclusion

The advances in International law, driven by a deepening in international relations based on technological advancement, encourages a deeper dialogue between domestic decisions and international guidelines. There is an increase in issues involving joint action by several states, which leads to the internationalization of law, which, in short, means the transfer of issues to international law that were previously restricted to the domestic order.

One of the issues that underwent this internationalization is the

51 Decision taken in a class action brought by J. Pablo Corrales Caceres, a Colombian citizen, the entire content of which can be accessed at http://www.secretariasenado.gov.co/senado/basedoc/cc_sc_nf/2010/c-830_1910.html

52 CABRERA, Oscar A. & GOSTIN, Lawrence O. *Human rights and the Framework Convention on Tobacco Control:mutually reinforcing systems*.In:International Journal of Law in Context, 7,3 pp.285–303 (2011) Cambridge University Press.

one related to tobacco control, object of the first international treaty on public health, the Framework Convention on Tobacco Control, which is embodied in the parliamentary diplomacy of the World Health Organization; given the imperative of creating uniform public policies for tobacco control and the control of the action of the tobacco industry, as the results can be more effective.

In addition to the standards of the actual text of the treaty, the COP creates guidelines for better implementation of international standards. In this way, the states must not ignore the FCTC in the implementation of domestic standards for tobacco control. They should also follow the guidelines as a result of the authentic interpretation of the treaty.

The guidelines set out in the Conference of the Parties (COP) can be equated to the acts generated by the regulatory or normative power of public administration. Therefore, there is an international administrative law, which would serve as the basis for demonstrating the binding force of the guidelines, as well as the existence of autonomous interpretation of the international treaty, as held by the parties themselves.

These are some of the many consequences brought about by the ratification of the FCTC, which cannot be neglected as a component of the standards that serve as the interpretation according to the Constitution. Therefore, the guidelines are binding for the FCTC parties as much for an exercise of the regulation as by an expression of its authentic interpretation.

Domestically, under the penalty of omission and international accountability, the state must, in dialogue with the FCTC and the guidelines, determine the regulation of the product and its use, which in Brazil, is attributed to ANVISA.

Keeping in mind that the protection brought by the FCTC, clearly outlined at the convention, is a minimum parameter, the states may set up mechanisms and policies to improve the protection.

In Brazil, ANVISA can and should regulate the product, exactly as defined within the law that created it. To that end, the guideline in article 5, numeral 3, created by the COP, is essential as it refers to transparency and control of economic power.

Highlighting the fact that there is no incompatibility between this guideline and article 170 of the Federal Constitution, due to the fact of there being no absolute principle, the principle of free enterprise is no exception. Furthermore, the actions of the tobacco industry are not curtailed by the guideline, and there should be, however, transparency in their actions, which is already established in the Constitution of Brazil, article 37. The protection of health is also the basis for a regulation aimed at the conventional guideline.

With regards to Brazil, the implementation of the directive has, therefore, constitutional protection, in addition to allowing more

effective control of economic power, which, also under the constitution, cannot be exercised in an abusive manner, in accordance to article 173, paragraph 4, of the Federal Constitution.

Therefore, regulation is necessary and should be performed domestically, based on the guidelines and on the treaty, which removes the violation of constitutional principles of the economic law, the main example of which being free initiative, which is also seen as a foundation of the Brazilian economy. As an example of an important decision on the issue, making concrete the possibility of domestic regulation in line with the international template, there is the stance assumed by the Court in Colombia in the action brought forth by Pablo J. Caceres Corrales.

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Panor. Braz. law - Year 3 - Numbers 3 and 4 - 2015 - pp. 222 - 253.
ISSN 1075-1343 (print)
ISSN 2318-1516 (online)
DOI: http://dx.doi.org/10.17768/pbl.a3.n3-4.p222

BUSINESS PURPOSE AS A TAX AVOIDANCE CONDITION IN CORPORATE REORGANIZATIONS

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Abstract: With the approval of the general norm of tax avoidance in the national tax laws, there are several judgments of the Administrative Council of Tax Appeals – Conselho Administrativo de Recursos Fiscais (CARF), which have used a tax avoidance institute of comparative law to consider specific practices resulting from companies' mergers, splits or amalgamation as abusive tax planning. It is known as the "business purpose doctrine", which has been running the Counselours of the CARF to establish limits on the exercise of business activity, but still little discussed by the Brazilian doctrine. In summary, this new approach seeks to prevent that corporate transactions of this kind are carried out with the purpose of building a diverse legal reality of the factual, under the cover of legal formalism. The legality in corporate reorganizations focusing on the business purpose theory has been subject of compliance with three basic requirements: the temporality of business, the interdependence of the parties and the normality of the operation. In spite of the controversies regarding the legitimacy of the institute, it is noted that adopting a business purpose test seems plausible, once the institute is identified with the cause of the legal business.

Keywords: Tax planning - Tax avoidance - Business purpose - Corporate Reorganization - Legal Fact

1. Introduction

This article addresses the construction of the business purpose doctrine, which is an American jurisprudential creation within the Brazilian Legal System from the perspective of the civil law and the criteria adopted by the Secretaria da Receita Federal do Brasil (SRFB), Brazilian Treasury Administration, to the application of the previously mentioned doctrine in administrative decisions. One must remember that the business purpose corresponds to the legal act that must pursue an economic purpose, with primary objetive of optimizing company's business, and not the simply get tax savings. From this perspective, the paper intends to examine the posture adopted by the Administrative Council of Tax Appeals – Conselho Administrativo de Recursos Fiscais (CARF) towards the business purpose, in order to verify whether the understanding which has been prevailing finds lodgement in the Brazilian law.

To facilitate such assignment, we analyse first, the conception of the general norm of tax avoidance, designed to refrain abusive tax planning in the legislation of other countries, including the development of the American and English judicial construction doctrine, based primarily in commercial purpose. Referred to as business purpose or business purpose test doctrine in American law, the doctrine of business purpose - also called doctrine of use negotiation among Brazilian scholars - was created in 1935 by the American Supreme Court, to guide the tax planning in American administrative and judicial field, setting the criteria for legality and illegality in corporate affairs.

Despite the divergence between the Brazilian legal system and the Common Law, CARF, monitoring the evolution of tax avoidance in many other legal systems around the globe, brought the business purpose test to the Brazilian legal system, althought under other figures related to the tax planning field, as a way to legitimize unreasonable administrative requirements in order to file appeals before the CARF, triggering several controversies in the doctrine. However, as noted in the second part of this study, the Brazilian administrative jurisprudence has built criteria other than those adopted by the Americans Courts applying the test of negotiable usage.

It is admissible within the Brazilian tax doctrine to say that the institute created by the Supreme Court and the American tax administration corresponds to the objective element of the tort cause of the legal transaction, which is why the tax administration would be able to implement it in their trials. This is what we examine in the third part of this study.

2. Business purpose: a historical approach

When one intends to examine an issue that involves taxation thre is invariably the risk of meeting antagonistic positions, strongly advocated by their heralds. It is undeniable, a branch of the Law characterized by the constant and ongoing conflict between the state and the taxpayer, and this confrontation is particularly apparent when examining the matter regarding the distinction between tax avoidance and evasion.

Historically, the characterization of evasion, therefore legitimate, has been the subject of endless discussions, mainly regarding its characterization. Specifically with reference to corporate reorganization, these legal disputes have been gaining increasing relevance in a globalized market, where competitors seek to ensure for themselves a more favourable tax treatment.

The classic distinction between avoidance and evasive actions, based solely on the criteria of temporality of the operation and the lawfulness of the behaviour adopted, became insufficient for the solution of several disputes that have emerged over the years. We can understand this as the cause of the Brazilian Complementary Law No. 104, of January 10, 2001, which introduced the Sole Paragraph of Article 116 of the Código Tributário Nacional (CTN), Brazilian National Tax Code, and the official text is as follows:

> *Art. 116, Parágrafo único. A autoridade administrativa poderá desconsiderar atos ou negócios jurídicos praticados com a finalidade de dissimular a ocorrência do fato gerador do tributo ou a natureza dos elementos constitutivos da obrigação tributária, observados os procedimentos a serem estabelecidos em lei ordinária.*[1]

With the emergence of a legal provision in the CTN, the SRFB would be allowed to disregard the acts and legal transactions executed by the taxpayer when these instruments were supported by commercial or economic acts that did not represent the reality of the business between the parties, in other words, the occurrence of a dissimulation, provided that existed an ordinary law setting the respective procedures.

According to Aurelio Pitanga Seixas Filho, the legislator chose to move away from the term simulation because it bears the sense of abuse of

1 Art. 166, Sole paragraph: The administrative competent authority may disregard acts or legal transactions with the purpose of concealing the triggering event of the tribute or the nature of the constitutive elements of the tax liability, subject to the procedures to be established in ordinary law.

the legal form or breach of the law, so that the word dissimulation would correspond to a disguise or concealment (SEIXAS FILHO, 2003, p.163).

Hence, it is said that the word dissimulation expresses the idea of concealing, hiding something in craftiness to misrepresent or disguise (FERREIRA, 1986, p.483). Therefore, the legal acts or business carried out by the taxpayers in a concealed or disguised form could be decharacterized by the Tax Administration.

Once the SRFB was able to disregard the acts or business carried out by taxpayers for tax purposes, the doctrinal portion advocated by the economic interpretation of Tax Law led to a state that the provision created an axiological evolution due to the open structure of types in the tax legislation (PORTO, 2012, p.155).

Not for reasons other than facing these issues, it prompted discussions in the administrative doctrine and courts related to tax avoidance and tax elision of the dispositive aforementioned rule.

With respect to the sole paragraph of article 116 of the aforementioned legislation, the doctrine was divided into two trends of thought. The first, headed by Alberto Xavier de Couto, stated that the sole paragraph of article 116 was about the anti-avoidance rule, because if it were about the norm of tax avoidance, it would conflict with the taxation principle of close tipicity. The second trend, headed by Marco Aurelio Greco, argued that the sole paragraph is about the norm of tax avoidance, under the guidance of the norm of tax avoidance rules in comparative law (specific tax avoidance rule) that act in fighting law evasion (Germany, Spain, Portugal), abuse of rights (France) or the supremacy of form-over-substance doctrine (USA, UK, Canada etc.) (TORRES, 2012, p.03).

The supporters of the economic interpretation of the Tax Law, in line with Marco Aurelio Greco, argue that the disposition is a norm of tax avoidance, because the tax planning will be lawful when there is no abuse of rights, and, if it occurs, the tax administrator may intervene in transactions among individuals to disregard the act or transaction made. Conversely, there are those who understand that the economic interpretation is unconstitutional because it offends the legality and close and formal structures of Tax. (PORTO, 2012, p.155).

Overcoming the disagreements, the characterization of the tax planning associated to the concepts of tax avoidance and tax evasion became obsolete by the classical distinction of temporality and lawfulness in the legal system, since in the contemporary tax setting, the scope of the discussion turns towards abusive tax planning, envisioning an interpretation of Tax Law that seeks fair taxation. (GOMES, 2005, p.503).

Given this scenario, the doctrine and the legislation of several coutrines were gradually created beacons to restrain abusive tax planning.

In Germany, the thresholds for prohibiting the abuse of the legal

form were enforced through a norm of tax avoidance established with the Taxation Code of 1919 (Reichsabgabenordung - RAO) and later modified in 1977 through the article 42 of the Tax Law of Adaptation, which establishes:

> *(1) Tax Law cannot be rigged by the abuse of the legal forms. Whenever abuse occurs, the claim of the tax will appear as the economic phenomena had been adopted the appropriate legal form. (2) The abuse occurs when an inadequate juridical structure is selected [...].*[2]

In the Spanish law, the prohibition of fraud to the law was given by Article 24 of the *Lei General Tributaria*, amended by Law 25 of July 20, 1995, which allows the tax authorities to consider fraud to the tax law, or tax demand object of tax avoidance, as shown in the transcript below:

> *Para evitar el fraude de ley se entendera que no existe extensión del hecho imponible cuando se graven hechos, actos o negócios jurídicos realizados com el propósito de eludir el pago del tributo, amparándose en el texto de normas dictadas com distinta finalidade, siempre que produzcan um resultado equivalente al derivado del hecho imponible. El fraude de ley tributaria deberá ser declarado en expedbuto iente especial em el que se dé audicencia al interessado.*

Similarly, the General Portuguese Tax Law (Lei Geral Tributária), article 38, item 2 also establishes prohibiting the breach of the law.

> *São ineficazes no âmbito tributário os actos ou negócios jurídicos essencial ou principalmente dirigidos, por meios artificiosos ou fraudulentos e com abuso das formas jurídicas, à redução, eliminação ou diferimento temporal de impostos que seriam devidos em resultados de factos, actos ou negócios jurídicos de idêntico fim económico, ou a obtenção de vantagens fiscais que não seriam*

2 Translation to Portuguese by Alfred J. Schmdt in "TORRES, Ricardo Lobo. Normas gerais antielisivas. **Revista Eletrônica de Direito Administrativo Econômico**, Salvador, Bahia, n. 4, nov./dez. 2006. Available at: < http://www.direitodoestado.com/revista/REDAE-4-NOVEMBRO-2005RICARDO%20LOBO%20TORRES.pdf>. Entry: 02 May 2014."

> *lançadas, total ou parcialmente, sem utilização desses meios, efectuando-se então a tributação de acordo com as normas aplicáveis na sua ausência e não se produzido as vantagens fiscais referidas.*[3]

In the Argentinian legal system, the institution of the norm of tax avoidance happened through the "*doctrina de la penetration*", or disregard of the legal entity, which authorizes the tax authorities to mischaracterize the legal personality of the company to meet the substance of the business and the liability of shareholders.

In Italy, the tax authorities have the power to mischaracterize the tax advantage acquired via corporate operations when there is no specific reason that certain economics is valid or when a fraudulent purpose from the taxpayer occur in order to save on taxes.

In many countries including such as the United States of America, Canada, England, Australia and Sweden it was developed a doctrine prompted by the business carried out between the parties, called doctrine of business purpose, business purpose or negotiating purpose, result of judicial construction in the United States of America and England (anti avoidance rules) or legislation in Canada, Australia and Sweden (GOMES, 2005, p.503).

In Canada, the norm of tax avoidance is enforced when it is abusive. The general anti-avoidance provision of the Canadian law allows the Internal Revenue Service (IRS) to deny tax benefits that result either directly or indirectly from operations, if it understands these were not carried out in a reasonable manner (AMARAL, 2002, p.296).

In Sweden the norm of tax avoidance takes place through three criteria which identify the imperfection in tax avoidance: a) legal business carried out by the parties is uncommon; b) incidence of significant tax savings c) evident purpose of reducing the tax burden without other legitimate reasons (business purpose) (DÓRIA, 1977, p.75).

In the United Kingdom (UK), the norm of tax avoidance arose through jurisprudential understanding of two significant cases of the tax planning industry: the Ramsay and the Furniss cases (Amaral, 2002, p.295). In the former, the taxpayer sought the sale of a property to a given buyer without paying taxes in England, transferring the property to a Tax Haven (Mann Island) to ensure that the company would sell

3 Ineffective under the Tax Acts or essential or primarily for legal transactions, by artificial or fraudulent means and abuse of legal forms, reduction, elimination or deferral of taxes that would be payable as a result of facts, acts or legal transactions of identical economic, or derive tax benefits which would not be reached wholly or in part, without the use of these means, taxing in accordance with the applicable rules in its absence and did not produce the tax benefits mentioned.

the property directly to the buyer in England (circuit operation). In the Furniss case, a determined English taxpayer sold the property to a company located in the Isle of Man, and they sold it to another taxpayer characterizing capital gain.

The House of Lords, a higher British instance, when analysing both instances, ruled that in Ramsay´s case the operation would be disregarded because of the fact that there was a purchase and sale business. In the Furniss case, the Court ruled that the transaction was valid because there was no specific buyer, so that there was no circular structure of the business, as in the first case, in other words, unequivocal purpose of obtaining economic advantage and prejudicing the Tax Statute (AMARAL, 2002, p.296).

Based on this context, it is consolidated in the British courts the so-called Ramsay Principle, explained here by Túlio Rosembuj:

> *Según Lord Oliver, em el caso Ramsay se enuncia el principio de que los tribunales pueden considerar transaciones individuales como 'un todo' y, por tanto, como um plan organizado para eludir impuestos; que este plan organizado puede estar formado por transaciones (contratos, operaciones, etc) artificialmente concertadas para obtener um resultado diferente, em su conjunto, del que se habría producido de no existir tal conexión; que es importante establecer si en algunas de essas transaciones falta um objetivo comercial; que es suficiente para tener uma preorganización elusiva, uma 'voluntad guía' que pueda garantizar que los diferentes passos sucesivos serán llevado a cabo. (ROSEMBUJ, 1999, p.380).*

However, it is the enactment of the business purpose doctrine in the American jurisprudence that establishes a landmark in the setting of tax planning (GODOY, 2003, p.61).

Notwithstanding, the construction of the business purpose doctrine was established by the intention to consider abusive a tax avoidance when the taxpayer in pursuit of tax advantages diverges from the purpose of the business in the area. This is a test created by by the Yankee precedent whose goal is to analyse whether the transaction would have been performed in the same manner if there had been no tax advantages. (SCHOUERI, 2010, p.18).

The doctrine was developed by the North American courts from the idea of the substance-over-form concept, which implies that

the business acts or transactions must show the reality of the entity (economic substance of transaction), rather than their legal form (form), in order to present a true and fair view of the affairs of the entity (AMARAL, 2002, p.294).

In this perfunctory review, in the next topic, we will study the origin of the business purpose doctrine and its unfolding in American jurisprudence.

3. Business purpose doctrine in the North American Legal System

Among those several institutes established by judge-made law in the United States, it gains in relevance the business purpose test, in the subject matter of this study, which enables, in greater amplitude, the analysis of the legality and illegality of tax elision.

This test was designed in 1935 by the North American Supreme Court with the trial of the case Gregory v. Helvering (293 U.S. 465, 1935) in order to judge whether a given commercial transaction entered into the taxpayer, Ms. Gregory, was in fact, of economic substance (MACHADO, 2013, p.70).

Arnaldo Sampaio Moraes Godoy says that in at the time of the trial - which dates from December, 1934 to January, 1935 - the United States of America was going through a major economic crisis, still struggling with the recession of 1929. The institutional image of the country needed to be reinstated by adopting pedagogical measures that undermined the commercial law of 1920 and the Supreme Court was the ideal setting for this intent (GODOY, 2003, p.61).

In summary, as we can conclude from the decision and the reviews of the jurist cited above, the taxpayer, Mrs Evelyn Gregory, owned all shares of United Mortgage Corporation. The company had 1,000 shares of the Monitor Securities Corporation in assets with a market value that exceeded the book value, which is why she wanted to alienate them to have direct access to the proceeds from the disposition. At first, the taxpayer could distribute the shares of the Monitor to herself to alienate them later, which would result in the taxation of dividends in the shares.

Thus, Ms. Gregory articulated a corporate restructuring as set forth in section 112 (g) of the Income Tax Law, 1928 to transfer the shares to herself, with the aim of reducing the amount of income tax when transferring the shares directly. This norm exempted taxation in cases where a given company by means of a corporate transaction, transferred shares to its shareholders who held shares in another company.

Next, the taxpayer created a new company called Averill Corporation, to which she transferred the shares held on behalf of Monitor Securities, dissolving, in sequence, the company Averill, and

thereafter distributing the assets to herself.

The US Treasury, by carefully examining the case, noted that the company Averill, established through a corporate transaction, never possessed substance and thus, its existence should be disregarded, even though the taxpayer had not directly circumvented the legislation.

Although in the administrative court - The Board of Tax Appeals - the view of the tax administration was rejected, the Court of Appeals - The United States Court of Appeals for the Second District - reformed the decision, considering that even though, the operation occurred according to the law, the deal did not meet the legitimate business purpose.

In the opinion of the Supreme Court, although the taxpayer was entitled to reduce or plan their taxes, they could not do so if the act practiced did not harmonize with the intent of the legislator, as seen in the excerpt transcribed below:

> *The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted. […] Bur the question for determination is wheter was done, apart from the tax motive, was the thing which the statute intended.*[4]

Thus, resulting in unfavourable trial to the taxpayer, we agreed that the Supreme Court:

> *(1) Minimization, Avoidance or Evasion of Liability: Taxpayer can decrease the amount of his taxes or altogether avoid them within what the law permits. (2) Acts Constituting Reorganization in General: Transfer of some corporation assets owned in full by the taxpayer, to the new corporation, created solely with the purpose of receiving and transferring assets to the taxpayer as liquidating dividend, after which the new corporation was dissolved, and reorganized within the statute, being exempt from the tax gain arising from the transfer of assets by one corporation to another corporation pursuant of reorganization. Revenue Act 1928, § 112(g), (i) (1), 26 U.S.C.A., § 112. (3) Plan of Reorganization: Under statute exempting from tax gain arising from the transfer of assets by one corporation to another, 'transfer'*

4 UNITED STATES. Supreme Court of the United States. Gregory v. Helvering, Comissioner of Internal Revenue. No. 127 Mr. Justice Sutherland. Decided on January 1st, 1935. Published in 55 S.Ct. 266.Available at:<https://a.next.westlaw.com/Document/I47>. Entry: 15 out. 2013.

> *must be made pursuant to plan of reorganization and not pursuant to plan having no relation to business of either corporation. Revenue Act 1928, C(g), (i) (1) 26 U.S.C.A. § 112.*

The trial of the case by the Supreme Court was crucial to raise the business purpose doctrine to a norm of tax avoidance by imposing limitations on tax planning carried out in the U.S.

In this aspect, the business purpose doctrine asserts that transactions will not be valid when the only purpose of these cases is tax savings unless they intended to reach a valid and independent negotiation use. In these cases, the tax administration, in the absence of a negotiating reason, can disregard the operation, even though they are in compliance with the tax legislation (JONES, 1999, p.73).

Thus, it is observed that the tax administration and the North American Courts seek to avoid the tax advantage by companies that are dissociated from the legal business usefulness the company with the mere motivation of overturning the tax, according to Tulio Rosembuj:

> *El business purpose test, em los EE UU resulta aplicado por los Tribunales para descalificar o declarar la ineficácia de determinadas actividades o negócios jurídicos cuya finalidade o alguna de las fases de los mismos, aun cuando sea verdaderas no son apropriadas ni necessarias a la empresa, dirigidos como están a obtener uma situacion de ventaja tributária (ROSEMBUJ, 1999, p.261).*

At the Institute of business purpose, the tax administration searches for a business purpose in the legal act accomplished by the taxpayer. The economic reality is essential for the implementation of the institute element, since the purpose, which is sought, is the one that rules the exercise of the business activity (MACHADO, 2007, p.48).

According to Hermes Marcelo Huck, "the economic significance of the legal transaction is essential, and not being found, it is lawful for the IRS to tax the covert operation by the business ostensibly presented" (HUCK, 1997, p.200).

Antonio Roberto Sampaio Dória explains that the recognition of the business purpose doctrine in corporate business occurs by applying three tests: a) the test of permanence; b) the test of corporate advantage and c) the test of fiscal savings (DÓRIA, 1977, p.78). The first test aims to prove that what does not fall under the definition of "reorganization" of corporate transactions, cannot extend their activities. The second test determines that the reorganization should provide benefits to the

surviving corporation, in order not to allow that such benefits directly influence the business owners. Lastly, the third test involves the corporate operations whose purpose is the reduction of taxes, which are not considered reorganizations within the legal directives.

Despite the birth of the business purpose doctrine in trial elsewhere, the so-called model of substance-over-form thrived-up from its advent.

It is a construction of the Internal Revenue Service, the North American Inland Revenue, and the Federal Courts, to ensure that taxpayers pay attention to the spirit of the law - their real purpose, and not just the normalized legal form as explains Sally M. Jones:

> *The substance-over-form doctrine says that the IRS is entitled to look through the legal formalities to determine the true economic substance (if any) of a transaction. If the substance differs from the form, the tax consequences of the transaction will be based on the reality rather than the illusion (JONES, 1999, p.73).*

The doctrine of substance over form operates to prevent the very nature of the transaction to be covered by mere legal formalities, which can be used to circumvent tax obligations, and promote effective governance of the legislative policy and the intention of the legislator.

The aforementioned understanding is used as support for the business purpose doctrine in common law countries, since it establishes the limits for use in business arrangements artificially established, as Raoul Lenz explains:

> *The Anglo-Saxon law, based on the precedents, developed a doctrine that considers the business substance more relevant than the form. When applying this doctrine, the court seeks the 'substance' of the transaction, which means the true purpose of the business. If the true substance is remarkably different from the form attributed to the operation, and if this form has the sole purpose to save taxes, the operation is considered simulated and is requalified in accordance with its true substance (LENZ, 1988, p.588).*

In the American legal system, the doctrine of the business purpose and the substance-over-form, together, are applicable three categories: a) sham transactions, in which the business purpose test

is used to disregard the corporate or the benefits obtained when the only goal is motivated by tax savings and a corporate transaction did not need be accomplished; b) transactions out of the economic reality, which, though practiced within the legal boundaries, are unrealistic because the tax consequences are the cause of their structuting, and last c) step transactions in which taxpayers employ the most complex tax legislation to perform operations in series, where the tax administration may disregard every step if the operation is considered as a whole. (MACHADO, 2013, p. 73).

In view of these considerations, the follow-up to this study assesses the association of the business purpose in the administrative decisions of the tax bodies, and later their presence in judicial decisions, which will provide a better understanding as an instrument adopted by the tax administration for tax avoidance viability in corporate reorganizations.

4. The (des) construction of the business purpose doctrine in the Brazilian Jurisdiction

Despite the contrasts between the continental and common law jurisdiction, it has been observed, especially following the introduction of the sole paragraph of article 116 of the CTN, the adoption of the business purpose doctrine and its variations in the trials of the CARF (or former Câmara Superior de Recursos Fiscais[5]), albeit under the designation of other theories, such as circumvention of the law or abuse of rights (SCHOUERI, 2010, P. 18).

In this light, the theory of the business purpose is being used to legitimize tax avoidance practices under the umbrella of the Homeland Legal Order, as Andrade Filho affirms:

> *Strictly speaking, this idea corresponds, in substance, to the enforceability of an 'extra tributary reason' to justify certain tax avoidance practices and, without the existence of such reason the taxpayer could not justify practices only from considerations about the legality of the means and forms. On the other hand, under the same perspective, the sole purpose of obtaining an optimization of the tax burden would not be catalogued as a valid business purpose (ANDRADE FILHO, 2009, p.200).*

The business purpose gained enormous prominence in the

5 The change in nomenclature for the CARF happened with the issuance of the Provisional Measure No. 449, converted into Law 11,941 of December 27, 2009.

trials of the CARF from the Provisional Measure No. 66/2002, which regulated the administrative procedure determining the disregard acts or legal transactions for tax purposes.[6]

Thus, that provision aimed to complement the sole paragraph of art. 116, establishing the absence of business purpose or the instance of abuse in order to disregard acts or legal transactions by the tax administration, as seen in the transcript excerpt below:

> *Art. 14. Are likely to disregard the acts or legal businesses that aim to reduce the amount of tax, prevent or delay their payment or conceal the true aspects of the triggering event or the real nature of the constituent elements of the tax obligation.*
>
> §1º For the disregard of legal business act or legal business it should take into account, inter alia, the occurrence of I - lack of business purpose; II- abuse of form.

The second paragraph of the aforementioned rule, tries to make a legal provision the requirement of the business purpose in the national tax legislation, specifying the extent of non-occurrence of the business purpose in acts or legal transactions.

> *§ 2º It is considered an indication of absence of business purpose the option for more complex or costly, to those involved, between two or more ways for the practice of certain legal instrument.*

The art.14 of the Provisional Measure No. 66/2002, which elected the absence of business purpose and the abuse of form to disregard the acts and legal business, did not flourish under the national law, because a particular part of that rule was not converted into law.[7]

Notwithstanding the non-conversion of the Provisional Measure was no hindrance for the Secretaria da Receita Federal do Brasil (SRFB), Brazilian Treasury Administration, to remain applying the North American doctrine in their decisions, albeit under the alias of other figures of tax legislation (SCHOUERI, 2010, p.19).

The attempt of the former Conselho de Contribuintes/CSRF to build the thesis of the business purpose in its judgments, even

6 BRASIL. Provisional Measure No. 66 of Augusto 29, 2002. It comprises on the procedures to disregard acts or legal transactions for tax purposes. Available at <http://www.receita.fazenda.gov.br/Legislacao/MPs/2002/mp66.htm>. Entry: 11 May 2014.

7 The Provisional Measure nº 66, of 29 August 2002, was subsequently converted into Law 637, of December 30, 2002.

"unauthorized" by the Legislative Power, stirred controversy in the field of the tax planning, mainly over the (in) compatibility of their implementation in the Brazilian legal systematic ahead to the principle of trict legal types and legal certainty, according to Hugo de Brito Machado:

> *The business purpose requirement for the validity of acts or legal transactions to the tax authorities, which gained strength from the Provisional Measure No. 66, is an intolerable limitation of freedom of the taxpayer, being rejected even by the most favourable doctrine to Treasury in terms of tax planning. The worst, however, is that the rejection by the National Congress of the dispositions from the Provisional Measure, which were under their care, appeared to be a victory against the discretion, but in practice it ended up as a pathway to its aggravation, as will become clear below (MACHADO, 2007, p.51).*

Prior to the issuance of the tax avoidance norm, the former Conselho de Contribuintes/CSRF embraced the principle of types and of the strict tax legality in their judgments, so that the mere compliance with formalities of the legal transaction characterized the legality of the transaction, that is, the legality of the act was intrinsically connected to compliance of the legal business to the law.[8]

By the principle of tax legality, the SRFB is obligated to crate and collect taxes in cases prescribed by the law as the state intervention in deed, property and the rights of the taxpayer may only be authorized by means of a judicial act (CARRAZA, 2010, p.278).

With the advent of the norm of tax avoidance, the former Conselho de Contribuintes/CSRF – currently CARF - strongly changed the way it understands the legal transactions practiced by the companies.

In fact, CARF is adopting the analysis of the absence of business purpose in the legal business, so as to determine if the validity of the corporate transaction is tied to certain indications "business motivation" and its legality[9], which means to say that a given operation should present a practical purpose, a negotiating rationale so that it takes place (HUCK, 1997. p.49).

8 In this sense see the judgements number 103-21.047 (10/2002), 101-93.616 (09/2001) and 106-09.343 (09/1997) the old Board of Contributors.

9 In this sense see the judgements 1103-000.960 (05/2014), 1102-001.018 (03/2014), 1401-001.059 (01/2014), 1402-001.229 (04/2013), 1202-000.884 (04/2013), 2202-002.187 (02/2013), 1402001.103 (08/2012), 1402-001.078 (08/2012), 1402-001.080 (07/2012), 1402-01.078 (06/2012), 1201-00.548 (08/2011), 2202-001.217 (06/2011), 9202-01.194 (02/2010) and 103-23290 (12/2007) the former Conselho de Contribuintes.

In a recent study conducted through the analysis of several trials of the former Conselho de Contribuintes/CSRF, Luis Schoueri found what indications of business purpose are admitted by the tax administration. The study revealed that there are three criteria considered by the SRFB to verify the absence of business purpose: the time lapse, the interdependencies of stakeholders and abnormal operations (SCHOUERI, 2010, p.482).

The first criterion is guided by the period of time in which the operation is performed, usually considered in corporate reorganizations performed in a hurry or on the same day. In such cases, the CARF understand that there is absence of business purpose when operations are performed without the necessary time for decisions to be made within the formalities that society demands, as seen in Case No. 106-14486, in the excerpt from of the vote of the Councillor Efigênia Sueli Mendes de Britto:

> *A transaction such as the transfer of the enterprise Freios Borges S/A, because of its importance and the value of the operation is not performed in a few days but in months, after many adjustments. The sequence of operations that were done fast is the strongest indication that all operations were performed in order to prevent the triggering event of the principal tax liability, to exclude or modify their essential characteristics in order to reduce the amount of tax due.*[10]

The second criterion is measured by the interdependence between the parties involved. Herein, the judges observe whether the operations are being conducted between different companies or between the same economic groups, as shown in the summary of the judgment nº 1803-000.551:

> *FINE LETTER-SUCCESSION BY INCORPORATION-SUCCESSOR LIABILITY-SUCCESSION AMONG*

10 BRASIL. Ministry of Finance. **Judgment n. 106-14486.** Applicant: Marina Varga Carvalho. Defendant: 3rd Class DRJ in Brasilia. Drafter: Efigênia Sueli Mendes de Britto. Brasilia, March 16, 2005. Available :<https://carf.fazenda.gov.br>. Entry: 12 May 2014. Translation: "Uma operação como a alienação da empresa Freios Varga S/A, por sua importância e pelo valor da operação, não é realizada em alguns dias, mas em meses, depois de muitos ajustes. A seqüência de operações realizadas a toque de caixa é o mais forte indicio de que todas as operações foram realizadas com o fim de impedir a ocorrência do fato gerador da obrigação tributária principal, ou a excluir ou modificar as suas características essenciais de modo a reduzir o montante do imposto devido".

> *ENTERPRISES CONSTITUENT OF THE SAME GROUP-DISCLAIMER-IMPOSSIBILITY-In the case of intercompany succession, affiliated or subsidiary, one should keep the fine letter drwan to the incorporated company should remain intact, since the intervention of the developer company on the procedures of the incoporated compony is notorious.*[11]

The third and last criterion is based on abnormal operations, considering those entities far from corporate reality, which can be observed in the following CARF trial syllabus:

> *BUSINESS INCORPORATION. SURPLUS AMORTIZATION IN THE ACQUISITION OF SHARES. SIMULATION. The corporate reorganization, to be legitimate, must result from effectively existing acts, not just artificial and formally revealed in documentation or in commercial or tax records. The characterization of acts as simulated, and not real, authorizes the disallowance of the amortization of recorded surplus.*[12]

Still, regarding the criterion of abnormal operations, it is clear that the administrative law has analysed the group of all transactions carried out and not only isolated acts of each transaction.

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11 BRASIL. Ministry of Finance. **Judgment n. 1803-000551.** Applicant: Marcotrade Foreign Trade of Brazil Ltda. Defendant: 5th Panel of Judges of the DRJ in Sao Paulo. Drafter: Benicio Benedicto Celso Junior. Brasília, August 5, 2010. Available at:<https://carf.fazenda.gov.br>. Entry:10 abr. 2014. Translation: "MULTA DE OFÍCIO – SUCESSÃO POR INCORPORAÇÃO – RESPONSABILIDADE DO SUCESSOR – SUCESSÃO ENTRE EMPRESAS INTEGRANTES DO MESMO GRUPO – EXONERAÇÃO – IMPOSSIBILIDADE – Tratando-se de sucessão entre empresas ligadas, coligadas ou controladas, deve-se manter a multa de ofício lançada na empresa incorporada, já que é manifesta a interveniência da incorporadora nos procedimentos da incorporada".

12 BRASIL. Ministry of Finance. **Judgment n. 1803-000551.** Applicant: Marcotrade Foreign Trade of Brazil Ltda. Defendant: 5th Panel of Judges of the DRJ in Sao Paulo. Drafter: Benicio Benedicto Celso Junior. Brasilia, August 5, 2010. Available at:<https://carf.fazenda.gov.br>. Entry:10 abr. 2014. Translation: INCORPORAÇÃO DE SOCIEDADE. AMORTIZAÇÃO DE ÁGIO NA AQUISIÇÃO DE AÇÕES. SIMULAÇÃO. A reorganização societária, para ser legítima, deve decorrer de atos efetivamente existentes, e não apenas artificial e formalmente revelados em documentação ou na escrituração mercantil ou fiscal. A caracterização dos atos como simulados, e não reais, autoriza a glosa da amortização do ágio contabilizado".

This is what is shown in the fragment of the ruling No. 1103-000.960, that deals with the succession of amending events of shareholding control in the same corporate group, without any negotiation purpose:

> *In examining cases of surplus amortization, it is necessary to evaluate the set of transactions investigated, not just each one individually, so to identify the position of companies before and after the succession of facts, checking whether there was any actual change in business, organization of corporate group, or if everything remained as before artificially, creating conditions for the reduction of the calculation basis.*[13]

The study highlights, however, that the "business purpose test" created by the CARF precedents does not always follow the same lines of the North American business purpose doctrine.

The assertion is clear when analysing the ruling No. 101-96087, on March 29, 2007. In the case presented, the tax court, when deciding on validity of an underwriting transaction and disposition of corporate shares, established the understanding that although formally legitimate, legal business must have an effective business purpose, forbidding empty forms that covet solely to circumvent the tributary prescriptive norm since such "deviations" infringe the law and fulminate the principle of the tax payers capacity.

The tax judges concluded that the negotiations must have a content in themselves so that the tax saving ~~is~~ be lawful. The company must assume the risks inherent to the institute adopted, showing its purpose its not merely to circumvent the application of the tax laws.

It the judgment under discussion, it seems that the business purpose employed there resembles more the figure of the abuse of rights more than the figure of the business purpose of Notrh American law. This is because the abuse of rights in the tax law has as a key feature the tax saving and the misrepresentation of the purpose of business. (SCHOUERI, 2010, p.496).

13 BRASIL. Ministry of Finance. **Judgment n. 1103-000960.** Appellant. Finance and National Weather Service. Drafter: Aloysio Percínio José da Silva. Brasilia, April 25, 2014.Available /at:<https://carf.fazenda.gov.br>. Entry: 12 May 2014. "No exame de casos de amortização de ágio, faz necessária a avaliação do conjunto de operações investigadas, não apenas de cada uma isoladamente, de tal forma a identificar-se a situação das sociedades antes e depois da sucessão dos fatos, verificando-se se houve alguma alteração efetiva nos negócios, na organização do grupo societário, ou se tudo continuou como antes, criando-se tão somente as condições para a redução da base de cálculo artificialmente".

It is also noteworthy is that the construction of the business purpose test, present in several CARF rulings, can also be observed, although implicity, in Brazilian judicial court rulings.

One of the most relevant cases related to the subject and addressed by the Tribunal Regional Federal da 4ª Região (TRF4) was the analysis of records of apeal no. 2004.71.10.003965-9 / RS, known as "Josapar Case", a large enterprise in the food ector in the state of Rio Grande do Sul.

The issue was a reverse merger transaction, in which Supremo Industrial, holder of tax losses, incorporated Suprarroz S.A. that had gains to reduce tax losses. Subsequently, company Josapar company incorporated Suprarroz S.A. The tax liability arose from the observation of a simulated merger with another entity for the use of tax losses and the removal of levy of income tax (IRPJ) and social contribution (CSLL).

Although the Josapar company has claimed the absence of simulation, once they respected the formalities prescribed in legislation, the TRF4 understood that the merger was not economically feasible as it was performed with the sole purpose of enabling the use tax losses in the merge. The Ministério Público Federal[14] (MPF) addressed the several factors that distanced the economic reality of the business.[15]

The Superior Tribunal de Justiça (STJ), where Josapar brought the action, confirmed the decision of the local, creating a significant precedent for the application of the business purpose doctrine in the Brazilian legal system.

Folowing this line of tought, Guilherme Costa Val Machado says:

> *It seems that the STJ digressed the issue and ended up validating the use of the business purpose test (even combined with other tests and analysis) as an instrument, almost intrinsic to the identification of simulated practice. This is because the analysis of the financial statements in attention to corporate structure and transactions practiced by the company*

14 The Ministério Público Federal (MPF) has no equivalent in the United States of America or in the United Kingdom, but its attributions are similar to the Justice Department (USA) or the Crown Prosecution Service (CPS).

15 As observed in the judgment from the Federal Judge Tilling Dirceu de Almeida Soares, it is mentioned as the absence of the economic reality of the business (business purpose): the real estate developer (Supremo) who took the corporate name of the incorporated; the headquarters of the new group resulting from the operation, which become the former headquarters of the incorporated company (Suprarroz); the merging company (Supremo) which did not even have a head office; members of the Board of Directors of the merging company (Supremo) who have renounced to take over the Board of the incorporated (Suprarroz).

> *the key to the understanding of the economic and social reality of the transaction that in the case was interpreted as unrealistic under such views. Would it be an economically viable business? Are there economic or logistical reasons that support the transaction? (MACHADO, 2013, p.77).*[16]

Therefore, the STJ rejected the formalism of the law in order to implement the business purpose doctrine, requiring interest in the economic reality of the legal business investigated , showing that the simple submission of the fact to the norm requires not only ~~to~~ the compliance with the formal and material requirements of the legal business, but also that there is no breach to the law (CAVALCANTI, 2011, p.14).

5. Business purpose and Civil Law: objective cause of the Legal Business

The doctrine has indicated changes that occur in the Brazilian Tax Law against the position of legality and tax types, which once prevailed with greater expression (GRECO, 2011, p.10).

The formalism as an instrument of protection for democratic values entailed the worship of the law, enabling organizations to adopt negotiation structures and purely formal corporate restructurings, that is, "corporate legal assemblies without any economic, entrepreneurial or extra-tributary substance" (GRECO, 2011, p.14).

With the advent of the 1988 Brazilian Federal Constitution, the attachment to the formal sense of the tax phenomenon should be reconsidered, mainly because the exaggerated formalism, the result of conservative and totalitarian legislation is incompatible with the "political and philosophical variable" of the Democratic State (GRECO, 2011, p.10).

In this respect, Ricardo Lobo Torres argues that the changing

16 MACHADO, Guilherme Costa Val. Planejamento tributário: o papel do "business purpose test" da "step transation doctrine" na verificação da simulação. **Revista Dialética de Direito Tributário (RDDT)**, São Paulo, n. 211, p. 70-79, abr. 2013. p. 77. Translation: "Parece-nos que o STJ tangenciou o tema e acabou por validar a utilização do teste do propósito negocial (mesmo que aliado a outros testes e análises) como instrumento, diríamos, quase intrínseco, à identificação da prática simulada. Isso porque a análise das demonstrações contábeis em atenção à configuração societária e às operações praticadas pela empresa são essenciais à compreensão da realidade econômico-social da operação que, no caso, foi interpretada como irreal sob tais pontos de vista. Seria o negócio economicamente viável? Há razões econômicas ou logísticas que suportem a transação?".

of the jurisprudence of concepts, which gives importance to the strict legality and in the role of the Legislative Power, to the jurisprudence of values, whose focus is the assertion of a democratic state of law, is a rupture with the old interpretations of Tributary Law (conceptualist and economic interpretation), recognizing new issues for the understanding of the Law, namely:

> *(a) Prominence of the fundamental principles of the Democratic State of Law, which in Brazil are expressed in art. 1 of CF: sovereignty, citizenship, human dignity, autonomy, value of labour, pluralism; b) balance between the principle of contributive capacity, linked to the idea of justice achieved by democratic argument, and the legality principle, legal certainty bound to the configuration "safety of the rule"; c) balance between state powers, with the possibility of jurisdictional control of tax policies adopted by the legislature; d) harmonization between law and economics, considering that, in addition to the fact that the economy lives sub specie juris, both show the common ethical coefficient; e) the symbiosis between teleological and systematic interpretation, according to the methodological pluralism, the legal system already segregates the purpose. (TORRES, 2012, p.14).*[17]

In this regard, Marco Aurelio Greco advocates that the freedom of the taxpayer to self-organize their ventures is required to be reconciled with equality and ability to pay, because, for their conduct be acceptable for tax purposes it is necessary to have all acts considered and not just the isolated acts, that is:

17 TORRES, Ricardo Lobo. **Planejamento tributário**: elisão abusiva e evasão fiscal. Rio de Janeiro: Elsevier, 2012. Translation: "a) Preeminência dos princípios fundantes do Estado Democrático de Direito, que no Brasil se expressam no art. 1º da CF: soberania, cidadania, dignidade humana, autonomia da vontade, valor do trabalho, pluralismo; b) ponderação entre o princípio da capacidade contributiva, vinculado à ideia de justiça obtido por argumentação democrática, e o princípio da legalidade, vinculado à segurança jurídica em sua configuração de 'segurança da regra'; c) equilíbrio entre os poderes do Estado, com possibilidade de controle jurisdicional de políticas fiscais adotadas pelo legislador; d) harmonização entre direito e economia, tendo em vista que, além de a economia viver *sub specie juris*, ambos exibem o coeficiente ético comum; a simbiose entre interpretação finalística e sistemática, eis que, de acordo com o pluralismo metodológico, o sistema jurídico já segrega a finalidade".

> *The tax debate - in so many words - ceased to be a formal debate. This is not about the prevalence of substance over form, but of coexistence; it is not about overlapping, but about composing values. (GRECO, 2011, p.15).*[18]

It can be seen from the cited speech, that the Brazilian doctrine and the tax administration are expanding the debate about formalism in the science of law, above all in the Tributary Law, which employs both descriptive and normative propositions for the construction of meanings, embracing interpretations that "seek the truth" without ignoring the actual facts, and thus allowing the practical scope of the normative text (ÁVILA, 2013, p.181).

Furthermore, it should be stressed that the 1988constitutional paradigm honoured the principle of contributive capacity, forbidding discriminatory requirements and unequal treatment between taxpayers who find themselves in comparable situations, as seen in the subsection II of art. 150 of the Constitution to pay taxes:

> *Notwithstanding other guarantees ensured to the taxpayer, it is forbidden for the Union, the States, the Federal District and Municipalities: II - set unequal treatment between taxpayers who find themselves in similar situation, forbid any distinction on grounds of professional occupation or role that they exert, regardless of the legal denomination of income, securities or rights.*[19]

As Humberto Avila explains, the ability to pay, established by § 1º of Article 145 of the 1988 Federal Constitution, was elevated to a "measure of distinction among taxpayers" for taxes aimed at particular tax purpose (ÁVILA, 2009, p.160).

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18 GRECO, Marco Aurélio. Crise do formalismo no Direito Tributário brasileiro. **Revista da PGFN**, Brasília, ano 1, n. 1, 2011, p.14. Translation: "O debate tributário – com todas as letras – deixou de ser um debate formal. Não se trata de prevalência da substância sobre a forma, mas de coexistência; não se trata de sobre+por, mas de com+por valores".

19 BRASIL. Constituição (1988). **Constituição da República Federativa do Brasil de 1988.** Available at:<http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm>. Entry: Dec. 27 2013. Translation: ART. 150. Sem prejuízo de outras garantias asseguradas ao contribuinte, é vedado à União, aos Estados, ao Distrito Federal e aos Municípios: II – instituir tratamento desigual entre contribuintes que se encontrem em situação equivalente, proibida qualquer distinção em razão da ocupação profissional ou função por eles exercida, independentemente da denominação jurídica dos rendimentos, títulos ou direitos".

For no other reason, the CARF has relativized the principle of freedom of self-organization by the constitutional principles of isonomy and ability to pay in proceedings leading to corporate reorganization, in the absence of extra-tributary motivation and among them the business purpose as the foundation for requiring tribute.

It is what can be seen on the syllabus of the ruling No. 104-21497, the former Conselho de Contribuintes/CSRF, by the Counsellor Maria Helena Cotta Cardozo, at the administrative appeal brought by former governor of the State of Rio Grande do Sul:

> *ABSENCE OF EXTRATRIBUTARY MOTIVATION - The principle of freedom of self-organization, which was mitigated by the constitutional principles of tax equality and ability to pay, no longer endorse the practice of negotiation acts without motivation, on the grounds of tax planning.*[20]

The same reasoning can be found on the syllabus of the decision 1302-001.108, of the First Section of Trials of the CSRF:

> *SELF-ORGANIZATION FREEDOM. LIMITATIONS. The freedom of self-organization of the taxpayer to the tax authorities and society is not absolute, but it is subject to constraints as the respect of free competition, good faith, the social role of the company, and does not comply with the practices of simulation, abuse of right or breach of the law.*[21]

Certainly the principle of self-organization freedom is a result of the principle of private autonomy, and as such acknowledged by the

20 BRASIL. Ministry of Finance. **Judgment n. 104-21497.** Applicant: Paulo Affonso Girardi Feijo. Defendant: 4th Class / DRJ - Porto Alegre. Drafter: Maria Helena Cardoso Cotta. Brasília, 26 May 2006. Available at:<www.carf.gov.br>. Entry:13 May 2014. Translation: "AUSÊNCIA DE MOTIVAÇÃO EXTRATRIBUTÁRIA - O princípio da liberdade de auto-organização, mitigado que foi pelos princípios constitucionais da isonomia tributária e da capacidade contributiva, não mais endossa a prática de atos sem motivação negocial, sob o argumento de exercício de planejamento tributário".

21 BRASIL. Ministry of Finance. **Judgment n. 1302-001108.** Applicant: Agrenco of Brazil S / A. Defendant: National Treasury. Drafter: Márcio Rodrigo Frizzo. Brasilia, September 17, 2013. Available at: <www.carf.gov.br>. Entry: 14 May 2014. Translation: "LIBERDADE DE AUTO-ORGANIZAÇÃO. LIMITES. A liberdade de auto-organização do contribuinte perante o Fisco e a sociedade não é absoluta, está sujeita a restrições como o respeito à livre concorrência, à boa-fé, à função social da empresa e não se coaduna com as práticas de simulação, abuso de direito ou fraude à lei".

legal order as "a creative source of legal relations", empowering private individuals to conduct several economic activities subject to taxation (AZEVEDO, 2002, p.13).

In this context, the principle of private autonomy is associated with an institute of civil law that related to Tributary Law, it becomes important to the study of business purpose in the Brazilian Legal System (FREITAS, 2010, p.462).

The legal business can be differentiated by its content (object) and its cause. Whereas content is the description of the event, the cause of the legal business is the actual event that takes place by the hand of the man. The content of the legal business will be tied to the domain of the "ought" (hypothesis) and the cause, to the domain of-"is" (fact) (FREITAS, 2010, p.474).

The will and the cause are elements that are external to the legal business, so the civil rules act only as "means of correction of business". This is the view expressed by Antônio Junqueira de Azevedo:

> *Will and cause, as we will see, are not part of the legal business, that is, the business exists independently of them (regard to the existence); both are only means of correction of the business, in the way that they, acting out of business, either in terms of validity or in the effectiveness, prevent, sometimes more, sometimes less, the effects not wanted (that is, not wanted subjectively) by the agent - will, or not wanted objectively by juridical norm - cause) (AZEVEDO, 2002, p.22).* [22]

Assertively, the same author explores the concept of legal business cause:

> *The cause is an external fact to the business, but that is what justifies the social and legal point of view, whereas the categorical element is precisely the objective reference, which makes this fact, the content of the business itself. In other words, the inalienable objective element is part, is an integral*

22 AZEVEDO, Antônio Junqueira. **Negócio jurídico**: existência, validade e eficácia. 4. ed. São Paulo: Saraiva, 2002, p.22. Translation: "A causa é um fato externo ao negócio, mas que o justifica do ponto de vista social e jurídico, enquanto o elemento categorial objetivo é justamente a referência, que se faz a esse fato, no próprio conteúdo do negócio. Por outras palavras, o elemento inderrogável objetivo faz parte, isto é, é integrante da estrutura do negócio, e a causa, não. O elemento categorial consiste numa referência à causa, a qual está, porém, fora do negócio (ela está, logicamente, ou antes ou depois, mas não no negócio; ela é extrínseca à sua constituição)".

> *part of the structure of the business, and the cause is not. The categorical element is a reference to the cause, which is, however, out of business (it is, of course, or before or after, but not in business, it is extrinsic to its constitution) (AZEVEDO, 2002, p.149).*[23]

It is said, in other words, that the cause of the legal business is nothing more than the "reason for being" of the business, seen not only as a juridical concept - will of the law, but as a social construct. It is the practical purpose of the legal business, receiving supervision of the system since the interest pursued is intended to (social) functions of the legal business (BETTI, 2008, p.261).

Thus, it is understood that the cause of the legal business is the economic purpose intended by the parties, according to Emílio Betti:

> *[...] it is easy to conclude that the cause or reason of the business is identified with the economic and social function of any business, regarded deprived of judicial protection, in the synthesis of its essential elements, and as a completely functional unit, which is manifested in the private autonomy. The cause is, in short, the function of social interest of private autonomy. The element (sic) necessary for the existence of the business are also essential elements of the typical function that is its characteristic. Their synthesis represents the type of business to the extent that is causal business, and it is an equally typical function. The economic and social function of the type of business, as an expression of private autonomy, which is a social phenomenon before becoming, with acknowledgment, a legal fact (BETTI, 2008, p.264).*[24]

23 Ibid., p.149. Translation: "A causa é um fato externo ao negócio, mas que o justifica do ponto de vista social e jurídico, enquanto o elemento categorial objetivo é justamente a referência, que se faz a esse fato, no próprio conteúdo do negócio. Por outras palavras, o elemento inderrogável objetivo faz parte, isto é, é integrante da estrutura do negócio, e a causa, não. O elemento categorial consiste numa referência à causa, a qual está, porém, fora do negócio (ela está, logicamente, ou antes ou depois, mas não no negócio; ela é extrínseca à sua constituição).
24 BETTI, Emílio. **Teoria geral do negócio jurídico**. Campinas: Servanda, 2008, p.261. Translation: "[...] é fácil concluir que a causa ou razão do negócio se identifica com a função econômico-social de todo o negócio, considerado despojado da tutela jurídica, na síntese dos seus elementos essenciais, como totalidade e unidade funcional, em que se manifesta a autonomia privada. A causa é, em resumo, a função de interesse social da autonomia privada. Os elemento (sic) necessários para a existência do negócio são também elementos indispensáveis

Yet, when considered in its social aspect, according to the same author, "the cause of the business is properly the social economic function, which characterizes this type of business as a fact of private autonomy (typical, in this sense), and it determines its minimum necessary content" (BETTI, 2008, p.265).

The best doctrine classifies the cause with typical economic purpose of objective cause, since the legal business endowed with such purpose, by the social interest that resident therein, demands a practical adoption. Hence, it is said that the objective cause is implemented in practice (SCHOUERI, 2010, p.477).

Based in this understanding, the theory of the business purpose is supported in the tort part of the objective cause of the legal business (objective final will of the legal business), which is why the doctrine and the tax administrative jurisprudence has recognized the institute's business purpose as the very objective of the legal business, as it denotes the summaries transcribed below:

> *TAX PLANNING. REASON FOR BUSINESS. BUSINESS CAUSE. LEGALITY. Reason of business is the subjective reason why the taxpayer does the legal business. Cause of their economic or business function is the effect that the business produces in the legal spheres of participants. The illegal motive implies invalidity when declared by a Judge. If the business motivation is tax savings, you cannot talk on illegal motive.*[25]
>
> *TAX PLANNING. REASON FOR BUSINESS. ECONOMIC CONTENT. BUSINESS PURPOSE. LEGALITY. There is no federal or national rule, which considers absent or ineffective legal business*

da função típica que é sua característica. A sua síntese, assim como representa o tipo de negócio, na medida em que é negócio causal, também lhe representa igualmente função típica. Função econômico-social do tipo de negócio, como manifestação de autonomia privada, a qual é um fenômeno social antes de se tornar, com reconhecimento, um fato jurídico".

25 BRASIL. Ministry of Finance. **Judgment n. 1101-000835.** Applicant: Termopernanbuco S / A. Defendant: National Treasury. Drafter: Edeli Pereira Bessa. Brasília, December 4, 2012. Available at: <www.carf.gov.br>. Entry: 15 May 2014. Translation: "PLANEJAMENTO TRIBUTÁRIO. MOTIVO DO NEGÓCIO. CONTEÚDO ECONÔMICO. PROPÓSITO NEGOCIAL. LICITUDE. Não existe regra federal ou nacional que considere negócio jurídico inexistente ou sem efeito se o motivo de sua prática foi apenas economia tributária. Não tem amparo no sistema jurídico a tese de que negócios motivados por economia fiscal não teriam 'conteúdo econômico' ou 'propósito negocial' e poderiam ser desconsiderados pela fiscalização. O lançamento deve ser feito nos termos da lei".

> *whose reason for their practice was only tax savings. It is not supported by the legal system the thesis that business motivated by tax savings would not have "financial nature" or "business purpose" and could be disregarded by enforcement. The tax levy should be done in accordance with the law.*[26]
>
> *TAX PLANNING - CRITERIA. What determines the incidence of tribute or not, for the characterization of tributary planning, is the function to which the operation within the economic enterprise is designated (objective cause - business purpose), not simply the existence of the formal content of the legal business, embodied in the declaration of intent.*[27]

In view of this, it is justified that the tax planning can be guided by analysis of the business purpose, if this is qualified as an element that forms the objective cause of the legal business (social economic purpose). (SCHOUERI, 2010, p.488).

It is important to mention, however, that the business purpose should be shaped to the objective criteria related to the elements that compose the legal transaction, considering that not every extratributary justification can be urged against the Treasury.

In short, is not for the tax administration any extratributary requirements, but only those that justify the objective cause of legal transaction (SCHOUERI, 2010, p.488).

6. Final considerations

It is understood, therefore, that the doctrine of business purpose can be recognized and enforced in the Brazilian legal system, although

26 BRASIL. Ministry of Finance. **Judgment n. 1101-000841**. Applicant: Companhia Energética do Rio Grande do Norte - COSERN. Defendant: National Treasury. Drafter: Edeli Pereira Bessa. Brasilia, December 6, 2012. Available at :<www.carf.gov.br>. Entry: 15 May 2014. Translation: "PLANEJAMENTO TRIBUTÁRIO – CRITÉRIOS. O que determina a incidência ou não de tributo para caracterização de planejamento tributário é a função que se destina a operação dentro do empreendimento econômico (causa objetiva – propósito negocial), não bastando a existência do conteúdo formal do negócio jurídico, consubstanciado na declaração de vontade".

27 BRASIL. Ministry of Finance. **Judgment n. 1202-001076.** Applicant: New Store-room Participações Ltda. Defendant: National Treasury. Drafter: Valentim Geraldo Neto. Brasília, February 10, 2014. Available at :<www.carf.gov.br>. Entry: 15 May 2014.

there is no express provision of the institute in the Brazilian legislation. This can be supported because the constitutional principles from the Republican Constitution of 1988, in particular the principle of the social function of property and the ability to pay, imposed limitations on business operations, enabling the legal rules to raise the business purpose as a valid institute for tax avoidance.

Moreover, the introduction of the sole paragraph of art. 116 of the CTN inserted in the national legislation the norm of tax avoidance, enabling the state, through tax administration service, to disregard acts or covert legal transactions used to conceal the generator of the tribute or elements that constitute the tax obligation.

It is noteworthy, therefore, that there is no obstacle to that the test of the business utility to be considered assumption of evasion practice, mainly regarding the analysis of tax avoidance in corporate transactions, thereby contributing to the transparency in tax planning that aims to reducing the tax burden within a correct interpretation of tributary law.

Some of the scholars still define it as "more of a foreign theory invading the Ordering", it was shown that the business utility, by finding support in the institute of the objective cause of the legal business, rule out, by itself, this obtuse reasoning.

Both North American and Brazilian jurisprudence are useful to corroborate the tax planning, and here is inserted tax avoidance, which need new legal instruments to stop the abusive conduct of corporate legal affairs.This does not mean that the taxpayer is prohibited from adopting behaviours that are most suitable to them, under a tax standpoint. What is required of them is only exercise their rights to tax savings and act within the parameters imposed by the social function of contracts by negotiating bona fide, seal the abuse of rights or forms of evasion of the law and absence of reasons.

Far from being finished and opening space for future discussions, we sought herein to demonstrate the plausibility of adopting business purpose by the criteria employed by the administrative courts. First, because in the Brazilian legal framework the figure can be identified as the cause of legal transaction, and second, because the clauses in civil law determine that the acts and legal transactions arising from private autonomy - and among these we can include tax planning - require a negotiating reason, so as to meet the constitutional principles and the new constitutional order established in the Constitution of 1988.

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Panor. Braz. law - Year 3 - Numbers 3 and 4 - 2015 - pp. 254 - 275.
ISSN 1075-1343 (print)
ISSN 2318-1516 (online)
DOI: http://dx.doi.org/10.17768/pbl.a3.n3-4.p254

THE APPLICATION OF THE HAGUE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION OF 1993 IN BRAZIL[1]

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Abstract: This article talks about the application of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption of 1993 in Brazil. Due to socio-economical circumstances, there are many orphans and abandoned children in Brazil that need care, love and attention. Providing these children a new family would give them a chance to build-up a new life in respect to their best interest. This work analyzes Brazilian domestic rules on international adoption, as well as the application of the Convention in Brazil. It criticizes how the Convention is applied in Brazil and the country´s role on the international net of international adoption.

Keywords: International adoption - Children - Hague Convention - International cooperation

1 This research was partially co-sponsored by the Federal University of Rio de Janeiro and the CNPq - the Brazilian National Agency for Research -, through the so-called PIBIC-UFRJ program. A scholarship was granted to Lara Gonçalves Oliveira (2011-2014), who collaborated, during her Law Degree, on the research on the Application of the Hague Conventions related to Family Law Issues in Brazil, under the supervision of Professor Marcos Vinicius Torres.

1. Introduction

Adoption is the most traditional alternative to search an offspring, when couples cannot have their own children. Since ancient times, it has been used to provide children to a couple who had no children or to provide a male heir that could guarantee the continuity of the family, i.e., a male heir who would continue the family name through marriage with male heirs and who would heir the authority and responsibility for the family religions celebrations, as it was predicted in the Manu Code and in ancient Roman and Greek Law.

Adoption has never disappeared, but it changed its profile with Christianity, whose dogmas encouraged procreation through biological offspring, but not adoption itself. From the 18th Century on, adoption started obtaining more recognition with the codification movement, but usually as an exceptional alternative to couples who did not have children alive, who had not had children and usually under some circumstances such as a minimum age or medical conditions – such as infertility - of the spouses. In many countries foreigners or people who lived abroad were prohibited or had restrictions to adopt a child.

The watershed for adoption was the II World War. Never in history was devastation and destruction so huge. The number of people who perished in the conflict and the number of orphans were enormous. And in many countries, these surviving children were the hope to rebuild the destroyed nations.

At a national level, the great number of orphans left by the conflict forced many countries to abolish the restrictions they had on the adopters, such as age, marital status and the inexistence of other own children alive. At an international level, it also pushed countries to reflect on pragmatic policies to help these orphans: the creation of an international organ to stimulate and promote assistance to these children and the signature of international instruments that could facilitate inter-country adoption and provide financial support to these children.

As an immediate answer to the problem, in the field of international relations and on the track of the creation of the United Nations Organization (UN), the UNICEF was created in 1946 as a provisory organ to raise funds and promote the welfare to the children who had survived the II World War. It was turned into a permanent organization in 1961, since the world was convinced that helpless children always needed help. At the legal level, the answers came later, as more complex solutions were necessary for the creation of international instruments: the New York Convention on the Recovery Abroad on Maintenance of 1956 was signed under the support of the United Nations and the Hague Convention onJurisdiction, Applicable Law and Recognition on Decrees Relating to Adoption of 1965 prepared

by the Hague Conference on Private International Law.

Due to the limited success of this Hague Convention celebrated in 1965 and attentive to the problems that were affecting children around the world such as simulated adoptions and the misuse of adoptions for human trafficking of children (for sexual slavery, pedophilia,selling of organs, etc.); a new convention was drafted: the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption of 1993[2].

The new Hague Convention on Intercountry Adoption of 1993 is one of the Hague Conventions with the largest number of States that have ratified or adhered to it. The focus on international legal cooperation is the key to the success of this convention, as it facilitates adoption and its subsequent recognition in another State that applies the convention. Besides, the requirements listed on the convention ensure that adoptions are made in respect of the children's protection and welfare.

Unfortunately, Brazil is a country where lots of children are orphans. Adoption is a long-time well established legal form to parenthood in Brazilian Law and socially accepted. The Hague Convention on Intercountry Adoption of 1993 was thus welcomed when Brazil ratified it in 1999. Since then, international adoptions – which were already common in the previous years, have increased. Therefore, this work analyzes the application of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption of 1993 in Brazil and criticizes its compatibility with Brazilian domestic law on international adoption.

2. General aspects of the convention

At first, it is important to say that the so-called Hague Convention on Intercountry Adoption of 1993 is a very "humanized" instrument that understands adoption not only as a form of parenthood, but also cares for the welfare of children in need of a family. Its preambule reinforces the purposes of intercountry adoption as a mean to protect children.The focus is the child who needs care and love, not the parents to whom a child is going to be entrusted to complete their family structure:

> *The States signatory to the present Convention, Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,*

2 See VAN LOON, J. H. A. "International Co-Operation and Protection of Children with Regard to Intercountry Adoption" " *In Recueil des cours de l'Académie de Droit International de la Haye.* vol. 244. (1993).

> *Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin, Recognising that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin, Convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children, Desiring to establish common provisions to this effect, taking into account the principles set forth in international instruments, in particular the United Nations Convention on the Rights of the Child, of 20 November 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986), Have agreed upon the following provisions:*

The scope of the Convention is also very well elucidated in its first article, with three targets: adoptees' protection, the network of legal cooperation amongst Contracting States and the validity of adoption decrees in other Contracting States:

> *Article 1*
>
> *The objects of the present Convention are:*
>
> *a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law;*
>
> *b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;*
>
> *c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.*

To avoid frauds and to guarantee that international adoptions are made in the best interests of the child and in respect of his/her fundamental rights, the Convention promotes more rapid and effective procedures. The Convention repeats the formula of cooperation authorities launched by theNew York Convention on the Recovery Abroad on Maintenance of 1956. Each Contracting States indicates a domestic authority to represent its authorities and to exchange information and documents with other corresponding authorities of other Contracting States[3], so that a trustful net of cooperation is open among them. These authorities cross information of available adoptees and interested adopters. With less bureaucracy, they validate international certificates of foster parents, to reduce the long-time period to conclude adoptions.

The international adoption, for the Convention, occurs when a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State in order to be adopted by a person habitually resident in the "receiving State"[4]. The Hague Convention repeats a usual formula also used for other Hague Conventions: the habitual residence as the criteria to connect adopters and adoptees to the Contracting States.

The concept of intercountry adoption from the Convention is similar to the concept of international adoption that we find in Article 51 of the Brazilian Children´s Act ("ECA"), as it considers an adoption international when the adopter(s) has(have) domicile outside Brazil.

It is remarkable to say that the choice for the "habitual residence" is specific for this Convention, but it is perfectly compatible with Brazilian Law. The Applicable Law on family matters is the law of the domicile of the person in Article 7 of the Introducory Act to the Brazilian Rules, enacted in 1942 and last reformed in 2010. This main law that indicates Brazilian criteria for conflict of laws does not specify rules for adoption, parenthood and some other themes. It does indicate a general formula for "family law". The Civil Procedure Code of 1973 established that Brazilian Courts have competence for cases originated from acts celebrated in Brazil, according to Article 88, III. Minors' Adoptions in Brazil are always granted by juditial decrees and are complex and formal acts. The New Civil Procedure Code from 2014 repeated the same formula in Article 21, III. Therefore, Brazilian Courts judge adoptions of minors resident in Brazil.

3. Requirements for intercountry adoptions

It is important to notice that neither the adopter's nationality nor the adoptee's nationality is relevant, due to the fact that the Convention's

3 See Articles 6-9 of the Convention.

4 See Article 2.1 of the Convention.

parameter is the law and jurisdiction of the habitual residence.

Articles 4 and 5 of the Convention in reference point out the requirements for the adoption proceeding:

> *Article 4.*
>
> *An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin:*
>
> *a) have established that the child is adoptable;*
>
> *b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;*
>
> *c) have ensured that*
>
> *(1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,*
>
> *(2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,*
>
> *(3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and*
>
> *(4) the consent of the mother, where required, has been given only after the birth of the child; and*
>
> *d) have ensured, having regard to the age and degree of maturity of the child, that*
>
> *(1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,*

> *(2) consideration has been given to the child's wishes and opinions,*
>
> *(3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and*
>
> *(4) such consent has not been induced by payment or compensation of any kind*
>
> *Article 5.*
>
> *An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State:*
>
> *a) have determined that the prospective adoptive parents are eligible and suited to adopt;*
>
> *b) have ensured that the prospective adoptive parents have been counselled as may be necessary; and*
>
> *c) have determined that the child is or will be authorised to enter and reside permanently in that State.*

When we consider a multilateral instrument on intercountry adoption, even though the requirements dictate by the Convention prevail for its application, we must consider that the domestic laws of the different Contracting States differ on the requirements for the constitution of the bond, such as the parties' age, the forms of consent, the impediments to the adoption and its effects (if there will be complete disruption of ties with the biological family, for example).As Vera Jatahy[5] remarks, these differences are a result of the importance of adoption for States as mater of public interest. However, the requirements established by the Convention match Brazilian domestic law for adoptions that take place under Brazilian law. In respect of Brazilian law, the Children's Act or more precisely the Child and

5 JATAHY, Vera Maria Barreira. "Novos rumos do Direito Internacional Privado. Um exemplo: A adoção internacional". In *O direito internacional contemporâneo: estudos em homenagem ao professor Jacob Dolinger*. Organizadores: Carmem Tiburcio e Luis Roberto Barroso. Rio de Janeiro: Renovar, 2006. p. 859

Adolescent Code ("ECA") reinforces the protective nature of adoption and harmonizes with the Convention's provisions, specially on the idea of the best interest of the child. As the Convention[6], the ECA also rules the adoption of minors under 18 years old.

In addition to the Convention´s requirements, Brazilian domestic law on international adoption prohibits that the adopter(s) leave(s) the Brazilian with the adopted child(ren) before the adoption procedure is fully completed, i. e., the judge´s decision – and only a judge can render it – that issues the adoption decree must be definitive, with no pending appeals on it. Besides, as Brazilian law determines that an intercountry adoption always feature an exception, as preference is given to adopters living in Brazil, an adopter applicant who lives abroad must present: (i) a document that proofs that he/she is duly empowered to the adoption according to the laws of his/her Origin State; and (ii) a psychosocial study elaborated by the accredited entity of his/her Origin State[7].

4. Cooperation proceedings

The present Convention operates through an international cooperation system. With the purpose to facilitate the chain of investigations and exchange of information, the Convention determines the appointment of central authorities in each contracting State to fulfill the obligations foreseen on the Convention, with the mission to co-operate with other national central authorities and with the competent authorities of its respective country, facilitating, in this way, the adoption proceedings.

In the matter of the proceedings, the State of origin will verify if the child is adoptable, if, (i) after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests; (ii) that the people who should give their consent did it freely, in the required legal form, and without any form of compensation; (iii) that the consent was not revoked; and (iv) that the child's will and opinions were considered (in the cases when the child has enough age and maturity to express his/her opinion).

On the other hand, the authorities of the receiving State should verify if (i) the prospective adoptive parents are eligible and suited to adopt – on a moral and material basis -; (ii) if they were dully counselled; and (iii) if the child is or will be authorized to enter and reside permanently in that State.

Basicly, the Central Authorities of Contracting States exchange and validate information about adoptees and adopters and certify

6 See Article 3 of the Convention.

7 See the extensive Articles 51 and 52 of the Brazilian "ECA".

documents such as the certificate that allows adopters to candidate for adoption. The procedure is based on mutual trust, as these authorities are indicated by each Contracting State. It also guarantees safe adoptions and avoid children human trafficking, as shown below:

> *Article 14*
>
> *Persons habitually resident in a Contracting State, who wish to adopt a child habitually resident in another Contracting State, shall apply to the Central Authority in the State of their habitual residence.*
>
> *Article 15*
>
> *(1) If the Central Authority of the receiving State is satisfied that the applicants are eligible and suited to adopt, it shall prepare a report including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care.*
>
> *(2) It shall transmit the report to the Central Authority of the State of origin.*
>
> *Article 16*
>
> *(1) If the Central Authority of the State of origin is satisfied that the child is adoptable, it shall -*
>
> *a) prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child;*
>
> *b) give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background;*
>
> *c) ensure that consents have been obtained in accordance with Article 4; and*

> *d) determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interests of the child.*
>
> *(2) It shall transmit to the Central Authority of the receiving State its report on the child, proof that the necessary consents have been obtained and the reasons for its determination on the placement, taking care not to reveal the identity of the mother and the father if, in the State of origin, these identities may not be disclosed.*

In Brazil, the designation of the Central authority fell upon the Human Rights State Secretariat of the Ministry of Justice, and the Judicial State Commissions of Adoption ("CEJAs") represent the local central authority for each of the 27 Jurisdiction corresponding to the Brazilian Statesand Federal District.

Furthermore, with the objective to facilitate the search for an adoptee in Brazil – specially for adopters living outside Brazil - and in order to make more effective the National Adoption Cadaster ("CNA"), the National Council of Justice issued Resolution No. 190 in 2014, so that the data of all the Federative States referring to children available for adoption is consolidated, as well as dada of adopters applicants that live in Brazil and overseas.

The Brazilian Child and Adolescent Code, with the changes operated by Act No. 12.010 of 2009 – which mostly targeted on adapting the Brazilian "ECA" enacted in 1990 to the needs of the Hague Convention on Intercountry Adoption of 1993 -, clears up how this direct assistance, by the Central authorities of the ratifying Countries will happen:

> *Article 52. The intercountry adoption will observe the foreseen on the articles 165 to 170 of this law, with the following adaptation:*
>
> *I – the person or foreign couple, interested in adopting a child or Brazilian adolescent, must file a habilitation request for adoption before the Central Authority for the matter of international adoption in the receiving country, understood as the country of the habitual residence;*
>
> *II – If the Central Authority of the receiving country considers that the applicants are habilitated and*

suited to adopt, it will issue a report that contains the information regarding the identity, eligibility and suitability of the applicants to adopt, its personal, family and medical status, its social environment, and the reasons that drive them to it, as well as the ability to undertake an intercountry adoption;

III – the Central Authority of the receiving State will send a report to the local State Central Authority, with a copy to Brazil's Federal Central Authority;

IV – the report will be instructed with all necessary documents, including a psychosocial study prepared by a qualified multidisciplinary team and a certified copy of the relevant legislation, with proof of its validity;

V- foreign documents will be certified by the consular authorities, respecting international treaties and conventions, and accompanied by a sworn translation;

VI - the local State Central Authority may formulate demands and request a completion of the psychosocial study made in the receiving country;

VII – if verified, after a study by the local State Central Authority, the compatibility of the foreign law and Brazilian Law, in addition to the fact that the applicants fill the objective and subjective requirements necessary for its approval, both in the light of the provisions of this Law and of the law of the receiving country, a qualification report will be issued for the intercounrty adoption, which will be valid for a maximum of one (1) year;

VIII – in possession of the qualification report, the applicant will be allowed to conclude adoption application before the Minors' Court on the site that is the child or adolescent resides, as indicated by the local State Central Authority.

§ 1º If the legislation of the receiving country so agrees, it is assumed that applications

for qualification to intercounrty adoption be intermediated by accredited bodies.

§ 2º The Brazilian Federal Central Authority is responsible for the accreditation of national and foreign bodies in charge to mediate requests for qualification to intercountry adoption, with subsequent notification to the State Central Authorities and publication in the official press organs and on the website.

§ 3º It will only be admitted the accreditation of bodies that:

I - are from countries that have ratified the Hague Convention and are duly accredited by the Central Authority of the country where they are headquartered and from the receiving country of in order to work in an intecountry adoption in Brazil;

II - meet the requirements of integrity, professional competence, experience and accountability required by the respective countries and the Brazilian Federal Central Authority;

III – are qualified by their ethical standards and by training or experience to work in the intecountry adoption area;

IV – meet the requirements required by Brazilian law and rules established by the Brazilian Federal Central Authority.

§ 4º Accredited agencies should also:

I –pursue nonprofit objectives, under the conditions and within the limits set by the competent authorities of the country where they are headquartered, of the receiving country and of the Brazilian Federal Central Authority;

II – be directed and administered by qualified personnel in recognized moral standing with proven training or experience to work in the intercountry

adoption area, registered by the Federal Police Department and approved by the Brazilian Federal Central Authority, by ordinance of publication of the competent federal agency;

III – be supervised by the competent authorities of the country where they are headquartered and from the receiving country, including their composition, operation and financial situation;

IV – present to the Brazilian Federal Central Authority, each year, the general report of activities and progress on intercountry adoptions made in the corresponding period, and forward a copy to the Federal Police Department;

V – send post-adoption semiannual reports of the children adopted to the State Central Authority, with a copy to the Brazilian Federal Central Authority, for a minimum of two (2) years. The report submitting obligation remains until a certified copy of birth registration, establishing the citizenship of the receiving country for the adopted child is presented;

VI – take the necessary measures to ensure that adopters forward to the Federal Central Authority Brazilian a copy of the foreign birth registration certificate of the adopted child and of the certificate of nationality of the adopted child, as soon as they are granted.

§ 5º Failure to submit the reports referred to in § 4 of this article by the accredited body may lead to the suspension of its accreditation.

§ 6. Accreditation of domestic or foreign bodies in charge of mediating applications for intercountry adoption will be valid for two (2) years.

§ 7º The renewal of accreditation may be granted upon application filed with the Brazilian Federal Central Authority in sixty (60) days prior to expiration of its validity period.

§ 8º Before a final and unappealable decree for international adoption be issued, it will not be allowed that the adoptee leave the national territory.

§ 9 if the decision become final and unappealable, the judicial authority will determine the license of expedition travel authorization as well as for obtaining a passport, stating obligatorily the child or adolescent characteristics adopted, such as age, color, sex, any signs or peculiar features, as well as recent photo and the affixing of the fingerprint of your right thumb, instructing the document with certified copy of the decision and its unappealable status.

§ 10. The Brazilian Central Authority may, at any time, request information about the situation of the children and adolescents who were adopted.

§ 11. The collection of values by the accredited bodies, which are considered abusive by the Brazilian Federal Central Authority and are not properly supported, is cause of its disqualification.

§ 12. The same person or his/her spouse can not be represented by more than one entity accredited to work in cooperation in intercountry adoption.

§ 13. The qualification of a foreign applicant or of an applicant domiciled outside Brazil to adopt will last up to one (1) year and may be renewed.

§ 14. It is forbidden the direct contact of national or foreign adoption agencies with leaders of institutional or foster care programs, as well as with children and adolescents in a position to be adopted without proper legal authorization.

§ 15. The Brazilian Central Authority may limit or suspend the granting of new accreditations whenever deemed necessary, on a reasoned administrative act.

5. Recognition of intercountry adoption decrees

According to the Convention, the adoption made in a Contracting State will be automatically recognized by other contracting States, as long as certified by the competent authority that it was conducted in compliance to the Convention.In the terms of the Convention, the intercountry adoption will not be recognized if it is contrary to the State policies and considering the child's best interest:

> *Article 23*
>
> *(1) An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognised by operation of law in the other Contracting States. The certificate shall specify when and by whom the agreements under Article 17, sub-paragraph c), were given.*
>
> *(2) Each Contracting State shall, at the time of signature, ratification, acceptance, approval or accession, notify the depositary of the Convention of the identity and the functions of the authority or the authorities which, in that State, are competent to make the certification. It shall also notify the depositary of any modification in the designation of these authorities.*
>
> *Article 24*
>
> *The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.*

Hence, a foreign adoption decision, according to this rule, in principle does not require a validation by Brazil's Higher Court of Justice ("STJ"), which is a kind of "cour de cassation" in Brazilian system and which has the exclusive competence to evaluate the recognition of foreign decisions in Brazil.

This way, the recognition of an intercountry adoption should only be refused if it offends the public policy or affects the child's best interest.

6. Adoption by Same-Sex Couples

Regarding adoption by same-sex couples, the issue is still controversial. For medical reasons, couples consisting exclusively of two men or two women cannot have biological children by themselves. So, same-sex couples have three alternatives to have children: 1) adopt the child of a partner/spouse, no matter if it is a biological child or a child previously adopted by the partner/spouse; 2) joint-adopt a child as a couple; 3) have a child through medical assisted reproduction, what is normally done with the genetical material of one of the partners/spouses. Adoption is certainly easier than surrogacy for same-sex couples, as the former is already allowed in many countries.

The Convention is indeed neutral about this theme as it does not make any reference to the adopters' sexual orientation, neither to prohibit nor to allow it.

In 1989, Denmark was the first country in the world to legalize same-sex unions.They enacted a law which allowed same-sex couples to have their partnership legalized, but did not allow them to bring up children nor to have a religious ceremony for it. Some Scandinavian countries followed on its footsteps, as well as Belgium and the Netherlands. France approved its PACS Act in 1999, and established a *suigeneris* model of partnership contract which made no distinction among homosexual and heterosexual partners, certainly inspired by French revolutionary spirit of equality, which guides French culture until nowadays, even though many homophobic voices have raised up recently in France against the approval to marriage and joint-adoption to same-sex couples.

By the turn of the century, homosexuals had won an important battle: they could have their unions recognized, but they could not get married, as straight people could do. Therefore, they did not have all the rights granted to heterosexual couples, such as full inheritance rights and children, and they claimed for them. So, the Netherlands was the first country in the world to legalize marriage and joint-adoption to same-sex couples in 2001[8]. Since then, some countries, such as Argentina[9], Belgium, Brazil, Canada, Denmark, France, Iceland, Luxemburg, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, the United States and Uruguay also legalized same-sex marriage. These countries allow same-sex spouses to joint-adopt a child, as a consequence of marriage. Some other countries such as Colombia and Israel also allow

8 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.

9 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.

it, even though they recognize limited rights for same-sex couples.

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 1999[10]. 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 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 decision[11] 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. It 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 Sul[12]. The decision was specific for this case but can be a reference for further cases.

On the hope to end the battle of controversial decisions on same-

10 BRASIL. TJRS, AC 598362655, 8ª Câm. Civ., rel. Des. José S. Trindade, j. 01.03.2000.

11 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.

12 STJ. REsp. 1183378/RS. Rel Min Luis Felipe Salomão. j. 25/10/2011.

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 couples[13]. The 27 jurisdictions for the States and D C. judge on Family and Succession Law matters, as well as notarial themes, which includes civil marriage. Notaries in Brazil are always 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.

Even though the main laws, such as the Civil Code, have not been changed on the field of marriage, same-sex couples joy full rights nowadays in Brazil. In march 2014, the Supreme Federal Court rendered a decision with binding effects that acknowledged that no distinction could be done between same-sex and different-sex adopters.

We do believe that with the wave of expansion of legalization of same-sex couples will facilitate intercountry adoption under the Hague Convention on Intercountry Adoption of 1993 for same-sex partners/spouses. We must consider that when the Convention was written in the early 90s, same-sex couples' rights were starting to be part of a legal agenda. Even the opinion of some authors[14] that consider the reference to "spouses or a person" for an adopter in Article 2 of the Convention as a restriction to adoption by same-sex couples should be considered in the context of the time when they wrote it.

The interpretation and application of the Convention should keep up with social changes in the Contracting States. And they do indeed. In the last years, adoption by same-sex couples have been granted among Contracting States that already allow it in their domestic law. Brazilian Courts, for instance, have already issued some adoption decrees in favour of foreign same-sex couples, from countries such as Spain and France.

7. Misapplication of the Hague Convention on intercountry adoption in Brazil?

Another important point for the present study is to check if the Brazilian Courts are correctly applying the Hague Convention precepts.

13 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.

14 See SILBERMAN, Linda. "Co-operatve Efforts in Private International Law on Behalf of Children: The Haghe Children's Conventions" *In Recueil des cours de l'Académie de Droit International de la Haye.* vol. 323. (2006).

We find, in the jurisprudential analysis, many decisions that distort the Convention logic in order to prevent the intercountry adoption, based on the exceptionality foreseen on article 31 of Brazil's Child and Adolescent Code, which provides that "The placement of a child in a foreign substitute family constitutes an exceptional measure, only admitted in the modality of adoption."

Such positioning can be seen in the decisions below:

> *"CIVIL. ADOÇÃO POR CASAL ESTRANGEIRO. O Juiz da Vara da Infância e da Juventude deve consultar o cadastro centralizado de pretendentes, antes de deferi-la a casal estrangeiro. Hipótese em que, a despeito de omissão a esse respeito, a situação de fato já não pode ser alterada pelo decurso do tempo. Recurso especial não conhecido[15]."*

> *" ADOÇÃO INTERNACIONAL. Cadastro central de adotantes. Necessidade de sua consulta. Questão de fato não impugnada.-A adoção por estrangeiros é medida excepcional que, além dos cuidados próprios que merece, deve ser deferida somente depois de esgotados os meios para a adoção por brasileiros. Existindo no Estado de São Paulo o Cadastro Central de Adotantes, impõe-se ao Juiz consultá-lo antes de deferir a adoção internacional. - Situação de fato da criança, que persiste há mais de dois anos, a recomendar a manutenção do statu quo.- Recurso não conhecido, por esta última razão[16]."*

> *"ADOÇÃO INTERNACIONAL. Cadastro central de adotantes. Necessidade de sua consulta.A adoção por estrangeiros é medida excepcional. Precedente (REsp nº 196.406-SP). Situação de fato superveniente, com o deferimento da guarda do menor a casal nacional, estando em curso o estágio de convivência. Perda do objeto. Recurso especial não conhecido[17]."*

15 REsp 159.075/SP, Rel. Ministro ARI PARGENDLER, TERCEIRA TURMA, julgado em 19/04/2001, DJ 04/06/2001, p. 168 – grifo nosso.

16 REsp 196406/SP, Rel. Ministro RUY ROSADO DE AGUIAR, QUARTA TURMA, julgado em 09/03/1999, DJ 11/10/1999, p. 74 – grifo nosso

17 REsp 202.295/SP, Rel. Ministro RUY ROSADO DE AGUIAR, QUARTA TURMA, julgado em 18/05/1999, DJ 28/06/1999, p. 122– grifo nosso.

Notwithstanding, there are decisions in the opposite sense of the above mentioned position:

> *"Preenchidos todos os requisitos exigidos por lei para o procedimento da adoção por estrangeiros, o fato de ser dada preferencia a casal brasileiro não pode prevalecer em situações que, devidamente, comprovadas, tragam vantagens para o adotado em obter uma vida melhor".* [18]

Taking into consideration the most recent doctrine regarding the subject, we conclude that the rule of exceptionality should not be applied indistinctly.

In other words, the child should not remain waiting for a place to live for years, in hostile environments, until a Brazilian family be found and wish to adopt the child, searching for every national register for that possibility. Intercountry adoption should be considered in the best interest of the child, as said by Article 43 of the "ECA"

Thus, we can point out that the indistinct application of the intercountry adoption exceptionality would go against the Constitutional Principle of the protection of the Child's best interest (article 227 of the Federal Constitution).

It is in our understanding that to remain in their own Country is probably in the interest of the child, though remaining without a family to provide affect, education and familiarity can be much worse.

Besides, it appears that there are a wide range of demands made by national families to adopt, such as color of the skin, age, lack of disabilities, etc. However, foreign prospective parents often do not make that distinction, so they can represent a small solution for the problem of abysmal numbers of orphaned and abandoned children in Brazil. According to Tania da Silva Pereira[19], intercountry adoption can be a means to provide good opportunities to children that would probably have no opportunity.

The provision of the exceptionality of the intercountry adoption is provided by the infraconstitutional legislation, what cannot overlap the principle of the best interest of the child, which must guide all cases involving minors.

For this reason, we can see that the exceptionality is only a tiebreaker, a decisive criterion for the hypothesis of when there are foreign and Brazilian prospective parents intending to adopt the same child, in the same conditions. So, in this case, the adoption should be

18 TJ/RJ, Processo 635/96, Rel. Paulo Sérgio Fabião, RT 757:300-3– grifo nosso

19 Dimas Borelli Thomaz Junior e João Luiz Portolan Galvão Minnicelli. Instrumento legal da adoção internacional e meios de coibição do tráfico de crianças. Revista dos Tribunais 641:7- 8. 1989.

granted to the prospective parent resident in Brazil.

Actually, this is also the understanding of Dimas Borelli Thomaz Junior and João Luiz Portolan Galvão Minnicelli[20], who reinforce the importance of no discrimination between nationals and foreigners, and of Viviane Alves Santos Silva[21].

8. Conclusions

Even though Brazil is not such a popular country of origin of children for intercountry adoption as China, India, Russia, South Korea or Ukraine, it is a country that has many children waiting for a chance to have a family and also a country that issue many intercountry adoption decrees.

The country has coherent rules that are severe enough to avoid that the children adopted will not be victims of human trafficking, but its rules are clear and precise enough to encourage foreign adopters to think of considering Brazil a possible country to adopt a child. Besides, its legal system matches the Hague Convention on Intercountry Adoption of 1993 in such a way that it makes adoption easier for residents from other Contracting States than for residents of countries that are not Contracting States to the Convention.

As the country is recently on the spotlight for different reasons, it would be nice if it could be recognized as a country with a serious and welcoming system to foreigners who wish to adopt a child. Maybe the possibility of adoption by same-sex couples could be a chance for many abandoned children in Brazil to find a new happy home abroad.

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20 Dimas Borelli Thomaz Junior e João Luiz Portolan Galvão Minnicelli. Instrumento legal da adoção internacional e meios de coibição do tráfico de crianças. Revista dos Tribunais 641:88- 94. 1989.

21 SILVA, Viviane Alves Santos. Novos rumos do Direito Internacional Privado. Um exemplo: A adoção internacional. In O direito internacional contemporâneo: estudos em homenagem ao professor Jacob Dolinger. Organizadores: Carmem Tiburcio e Luis Roberto Barroso. Rio de Janeiro: Renovar, 2006. p. 884.

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Panor. Braz. law - Year 3 - Numbers 3 and 4 - 2015 - pp. 276 - 300.
ISSN 1075-1343 (print)
ISSN 2318-1516 (online)
DOI: http://dx.doi.org/10.17768/pbl.a3.n3-4.p276

FREEDOM OF PRESS AND JUDICIARY CENSORSHIP IN BRAZIL

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Abstract: This paper intends to provide an overview on freedom of press under the 1988 Brazilian constitution. Despite living the longest democratic term of Brazilian history – twenty seven years so far, the constitutional and democratic project are under a clear and present threat, this time coming from an unsuspicious player in the democratic game: the judiciary branch of the state. The 2009 ***Estado de São Paulo*** **case** reflects how such threat has been identified by some justices belonging to the Brazilian supreme court – the S.T.F. - committed with a democratic and constitutional culture. The threat is scattered all over the land, coming from individual members and sometimes from several states´ appeal courts of both state or federal degrees. Either we enjoy plainfully the fundamental rights or we do not live in an actual democracy, in the western liberal and bourgeois concept of it. Becoming aware of it, rising up legal resistance against such threat and spreading the news for the whole citizenship is a necessary step to consolidate democracy in Brazil and to push away authoritarian political regimes.

Keywords: Brazil - October 5, 1988 Brazilian constitution - Fundamental rights - Freedom of press - Censorship - Judiciary censorship - The 2009 ***O Estado de São Paulo case*** - Freedom of press under liberal and non liberal post 1988 Brazilian governments

1. Introduction

This paper aims to give the reader a panorama on the freedom of press in Brazil from the times of colony through Empire until after 1982 new democratic regime. In the early moments of the so called New Republic - born with the constitution enacted by the Congress on October 5, 1988 -came the opening for a new democratic living experience. It was expected by civil society the Executive branch would no longer interfere with the press. But daily life in some regions of Brazil brought to the world of facts several distorted decisions taken by judges of the Judiciary branch establishing prior and post publishing Judiciary censorship. The climax of this distortion came with the case of the São Paulo daily newspaper *O Estado de São Paulo,* one of the most important and prestigious in Brazil.

The *O Estado de São Paulo* reaches the peak of the main issue here. A simple operation conducted by the Brazilian Federal Police on 2009 found out and arrested many persons with links to high grade politicians in the Brazilian National Congress, beyond persons linked to police organizations, law firms and etc. The journalistic cover conducted by that daily newspaper got repercussion because one of the allegedly involved was the son of Brazil´s Federal Senate President, Senator and former President of the Republic – José Sarney. With the journalistic cover the daily newspaper begun to suffer many sorts of retaliation. Judiciary censorship fell over the news and lasts until now. The case is at the Brazilian Supreme Court to be judged, but not in schedule so far. Our intention is to follow the chain of events and expose the issue for analysis.

2. A panorama on freedom of press and censorship in Brazil

A fast panorama on freedom of press is necessary to enlighten the issue in Brazilian History. Since 1500 with the arrival of Pedro Álvares Cabral and the first settlers on the Brazilian shore the Portuguese Empire imposed royal censorship. Publishing and printing equipment were prohibited. With independence from Portugal and the foundation of the Empire of Brazil (September 7, 1822) to republic proclaimed (November 15, 1889) Brazil lived some liberal period for the press to grow free. The proclaimed republic represented the political well succeeded pact between the two major landowners elites in the country, situated in the federal states of Minas Gerais and São Paulo. The pact was denominated the *Coffee and Milk Policy*. This pact established the appointment and election for President of a representative of each of these two states, in different turns regardless of the other federal states interests, claims or will. The ideals of republic and democracy were

just ideas and part of a political farce. This was the Old Republic which lasted until the 1930 Revolution[1].

The so called 'Old Republic' endured until 1930, when the landowners rule inside the political life begun to lack political support from different sectors of society exhausted by the pact as it was. The 1930 revolution put an end with the *Coffee and Milk Policy* and Getúlio Vargas was its main leadership. The revolution promised to draft a new constitution for the country. After two years and no constitution on sight a counter revolution started in São Paulo, which claimed for the constitution. The light and fast São Paulo civil revolution happened on 1932[2]. São Paulo was militarily defeated, but a new constitution was drafted on 1934[3]. After a short three years lifetime Getulio Vargas as the supreme political leader imposed the constitution of 1937[4]. The war begins in Europe on 1939 and Brazil aligned with United States sends one army division and one air group to fight in the Italian war front[5]. The war finishes on august 1945 and Getúlio Vargas was deposed.

Democracy comes again on 1946 with a new constitution. For some time the country finds development and political stability. The post second war world displays the international political order divided between the United States of America and the Soviet Union, a division between capitalists and communists. The 1946 constitution lasted until the military intervention and government on 1964. The intervention wanted to put an end in the communist influence rising in Brazil, as sponsored by the Soviet Union and Cuba. A constitution was drafted

1 This pact is known as the *Coffee and Milk Policy*, because São Paulo and Minas Gerais were the richest federal states at the time. The first one was the biggest coffee farm state and Minas the biggest Milk producer. The coffee income would boost São Paulo´s industrial revolution after 1920. Until now São Paulo is the most industrialized federal state in the Brazilian federation.

2 The constitutionalist revolution of São Paulo, which demanded from the provisory government of Getúlio Vargas the commitment on drafting a new constitution as stated by the 1930 revolutionary movement before.

3 The 1934 constitution opened the door for the social rights in the text, designing anew Title on the constitution named Social and Economic Order. The new rights were to protect the family, the youth, the woman and the workers. It was influenced mostly by the 1919 German Weimar constitution.

4 The 1937 was just a pro forma constitution, never to be applied. It was based on the polish constitution drafted by Marshall Pilsudski. It was a dictatorial constitution. The power of the president was increased to keep Getúlio Vargas in office. In political terms, he was ambiguous with both dictatorial regimes such as Nazi Germany and fascist Italy and democratic USA.

5 The Brazilian expeditionary force was composed of twenty thousand troopers and one air fighter group. It was completely equipped, trained and at last transported by the United States into Italy on late 1944. The Brazilian division was attached to the 5th American Army commanded by General Marck Clark. It captured four German and Italian divisions. The air fighter group was awarded the U. S. Presidential Honor Citation by gallantry and outstanding action against enemy forces.

and imposed by the military leaders on 1967 and got emended on 1969. All this time political censorship was everywhere in Brazilian society, mainly from the Executive branch controlled by the military. The other branches of the State didn´t oppose resistance.On 1982 the last military President General Figueiredo passed the power to civilian politicians.

The 'New Republic' as denominated was founded on 1986 with the presidency of José Sarney – former allied to the military government – and new democracy term begun with the constitution enacted on October 5, 1988.

Democratic living in the Brazilian history has been often interrupted by unsolved internal political crisis and conflict of interests between several political factions whether if they are in power or not. As a consequence some political institutions lack the basic values of a continuous democratic expertise. Bonds of commitment with democracy and constitution are feeble.

2.1. Brazil´s historical and political backstage and Judiciary branch

It is a common ground for Brazilian historians and political scientists that Portuguese settlement in Brazil during four centuries rooted in the colony rulerswith political vices and corrupted views. Such enrooted vicesled to misconceptions on how to deal with both State authority and treasury assets. To control a vast territory of more than three million square kilometers the Portuguese crown gave full authority and no limits for its rulers. The practice of organizing territory in *Capitanias*[6] established on people´s mind the idea that State and all within it belonged to the ruling *Donatários*[7] families. The same line of thinking remained during the Empire of Brazil (1822-1889)[8] and it lasts for the whole Republic term (1889 –present days). Its resilience is due to the ability on building allegiances and promote political take over at all costs.

6 In the first centuries of settlement and Portuguese territorial expansion, the Portuguese Crown divided the territory in latitude from seashore inland until the line set by Portugal and Spain in the Treaty of Tordesilhas, from the XVI until the XVII century, when this system was abolished by the Marquis de Pombal.

7 *Donatários* mean 'Grantees' of the Portuguese Crown, in charge of a certain slice of territory or *Capitania*, with full authority to settle and develop it. Extraction of minerals, gems and all sorts of foods were to be exported to Portugal. Black slavery from Africa was massively introduced in the colony to accelerate development and to perform the task. Between the XVII and XIX century it is said that Brazil received five million black slaves while USA received five hundred thousand.

8 The Empire of Brazil was founded on 1822 with Independence. Dom Pedro I, son of Dom João VI – King of Portugal, broke the bonds with the Portuguese Empire and created his own monarchic dynasty which lasted until 1889 when his son Dom Pedro II was removed from power by the proclamation of the Republic on 1889. At the time the Brazilian Empire was considered bigger in size then the British Empire, but all concentrated in one main continental territory.

The idea of Republic brought to Brazil after 1889 was very much based upon the conception raised with the 1789 French revolution. However, this vision of world only grew widely between the military personnel who embraced its philosophical values[9]. Civil society remained controlled by politicians attached to their *Patrimonialism*[10] colonial mentality as political sciences defines it[11]. To understand the meaning of the word is to understand Brazil. In some regions in Brazil some political ruling families for over decades and maybe centuries truly think State´s power and influence belong to them as personal property or an extension of their personal assets. For them the actual sense of Republic doesn´t exist and the rule of law do not apply to them.

There is a permanent clash between in one hand modern sectors of society enlightened by good quality and refined education, embedded re publican values, which travels the world with a clear understanding on how a modern Republic[12]shall be;and in the other hand underdeveloped 'colonial'narrow minded sectors of society, whose political dominance prevails by imposing ignorance, poverty and illiteracy over the people. In what affects the State and more specifically the Judiciary branch some of these politicians are historically so influent justices´ appointment for the Judiciary branch are sometimes determined by political non republican allegiance factors. By doing so these politicians 'fill the blanks' of the State to possibly grow influence inside the Judiciary branch[13], its relations with other branches of the State and Republic´s

9 Brazilian Navy and Army embraced the Republic seeing an opportunity to grow influence within the State. As the civilians didn´t manage to get organized and build a project of nation, the military staff always behaved as a last resource to solve all political crisis and 'save the country'. The Lieutenant movement will make a stand in the 1920-1930 liberal revolutions, mostly and highly influenced by similar movements as the *Kemalism* in Turkey, founded by Mustapha Kemal Ataturk, the founder of the modern Turkey.

10 Patrimonialism is a conception of the State typical from European middle ages. It represents a confusion between the personal belongings of the ruler and State´s assets in order to favor the ruler and his family and the group nearby.

11 Practice in dealing with State and its resources as if they were part of the ruling family personal assets, and to profiteer from it at all costs and with all means possible, regardless of accountability to society.

12 As a quick reference for the reader, 'republican' here means the French revolution concept of republicanism thought, not the political dichotomy used in the US between democrats and republicans.

13 Just as an example the C.N.J. – National Judiciary branch Council in charge of performing the external control of the Judiciary branch across the country opened the Proceeding of Administrative Control n. 510 to investigate fraud on the public exams for Judges in the federal State of Rio de Janeiro, on 2006. The Rio de Janeiro State Court of Law opened an internal investigation which came to the conclusion of no fraud whatsoever. Then, the C.N.J. was called to intervene due to a plea of partiality. The C.N.J. has a mixed composition of judges from different courts, district attorneys and lawyers appointed by the Brazilian Federal Lawyers

institutions. At the utmost extreme they may influencethe interpretation of the law favoring their interests.

According to law dogmatic sovereign power is unique in the whole territory. The Judiciary branch is an expression of this power and it is only one[14] in the whole country, but not the same.The political and administrative organization of the Brazilian State[15] reflects twenty seven states in the federation. Each one has a Federal Court of Law to judge cases in which the Union has an affected claim or interest.Excluding the federal jurisdiction for the issue[16], the State has a local Court of Law to judge civil, criminal and other kinds of cases. As pointed out above, as established by the 1988 constitution each one of these Courts has to coordinate and select young judges to the court through public exams. In some states and in many occasions frauds in these exams have already been reported.

Brazil is a land with many countries inside. Due to the size of the country its geographical peculiarities and uneven degrees of socio-economic development are clear.The people features different historical backgrounds according to the predominant ethnic group and other variables on the political backstage which are almost impossible to list up here in this paper. The 1988 constitution itself recognizes the importance of the main ethnic groups in the formation of the Brazilian nation[17], which were the multiple native Indian tribes, the African slaves and the many European immigrant settlers who came to the country between 1500 and 1950[18]. At this point is more than convenient to remember MONTESQUIEU pointing out the influences of natural, historical and geographical variables in the formation of

Bar Association. The public attorney in charge to report the case Felipe Cavalcanti came to the conclusion of fraud in the exams. The Brazilian Federal Lawyers Bar Association supported its branch of Rio de Janeiro on the claim for cancelling the exams. At the C.N.J. session on the case the Federal General Attorney supported the claim for cancelling based upon the Federal Police evidences gathered. The claim was denied at the C.N.J. due to internal political interests. The representative of the lawyers at the C.N.J. stated that at the end a corporate decision was taken. See: http://www.conjur.com.br/2008-fev-26/relator_cnj_houve_fraude_concurso_rio. Access on June 6, 2015.

14 As an expression of sovereign power it cannot be understood as a fragmented power over the territory. Only its organization seems to give such idea, because it is organized in federal and state levels, determined by the presence of economic or procedural interest of the Union. If the Union has no interest on the case, then the state judiciary branch is the competent one to decide the case.

15 Articles 19-35, Brazilian 1988 constitution.

16 The federal jurisdiction is listed on article 109 of the 1988 Brazilian constitution.

17 Brazilian constitution: Article 216. Compose the Brazilian cultural inheritance the assets of material and immaterial nature, taken individually or in group, bearers of reference to identity, to action, to memory of the different forming groups of Brazilian society, (…).

18 Portuguese, Germans, Italians, Japanese, Ukrainians, Armenians, Turkish, Lebanese, etc.

the law of a land[19].

All this human melting pot picturing Brazilian society was somehow ruled by representatives of the Portuguese crown during the colonial term (1500-1822) - Independence: September 7,1822; representatives of the provinces during the Empire (1822-1889) and representatives of the Republic since its foundation (November 15, 1889). Many different claims on the fields of politics, social and economic levels have to be conciliated and ruled. Even after independence these families which 'ruled' specific regions of the country remained in power, directly in office or indirectly influencing politics due to its wealth. They were clearly identified as *oligarchs* by contemporary Brazilian historians[20]. They are still known as the ***Coronéis***[21] of the politics, which led to the expression ***coronelismo***[22] on the Brazilian political sciences[23].

3. The freedom of press under the Brazilian constitution of October 5, 1988

The 1988 constitution in the head of article 5 establishes that freedom is one of the citizen´s fundamental rights and shall be guaranteed by the State. Freedom is a value chosen by 1986 constituent assembly to be protected. The idea was to avoid a revival of an authoritarian or dictatorial experience, which so many times took part of the Brazilian history[24]. Under such historical point of view, freedom

19 MONTESQUIEU. *The Spirit of the law*.São Paulo: Martins Fontes. 4 ed.2005.

20 FAORO, Raimundo. *Os donos do poder*. São Paulo: Globo, 20--. GOMES, Laurentino. *1808*. São Paulo: Globo, 2013. From the same author: *1822* and *1889*.

21 'Colonels'= military army commission.

22 A new form of imposing personal will through the force, sometimes paramilitary force, all out of the rule of law.

23 ***Coronel*** in portuguese means Colonel, the highest military commission before General commission. It comes from the imperial time, when big farmers and landowners across the land bought from the imperial authorities the commission of Colonel of the Freewill Army Core, a reserve of the Brazilian imperial army. Since then the farmers remained known as such. Despite these commissions are no longer valid, the use of the word persists to point out a no modern republican politician, but an old one attached to bad political practices. In so doing, then comes the expression ***Coronelismo*** which reflects an authoritarian person with no respect to the democratic political institutions or procedures, insisting upon a behavior margining the law, sometimes out of law. To get more acquainted on the issue it is recommended the work of the famous north-american brazilianist Thomas Skidmore.

24 It shall be informed to the reader the rule of exception to lawin Brazilian constitutional history was 1937-1945 and 1967-1982. The period 1822 to 1889,Brazilian Empire - was a constitutional monarchy ***pro forma*** - a constitutional euphemism - because it was not like anyexisting modern European constitutional monarchy. Nevertheless, Brazilian Imperial constitution strongly influenced the Belgian constitution of 1832 in the chapter of the fundamental rights.

is an object of people´s desire since the ***Inconfidência Mineira***[25], but had to pass through many terms of illegitimate governments, suspended fundamental rights and rules of exception until becoming a reality in the current constitutional frame.

The notion of freedom carved by the fathers of the 1988 Brazilian constitution projects itself in the widest way possible, although not in an absolute way. Citizens shall be educated to exercise their rights by accepting the idea that some of their fundamental rights might be moderated and adjusted by other fundamental rights when in conflict. It shall be remembered the Brazilian constitutionalism does not admits or conceives the existence of absolute fundamental rights. In many occasions daily law operators – lawyers, judges and public attorneys – have to deal with edging cases dealing with fundamental rights collision. To preserve all fundamental rights in the concrete case in all senses, a judgment of moderation becomes necessary. It is necessary to decide according to the case and its circumstances and further choosing which one shall slightly prevail, without suppressing the other.

I would like to approach the concepts of property and freedom. When studying civil law at law school it is taught that property obliges. The landowner shall create a bond with the property, real state or a mobile object, by performing all necessary measures put by the law of the land in order to express its ***dominium*** over the ***res***[26]. Such commitment to property reflects itself by the maintenance of the ***res*** in good conditions of use, by the payment of related property taxes and fees, as well as by bringing to effectiveness the sense of *'social function of the property'*[27] in the terms of the current 1988 constitution. In a similar way, it is possible to state that freedom obliges all citizens of the ***polis***. In this case the commitment with freedom and democracy shall be devoted by the citizenship unto democratic institutions: the respect to the law, the respect for other citizens, the high consideration to republican values[28],

25 Movement of Independence which took place in the province of Minas Gerais, during the Portuguese colonial rule. The riot failed and its leaders were hanged and chopped with further exhibit of their pieces on the street according to the Portuguese law. Tiradentes was one of the ringleaders and was martyrized and lasts as an icon of freedom in Brazil. Tiradentes is considered a national hero.

26 ***Dominium***= dominance. ***Res***= thing.

27 The *'social function of the property'* is a conception established by the 1988 constitution. It reflects a leftist influence over the liberal conception of the property. The constitution guarantees and establishes that State shall protect the property (article 5). Nevertheless, its landowner shall carry on giving the natural use of it for the generation of wealth for society and not as a way to accumulate and speculate with it. Expropriation measures are listed in the constitution for unproductive farms, farms and lands used for narcotic plantations and urban properties not properly used or empty – in this case the Lei 10.257/00 – *Estatuto da Cidade* (Statute of the city).

28 'Republican values' in the sense used here guards no relation to the U.S. Republican party.

the maintenance and constant renovation of the civic spirit and the daily handling with freedom within its legal boundaries.

Property and freedom are two of many political liberal values left to us as a constitutional legacy of the XVIII century liberal revolutions and which were inserted in all Brazilian constitutions since 1822. The birth of these values are the American (1776) and French (1789) revolutions.Property and freedom are the main guidelines of political liberalism and liberal democracy is the very stronghold of them. With a ring of fundamental rights in the constitution it is possible to hold any threat to property and freedom coming from the State, any of its branches or clerks. In this issue the British 1215 *Magna Charta Libertatis* shall be remembered as the starting point and the highest paramount of it in the very birth of constitutional law.

Freedom of expression consists on a great achievement of the liberal revolutions. It means the public and subjective right of the citizen to express and to spread his thoughts, opinions and conceptions to the world, without the lightest fear of suffering any sort of reprisal neither from other citizen nor from the State. However, such freedom shall be made compatible on its exercise with different opinions and other citizens´ thoughts so creating an atmosphere of plural ideas and political tolerance. By exceeding this freedom calls the proper sanction according to the law of the land.The freedom of expression is one of the ways through which an individual develop its personality. Through freedom of expression citizens interact with each other in society exchanging reflections, ideas, opinions, analyzing political proposals and being criticized. Its very existence recognizes clearly the plural and democratic society which is brought to us by the constitution.

Freedom of press is one dimension which derives from freedom of expression. With Guttenberg´s technological innovation the possibility to spread ideas and thoughts reached a scale never seen before. Nowadays with the digital means of the information age it is possible to find in the printed media or daily newspapers amongst other digital media channels the very instruments capable of capturing and speeding up public debate of ideas in large population countries. And this is not all. Knowledge in a higher scale makes available to governments the necessary means to provide a good civic education, awakening and turning the people to behave in a more civic manner. In the era of information all digital means available open new frontiers for the freedom of expression and for press. Access to multiple sources

The reference here is to the symbols and values of the republic as a form of government in opposition to monarchy, as spread by the French revolution in the world after 1789 and the roman republic prior to that. It means transparency in the deal with public treasure and public services, respect to democratic rule and institutions, citizenship and its obligations to the state and the constitutional umbrella of fundamental rights.

of information coming from all sides and lands somehow contribute to shape the well informed citizen of the century.

In Brazil printed press and any related equipment was forbidden by the Portuguese crown until the nineteenth century, as stated before. With Brazil´s independence (1822) and during the empire freedom of press was exercised with some moderation[29]. Only with the Republic on 1889[30] freedom of press was considered to be fully protected by a constitution. Censorship came back with the 1937 constitution imposed by Getúlio Vargas lasting until democratization on 1946. With the cold war and military intervention on politics censorship came back on 1967 lasting until 1982, to definitively be banished in all forms by the 1988 constitution. The political stage in South America follows a similar story. Nevertheless, despite the renewal of democratization and the creation of new constitutional pacts all over South American continent in the 1980-1990 decades, it is possible to notice a clear and present danger to press, freedom and democracy.The reason might be the failure of the new democratic political projects in some Latin American societies on delivering people´s social and economic claims. Such gap in the social tissue opened the path for the existence of *'semantic constitutions*' in the sense deployed by LOEWENSTEIN[31].A turn to the left was made in some countries. Such turn is known as the 'new Latin American constitutionalism'.

As printed press and new media cover and follow the political world, governments in office refuses to accept the work of the media and its investigative role. The scenario portraits in some cases harsh measures taken against press such as murder of journalists and news shut down, overtaxing and bureaucratic obstacles. In Brazil a concrete threat from the State to press and freedom of expression cannot be seen in ashort period. On the contrary, most of the times the threat comes from the power which should be guaranteeing and protecting it from authoritarian politicians, i.e. the Judiciary branch of the State. Some cases came to light on the last twenty years demonstrating judicial decisions with no ground on law or the constitution and making no reason or point at all. Local judges in some counties inland and AppealCourt´s judges sometimes perform unreasonable and unexplainable decisions to restrain the press work. The most expressive case is the one involving the daily news *O Estado de São Paulo,* which is under siege since 2009.

29 As a curiosity for the reader Hipólito da Costa is considered the founder of modern Brazilian printed press, having created the *Correio Braziliense* in London in the beginning of the nineteenth century, through which he defended liberal ideas for Brazil.

30 Proclamation of Republic in Brazil: November 15, 1889.

31 LOEWENSTEIN, Karl. *Teoria de la constitución*. Barcelona: Ariel, 1992.The semantic constitution is the one which reflects ontologically reality as it is, in order to preserve the power and its benefits for those who profiteer with it.

On 1982 with the beginning of transition to democracy freedom of expression and freedom of the press were back again in Brazil under a new democratic context. Later with the new 1988 constitution the liberal concept for freedom of the press was repeated. Brazilian society seemed to be living a new path to become a more democratic nation. Daily newspapers began to demand transparency of the public administration and accountability of bureaucrats and politicians. The struggle against corruption and bad political influence in all instances of power or state bureaucratic mechanisms got more intense. Schemes and detour of budgetary assets were identified all over in an uninterrupted chain until now. Within the schemes persons were spotted and identified linked to politicians, legal firms, etc. The reaction against this press 'controlling police action' was to be built by politicians in office in the Courts. Censorship coming from the State belonged to the dictatorial past. The solution found was to impose a ***sub poena*** to the media and newspapers from publishing anything involving the name of politicians and its schemes.

At some point many judiciary decisions contrasted with the values of freedom of the press protected in the constitution. Countless cases were put into courts to set the boundaries on the constitutional freedom of the press. It might seem pointless and too obvious go to a court of law to prove a daily newspapers can publish a fact of public interest involving bad administration of public funds, detour of treasure assets or anything else in the same tone in a democratic environment.

The most symbolic case came into light with the *Operation Boi Barrica* developed by the Brazilian Federal Police. The reader shall focus attention for the bizarre situation which became common ground in Brazil, i. e., the Judiciary branch imposing censorship onto freedom of the press and violating the public liberties assured by the constitution. In some regions in Brazil, local judges attached to oligarchic families commonly decide restraining the right of small local media newspaper on publishing ideas and comments contraries to their interests. These local judges are many times upheld by their superior local State Courts. The situation takes another proportion when the same path is taken to submit one of Brazil´s biggest and most respected daily newspaper to the same restriction. This is the case of the news *O Estado de São Paulo*, in the federal State of São Paulo, which on 2009 was object of a ***sub poena*** to restrain the publishing of any comment, information or names involved in the *Operação Boi Barrica* conducted by the Brazilian federal police[32]. According to the Brazilian federal police – the Brazilian

32 Here is a chronology of events for the reader.On June 2009 the *Estado de São Paulo* publishes journalistic cover related to 300 secret acts and administrative decisions within the Senate, kept locked in a secret room, involving assets management and illegal payments made by the Federal Senate compromising public treasury. On July 2009 Brazilian Federal Police begins *Operação Boi Barrica*. The Distrito Federal High Court justice Desembargador Dácio

equivalent to the U.S. - F.B.I. – there were signs of involvement of the Brazilian businessman and entrepreneur Fernando Sarney, son of Senator José Sarney – at the time President of the Brazilian Federal Senate – in many illegal and criminal actions.

After more than twenty seven years of democratic renewal it is shocking and outrageous to see the constitution being violated to what relates to freedom of the press in such a basic and oblique manner. This Judiciary branch censorship was conceived bypassing the constitution and procedural law. It is more surprisingly to see that it remains up to now. The daily news *O Estado de São Paulo* continues under legal siege on this issue. The decision was taken by the Distrito Federal Appeal Court´s Justice Dácio[33], who was appointed some time before the case by Senator José Sarney.

3.1. Reflections on the freedom of press in Brazil in the last years

Printed press always had problems with dictatorships and political exception regimes all over the world. And in Brazil the story is no different. The press was under censorship during the military rule between 1964 and 1982. After the last General President João Figueiredo have left office on 1982 to a civilian elected by an Electoral Collegiate in the Congress, things changed in the political scenario. The civilian was Tancredo Neves and his Vice was a former pro military rule politician named José Sarney, coming from the federal State of Maranhão. Tancredo died before taking the presidential oath to the current constitution of 1969 and his Vice José Sarney took place on presidency with the support of the Minister of the Army General Leônidas. Transition into democracy and the rule of law was to be effective and a constituency was to be called to draft a new constitution.

The new constitution was proclaimed on October 5, 1988. Ulisses Guimarães is considered the politician responsible for

Vieira – appointed to office by Senator José Sarney – establishes a restraining order on the news to prohibit any further publishing or journalistic cover related to the federal police operation. The news requires suspicion of the justice due to the link with Senator José Sarney, whose son was supposedly involved in the scheme. The justice in charge of reporting the case Waldir Leôncio declares justice Dácio suspect to decide on censorship over the news. On October 2009 the Special Council of the Distrito Federal Court holds Dacio´s decision on censorship. On December 2009, the news proposes constitutional action ***Reclamação*** in the Brazilian Supreme Court, which denies the injunction order. The news then decides to hold the constitutional action until final judgement of the issue so the Supreme Court can speak if such procedural decision constitutes or not judiciary censorship.

33 The Federal Court in the capital city of Brazil, Brasilia. The constitution of 1988 allows the fulfillment of some places in high courts of justice by political appointment. Many of these appointed justices who were lawyers, law professors or attorneys in their prior life bring to court with them their corporative interests and some sort of thankfulness by their appointments.

coordinating the constituency work and to articulate all political demands harmonically in the constitutional text. With the new constitution the 'New Republic'was officially founded putting side by side liberal and social values in what is considered a social-democratic transitional constitution. The preceding pieces of legislation referred to the press and its exercise were considered received due to material compatibility to the new constitution. Printed press had already a legal and a constitutional framework to deal with, respecting the fundamental right of privacy and what was to be considered a professional exercise of the press to apprize society[34].

3.2. The unexpected censor in democracy: the Judiciary branch

With democracy the following of the public administration by the press allowed to build a higher control by civilian society over the state and politicians. Politicians started to be object of criminal persecution due to misgovernment of public treasury funds by public district attorneys, on both state and federal levels. Sometimes these actions failed to prove politicians´ guilt according to the procedural law, what doesn´t implies in absence of guilt of their behavior on dealing with public funds. In these cases, many politicians got convinced that civil actions to seek for reparations were not enough to constrain the job of the press.

The path was open for politicians to put some pressure over the Judiciary branch in order to obtain restraining orders or ***sub poenas*** with county judges or Appeal Court´s judges sympathetic or thankful to their appointments to high Courts[35]. An unexpected situation emerged,

34 The constitution set a frame to avoid and to punish the exercise of a free press off the limits, which might cause damages on people´s life. Just as a reference to the issue is the remarkable case of the *Escola de Base* in São Paulo. On 1994 the owners of a child private school for children were falsely accused of pedophilia. Police agents in charge of the case turn public into press initial and wrong conclusions on the guilt of the accused ones and the school was invaded and damaged and the accused were almost killed. The judiciary determined state authorities to appoint another Marshall for the case and the conclusion was the accusations were false. The entrepreneurs lost much of their economical wealth proofing their innocence and even suiting the state for damages they never recovered their prior social condition. Moral and emotional effects tormented then until their deaths.This case is a legal mark for both the judiciary police and judiciary branch on how to behave when performing an investigation which affects people´s lives. Nobody shall be considered guilty or previously 'convicted' by personal subjective opinions or judgements of value before the case is submitted in a court of law.

35 To give the reader a clearer idea on how the judiciary branch sometimes put itself in the Brazilian political board, here is an interesting interview bonding law and politics. "***The censorship issue is the same on the Senate´s crisis".*** This is the interview given by José Arthur Gianotti (Professor of Philosophy) to Julia Duailibi of the*Estado de São Paulo,* on August 08, 2009. For Arthur Gianotti, it is not role of the judiciary branch to impose restrictions on information

publishing. On the 30, the Desembargador Dácio Vieira, from the Tribunal de Justiça do Distrito Federal, prohibited the ***Estado*** on publishing journalistic information about Fernando Sarney, son of the Brazilian Federal Senate´s President, José Sarney (PMDB-AP), from whom he is a dear friend. "*When you see judges who are taking part in the banquet, they perfectly understand they need to defend the banquet*", he states. For the philosopher the fragile Brazilian democracy allows situations like this one. "*We shall be always vigilant*", said Gianotti, completing: "*What we have here is a total and general disorder*". Read the interview as follows:

What´s your evaluation on the prohibition imposed to the daily news *Estado de S Paulo* on publishing informations concerning Sarney´s son? First of all, this is within a general problem in Latin America, which is the threat on formal democracy, which is a democracy of rights. We pass through a time of development and growth, of Brazil in particular. A great number of citizens entered into the political system, and its representatives are people who were entirely out of traditional political life. And this people have no compromise with formal democracy. The issue on the censorship, to my opinion, is the same which is taking into the Senate´s crisis, which is driving politics in Latin America into a total disorder. It is a world issue, but in Brazil it happens deeper.

Do you think it is up to the judiciary branch to impose restrictions on publishing informations of public interest? No, obviously not. It happens that, when judges take part in the banquet in Brasilia, they perfectly understand they have to defend the banquet.

Are the judiciary branch decisions somehow influenced by political issues? When overall decisions of the judiciary branch go to the Brazilian constitutional court, they are always influenced by the political game. The constitutional court is the place where law and politics bond, like anywhere in the world.

In Brazil, because it is a fresh democracy, does this influence occur more frequently? Yes, in Brazil we shall resist the best we can. We have to feel that this is not an epiphenomena (accessorial phenomena) also, it is not accidental. It is attached to the growth of citizenship in Brazil. In the way that an enormous disorder of people joined the market and begun to participate on daily political life, with their rights. These people as they got there, they begun to think in terms of immediate gains. They are not capable of feeling that an immediate gain may vanish in a further perspective. This lack of forecast, which is a trend mark of the Lula governmental term, tends to cause despise on formal democracy. If our representatives had a deeper political culture this wouldn´t be happening.

How to conciliate individual freedoms and the right to information in a country where the judiciary branch is subject to political influence? Is there a need for new rules? No rule will solve the issue. The issue is that people begin to follow the rule and other people will complain when the rule is followed. There is always some bastard who is going to bypass the rule. What has to be done and it is being well done is the struggle against the restrictive order hardly and with the blessings of a right which is usually misinterpreted.

What lesson can the country take from episodes like this? That Brazilian democracy is very fragile. And that we shall be always watching.

This censorship links to times like in the military regime? I don´t think so. In dictatorship the political process was another. There was a break of the democratic system. This is not what is happening now. What we have now is overall a total disorder. It reflects the enormous contrasts of Brazilian society today. It is the integration of this people in our daily life, publicly and politically.

The Brazilian political institutions tend to strengthen with democracy´s maturation? Yes they do, but there are opposite tendencies also. There are countries which fail. Nothing leads us to say Brazil is going to succeed. See Argentina. It was a great country which lost track. Nothing is avoiding Brazil to follow on the same track.

when the threat to freedom of the press doesn´t comes from the state apparatus or the executive branch but from members within judiciary branch who should be guarding and protecting the constitution and its values, such as the freedom of the press. It is necessary to say that these are isolated situations but represent an unacceptable legal stand which should be harshly reproved by society and by the Judiciary branch itself.

3.3. The 2009 daily newspaper *O Estado de São Paulo* case

Two cases decided by the Brazilian constitutional court – *S.T.F. – Supremo Tribunal Federal*– on 2009 frame the climax on prior censoring freedom of press: the A.D.P.F. 130[36], which resulted in the declaration of the Brazilian Press Act as unconstitutional and the *Reclamação*[37] nº 9.428 with injunction claim, having as claimer – *reclamante*[38]– the daily newspaper *O Estado de São Paulo*, being this a constitutional action following the *Ação de Descumprimento de Preceito Fundamental* - A.D.P.F. constitutional action. The *reclamação* followed due to the transcendent procedural effects of the A.D.P.F.´s reasons beyond the action itself and by the fact of the losing votes of three Justices of the Brazilian constitutional court (S.T.F.) – Ministers Celso de Mello, Ayres Britto and Carmen Lúcia – have considered the general power of injunction on civil procedure given to judges and Appeal Court´s Justices the new face of previous censorship and an obstacle to the development and exercise of freedom of press in the land.

That three justices minority block[39] of the court defended a stand which reflects the constitutional understanding upon which this article focus, bringing to the light of academic debate new questions on the issue and some important observations made by the Court´s Justices:a possible misuse of the legal institute of injunction on procedural law as a new form of oblique censorship to media in all forms is put into public

http://politica.estadao.com.br/noticias/geral,a-questao-da-censura-e-a-mesma-da-crise-do-senado,415599. Accessed on May 27, 2015.

36 A.D.P.F. is an abbreviation for AÇÃO DE DESCUMPRIMENTO DE PRECEITO FUNDAMENTAL. It is one of many constitutional actions designed to guarantee fundamental rights or constitutional values within the constitutional text. It is regulated by Law 9.882/99.

37 MCRecl. Is an abbreviation for *Medida Cautelar na Reclamação* or 'injunction effect on Complaining Action'. It is the Brazilian equivalent to the German institute of the *Verfassungsbeschwerde*. Is one of many constitutional actions inserted on article 102, inciso I, alínea "i" of the Constitution, and regulated by article 13 of Law 8.038/90 – Procedures on Constitutional Court. It is designed to be proposed directly before the Constitutional Court (STF) as an action to preserve the authority of the Court´s decisions which might not being complied by state authorities or civil entities.

38 Or: claimer.

39 The Brazilian constitutional court is composed by eleven justices.

debate display. Such oblique misuse of the injunction procedural law appointed by the Court´s Justices reveals how threatening is the situation within the Judiciary branch of the state, compromising the true defense of fundamental rights into personal opinions of local judges who sometimes might leave aside the compromise to defend the constitution. By doing so they alone overlap the 'will of the constitution'[40] to guarantee the freedom of the press. Maybe people should get more worried on trying to understand the reasons of the other justices not to take the same stand and think why they didn´t see any constitutional violation.

Nevertheless, it is to be considered that the deployment of such legal measure shows how fragile our constitution is to be easily bypassed on its aim to guarantee fundamental rights. A simple reasoning which could be repelled bythe Judiciary branch anytime, but so far it was not. It is acceptable the idea the Brazilian Supreme Court is a political court and that its decisions many times bare political content, but the decision in the *Medida Cautelar na Reclamação* nº 9.428 shows how fragile the constitution is when politics get more ground than the democratic commitment with the law and the fundamental rights, even in the Supreme Court field[41].

Until the emerging of cases similar to this the constitutional history of freedom of the press had logged threats coming mostly from the State apparatus – the Executive branch mostly. However, by bringing to the judiciary branch political issues which the Brazilian Congress didn´t want to take full responsibility for the decision, the Judiciary branch begin to take a stand in the post 1988 constitutional and political scenario in Brazil as the main and most controversial source of legal restraining orders into freedom of the press. Some sectors of civilian society remnants of the oligarchic ruling families all across the land, this time more educated and enlightened in the legal matters may have identified the legal rhetoric and speech in court as the best way to hold their stands in the political ground by directly or indirectly interfering on high court decisions, 'wrapped' in the blanket of the new judicial branch activism. In such way a new brand of censorship took shape in the Brazilian democratic scenario. Judiciary branch censorship is a more considerable threat to democracy as we know than the prior State´scensorship mechanisms, flaring a political setback for Brazil and opening the gates of reshaped regimes which work under the rule

40 Expression used by Karl Loewenstein on his book "The normative strength of the constitution".

41 From another point of view, it is to remember how the German Weimar constitution of august 11, 1919 was suspended by a simple interpretation of its article 48. History teaches mankind so errors committed in the past shall not be repeated. Society should think over the creation of a judiciary compliance mechanism within the judiciary branch, following the example given by major private enterprises.

of exception as became so present in Latin America´s life in the last twenty years[42].

Then, it is to be said the Court´s final decision on the *Medida Cautelar na Reclamação* nº 9.428 points out possible case of prior censorship in the daily newspaper *O Estado de São Paulo*.The alleged censorship is due to the publishing of many reports and journalistic covers about the entrepreneur Fernando Sarney, son of Senator José Sarney, then President of the Brazilian Senate. The newspaper issue indicated possible clues on his involvement in criminal actions.Such reports were based on information press releases of the Brazilian Federal Police after the *Boi Barrica Operation*. All information was obtained legally by the daily newspaper. There was no illegal disclosure of secret or classified information. Right after that and due to the repercussion of the journalist cover across the land the sanctions to the newspaper begun. A restraining order was issued to prohibit any information disclosure on the case by a Justice belonging toTribunal de Justiça do Distrito Federal at the capital city Brasília, who was appointed to office a few years before by Senator José Sarney.

Following the legal procedure as set by the constitution and co-related legislation it was believed by the newspaper´s lawyers the *Reclamação constitucional* and the injunction claim would cease the Appeal Court´s decision setting up censorship on that journalistic cover issue. Instead of the expected result, the succession of events along months showed clearly an enormous disappointment displaying how Democracy and Fundamental Rights in Brazil were weakened. As notes BUCCI (2009), in face of the clear movements of oligarchic sectors in the political and legal backstage it is possible to see how well coordinated is the reaction to the democratic project by some sectors of civil society in Brazil. Despite the teaching of democratic culture and republicanism at universities, in the real world the project of a Republic based on the French model is still on hold position.

The will of the Brazilian constitution prohibits censorship in all forms, but sets up a mechanism to punish those who exceed the limits of a free press with the possibility of civil and criminal actions in the form of the Brazilian defamation law. This legal breach in the law, which allows the misuse of injunction tends to attach on the Judiciary branch the label of the new censor. Censorship can be understood as a prior judgement of value which is done by someone referring to information content, further determining its reformulation or suppression. The intention is to erase the idea or the concept from the world of facts, because it is contrary to the group in power. It brings naturally the concept that bares a moral or ideological burden. A democratic society based upon the

42 See ANASTAPLO (2002).

concept of tolerance and pluralism of ideas, religions, ethnical groups and political concepts shall create and preserve a neutral field where all members of society may live peacefully side by side. Censorship is a concept opposite and contrary to freedom of press. It is up to the readers to comment and 'judge' the publishing, not a task for a censor, political committee or even less the State or its branches.

New forms of by passing the constitutional guarantees are being built in Brazil by many self-denominated democracy defenders, such as the alleged needed "*content adequacy*" into a temporary political party idea in office. It is remarkable how such pedestrian, misconceptions and flat ideas on democracy insist on proliferate in Latin America. The use of legal euphemisms brings back trashy recycled concepts used in the old times of the Soviet Union and its satellites. As if the Pravda or the Granma were the bearers of truth and consensus in society. The fall of the countries behind the iron curtain on 1989 culminating with U.S.S.R. has shown they were wrong. The model of free press under liberal values is still valid and shall be defended.

The understanding in the Brazilian constitutional law as set by AFONSO DA SILVA (1998)[43]on the issue is that fundamental rights are plain on producing immediate effects in the world of facts as seek by the 1986 constitutional assembly which draft the text. Most of the fundamental rights do not need any piece of further legislation to reach plain effect. So is the freedom of the press according to article 5 of the constitution, amongst other fundamental rights with freedom related. Furthermore, paragraph 2 of article 220[44] from the constitution reinforces this understanding. Then, it rests more than clear how confusing is the effect of the Brazilian Constitutional Court decision on the exercise of freedom of the press.

As a model for the Brazilian constitutional law freedom of the press content´s on its extension is given by FISS (2009) when analyzing the U.S. Supreme Court *Pentagon Papers* case 1971 decision. The case shows how important was for American civil society to know all details of public life, including the status of wars raged by their State abroad, once it reaches and causes effects on people´s lives. If someone is going to die for the State, then there is the constitutional right to know how war is being conducted by the State and military staff. The useless sacrifice of lives shall be avoided as it was done in old Athens when citizens gathered in the ***agora***[45] had to decide all concerning their city –

43 See on the same path Sarlet (2009) and Gomes Canotilho (1993).

44 Article 220 of the Brazilian 1988 constitution – Manifestation of thinking, the creation, expression and the information, under any form, procedure or mean will not suffer any sort of restriction, observed the constitution.

§ 2º – It rests prohibited every and any censorship of political, ideological and artistic nature.

45 'Square' in greek.

the ***polis***[46]. The press in all sorts of media channels shall develop its job highly compromised with ethical values and take full responsibility for to what is printed or published. Abusive use of the press calls for law enforcement in the terms of the Brazilian defamation law[47].

Based on MORANGE´s (1985) reflections on the issue, it is possible to note Brazil is passing through a temporary setback on this fundamental right in particular, because if Brazilian people still have to struggle politically to live as a whole thefirst fundamental rights generation such as protection to life, physical integrity, public liberties linked to religion, political opinion and other kinds of civil rights, it is sad to see we are still living two hundred years in the past. Press censorship is no longer acceptable, under any circumstances.

So, it is more than fair to sense through it how much democracy in Brazil has to mature still.The debate is framed by those two Constitutional Court´s decisions (A.D.P.F. 130-D.F. and *Medida Cautelar na Reclamação* 9.428), both from 2009. Their content reflects the Brazilian Constitutional Court´s main reasons on freedom of press and censorship. The *Reclamação* is directly attached to the A.D.P.F. by a thematic bond, i.e. freedom of the press, once the background debate is freedom of press. The *Reclamação* was proposed as a constitutional action in order to preserve the authority of the decision set by the Brazilian Constitutional Court, considering the so called *'transcending effects of the determining reasons'* contained in the decision, as a procedural effect adopted by the Brazilian Constitutional court in order to wide up the constitutional control.

By the occasion of the A.D.P.F. 130-D.F. judgement, the Brazilian Constitutional Court declared the Press Act – Lei 5.250/67 unconstitutional. The Brazilian Constitutional Court´s Justice in charge to report the case for his fellow justices on the court´s ***plenarium***, Min. Ayres Brito stated:

> *The normative core of the Brazilian constitution equalizes freedom of journalistic information and freedom of the press, repelling any form of prior censorship to a right which is sign and guarantee of the worshipped dignity of the human being, as well as the most developed state of the civilization. […]. There is no such thing as freedom of the press by the half or under the forceps effect of prior censorship, including one coming from the judiciary branch of the state, otherwise approaching the unconstitutional field of legal jugglery. (Report of A.D.P.F. 130-D.F., pages 4 and 5)*

46 'City' in greek.

47 See Liern (2002). The Brazilian defamation law also.

3.4. New borders for the freedom of press under the post 2003 non liberal government

By the occasion of judgement of A.D.P.F. 130 – D.F., Minister Celso de Mello made a reference to the *Hemispheric Conference on Freedom of the Press*, occurred on 1994 in Mexico. The Conference ended with the *Chapultepec Declaration* signing between many principles and values the following applied to the issue focused on this paper:

> *II – Every person has the right to search and to receive information, to express opinions and to spread them freely.* **Nobody may** *restrain or deny these rights.*
>
> *V –* **The previous censorship***, the restrictions on mean circulations or the publishing of its messages, the arbitrary imposition of information, the creation of obstacles to the free informative flow and limitations to the free exercise* **and** *movement of journalists* **oppose** *directly the freedom of press. (sic) (ADPF 130-DF, p. 146)*

The Brazilian Constitutional Court´s Justice Minister[48] Celso de Mello built again an expressive and historic defense on freedom of the press, by the occasion of the injunction request in the *Reclamação* 9.428, on December 10, 2009. When aligning his reasons of vote with Minister Ayres Brito, he stated that press shall be free of any kind of restraining, limitation or chains from any State branch in order to exist fully on its major task to strength democracy.

On M.C. Reclamação nº 9.428, Minister Celso de Mello states:

> *Nowadays, the censorship, and I identify it so, has been so abusive on the behavior of certain judges and courts in our country. Nowadays, the general power of injunction[49] is the new name for the judiciary censorship in our country. And this is very*

48 In Brazil, the Constitutional Court´s members have the status of State Minister.

49 Just as a brief information for our foreign reader, the general power of injunction as we may call it so in english is a specific procedure in procedural law designed to prevent potential damage or a damage in progress, before proposing the action, which might take more time than needed to stop the damaged, into a point where it is irreversible. Judges and courts are invested of such power, once the reasons are well presented and the injunction order seems necessary. Sometimes a monetary guarantee is asked by the court from the claimer, which serves as insure for the effects of the injunction order.

> *serious, because it makes us to turn back into our colonial past (sic).*

The statement above demonstrates that more than twenty seven years after the 1988 constitution it is possible to identify a breach in the legal system which may put into 'suspension' or 'restriction' some fundamental rights inserted in the constitution. Such not so openly declared effects do not come from the historical 'suspect' Executive branch, but this time from the Judiciary branch. The Judiciary branch should rethink as a whole its role on the democratic project of nation in progress in Brazil. Following, it should propose to the Legislative branch reforms on the injunction legislation in order to limit such kind of decisions which turn the *will of the constitution* in a joke before the eyes of the people. Judges are citizens within a Republic and they shall behave within the constitutional frame, being accountable for their behavior to society also.

4. Are we truly living in a democracy?

This question will not meet an answer on many countries in Brazil´s neighborhood for many reasons which are not object of this paper. For now it is possible to reply affirmatively that Brazil is living a work in progress democracy. But it is neither fail safe nor consolidated yet, the way I see it. Many issues in the 1988 Constitution are a legal nobody´s land still waiting for further pieces of legislation to put it entirely on the track. Considering Brazilian constitutional historical panorama and the political events which took place in the country between 1934 and 1988, it is clearly possible to admit the theory that a new constitution might appear in the horizon before the 1988 is fully regulated by all sorts of acts needed.This is a question frequently made by my students at Law School during my History of Brazilian Law classes at University[50]. I always have to explain them enumerating a number of historical and political facts not lived by them and neither by me, what astonishes them is how far it goes back to the past. Because of their youth they look at me with some sort of skepticism and resilience to accept the explanation.

Anyway, if it happens there is much few to do to avoid it. The wheels of history and the will of politicians are unstoppable. What worries the most is the historical resistance to embrace a liberal democratic project of nation for Brazil. The lack of a serious constitutional culture directly affects both legal and economic stability and people´s lives also. Not far back in the past Germany fall in the hands of a certain

50 U.F.R.R.J. – Universidade Federal Rural do Rio de Janeiro= National Rural University at Rio de Janeiro. Law School.

Nazi party, which enjoyed and took advantage of such constitutional breaches and democratic weaknesses to suppress democracy and to install a totalitarian regime. Times, places and villains are different but the threat to democracy remains. It is possible to find some of them along the Brazilian border.

Democracy in Brazil will be more solid as more education is given to the people. However, lack of a good public education is a permanent debt in the country. Moreover, the lack of liberal values demonized by its opponents keep us away of this political democratic experiment. The anti-liberal pupils create a new language, where prior censorship to freedom of the press becomes acceptable into the eyes of careless citizens through the political euphemism "*content adjustment*" for the press, in order to slightly restore State censorship mechanisms to put the press on a leash. It is up to society, its institutions and the Brazilian Constitutional court to become aware of such threat and do whatever they can do protect democracy.

5. Conclusions

It is important to spread the knowledge on the issue above, so the Brazilian people may be aware of the threatsgetting near the constitution. The values of the Brazilian independence insurrection of Minas Gerais happened in the XVIII century shall not be forgotten: ***libertas quae sera tamen.*** The insurrection against the Portuguese Crown equalizes in a much smaller scale the same liberal values of the French and American Revolution. The first word of the motto in Latin is 'freedom'. For how long shall we still wait to live in a country where the whole meaning of freedom is guaranteed by the State and known by all the People is a question yet to be answered. Press has been a bulk of freedom in the struggle against monarchist, dictatorial and totalitarian regimes since the XVIII century. In a recent past some South American countries are passing through a hard test on their political democratic regimes, sometimes failing to guarantee the most basic freedoms. It is time to open widely the eyes to what is happening around us and become aware for the importance of both democracy and constitution. May the example of the United States Constitution´s first amendment inspire Brazil in our path to secure democracy in the forthcoming years.

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Panor. Braz. law - Year 3 - Numbers 3 and 4 - 2015 - pp. 301 - 341.
ISSN 1075-1343 (print)
ISSN 2318-1516 (online)
DOI: http://dx.doi.org/10.17768/pbl.a3.n3-4.p301

PATENTS ON GENE SEQUENCES

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Abstract: The patents on gene sequences are a controversial theme in the setting of intellectual property. The discussion revolves around the supposed inventiveness of these genetic materials: would they be considered true inventions or mere discoveries? It is certain that there is no unanimity of treatment. This study sought to systematize the patentability on genetic materials, under the decision on the Myriad Case, decided by the U. S. Supreme Court. Also, an analysis of the Brazilian legislation was necessary, as well as an understanding of the Brazilian Patent Office's practice. Considerations were made regarding whether the protection of biotechnological inventions is necessary, pondering the mandatory social purpose of the scientific and technological development established by the Brazilian Constitution.

Keywords: Intellectual Property - Patent - Biotechnology

1. Introduction

Biotechnological inventions have achieved undisputed importance in industry, agriculture and business, as well as in the promotion of social welfare. Chemical methods previously used have been replaced by others more efficient, based on the use of biotechnological processes, making new products that meet specific demands of human beings.

In human medicine, research relating to the human genome and its mutations has led to better understanding of diseases such as cancer, enabling more accurate diagnoses, even before the manifestation of the symptoms of the disease itself. Similarly, such advances have also contributed to the development of new drugs (pharmacogenomics), as well as on therapeutic medicine (gene therapy), in addition to the creation of DNA (deoxyribonucleic acid) vaccines.

Under these new creations of interest to industry and with

significant impact on human health, it is observed a legal clash resulting from the imposition of rules and interpretations of the patent system, which is considered relevant to the promotion and guarantee of investments to research and development of new products and technological processes.

If the patent system acquires a strategic importance for research and technological development, the result of research involving living organisms, or parts of them, brings benefits with the adoption of new products, on the other hand, this biopatenting system brings forth the questioning about the possibility of appropriating knowledge based on these natural materials, restricting the innovation in the area.

More specifically, one may question about the suitability of patent protection to the discoveries in biotechnology, especially in regard of isolated biological materials from nature to the research and development of new drugs, as well as the whole or part of the genetic code. Would these materials, in such cases, be considered a creative intellectual work of humans? The genetic code is patentable matter or would it be a mere discovery?

2. The myriad case

It is in this context that the United States Supreme Court´s decision on June 13, 2013, in the Myriad Case[1], is gaining importance because of its impact on the interpretation of American law about what would be patentable, mainly in the area of biotechnology. That decision has put to the ground the practice adopted for decades by the United States Patent and Trademark Office (USPTO), since the previous understanding was for the broader possibility of patenting genetic sequences, as well as all material isolated from its natural environment.

Important to note, here, that the analysis of the case does not cause impact only in the patenting of genetic sequences, but also involves all products of nature taken to laboratories to be isolated from its environment, as hormones, vitamins, as well as other extracts. The impact is of such a broad spectrum that Nanotechnology industry participants interfered in the case as *amicus curiae* to demonstrate their arguments and concerns about the restriction of the patenting of genetic sequences, as nanomaterials are nothing more than isolated products[2].

1 *The Association for Molecular Pathology, et al. v. U.S. Patent and Trademark Office, et al*. (*US Supreme Court*, Process n. 12-398). The US Patent and Trademark Office (USPTO) was removed from the demand later. Besides Myriad, it was also a defendant in the demand the University of Utah/ USA.

2 AMERICAN BAR ASSOCIATION. Available at: http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-398_resp_amcu_nano.authcheckdam.pdf. Accessed May 09, 2014. p. 11.

Basically, the arguments of the parties in the Myriad Case can be summarised as follows, in connection with the genetic sequences:

(i) by the Association for Molecular Pathology: the applications would not be patentable matter as they would not meet Paragraph 101, of Title 35, of the U.S. Code[3], i.e. by being true products of nature, as well as the lack of inventiveness. Also, such patents would impede innovation, by reason of the prohibition of conducting research; and would limit the options for the testing of patients with cancer. It was also stressed that the patents on isolated genes would violate the First Amendment of the Constitution of the United States of America[4] by blocking scientific research on the isolated sequence, since it would be a patent on pure information[5].

(ii) By Myriad Genetics, Inc. ("Myriad"): the genetic sequences would be liable to protection based on the understanding that they would be chemical compounds. In this sense, the sequence, after the isolation process, would present different characteristics found in the human body. It was also argued that such patents promote innovation in the field of biotechnology, in particular with regard to genetic engineering, to the extent that, by being granted patents, the knowledge is made public, encouraging to not be maintained as business/trade secrets.

Thus, the main issue may be summarized as follows: The isolated genetic sequences are a composition of matter (invention) or occur naturally (discovery)?[6]

In regard to the patenting of genetic sequences, it should be noted that the understanding of the USPTO, with seat in jurisprudence, was that patent protection would be possible only if a substantial change in naturally occurring products was found. In this way, the isolation of the gene sequence would characterize this substantial change.

When the Myriad Case reached the Court of Appeals, all three members issued their opinions; but there was no consensus on the basis of the reasoning.

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3 35 U.S.C. § 101 35 U.S.C. 101. Inventions patentable: Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

4 *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"*.

5 We understand that, although this argument was not clarified in the final decision, it relates to the fact that it is a discovery and, therefore, a basic tool for the genetic research.

6 We clarify that, for Brazilian law, the difference is of great impact, since it cannot be granted a patent on a discovery.

For example, Judge Lourie understood that, for the examination of the marked difference, little mattered the gene functionality, but only the structural difference, which, for him, existed in the case. Judge Moore understood that the isolated sequence was subject to patenting because of the practice of the USPTO. Judge Bryson found that the isolated gene sequence, even with its proper function identified, behaved in the same way that it behaves in the human body, being absent any new use; in this sense, the patent would be only a consequence of the possession of the sequence[7].

Because of these controversies, the American Civil Liberties Union (ACLU) and the Public Patent Foundation (PPF), on the proposed action in face of Myriad, have petitioned on September 25, 2012[8], to the U.S. Supreme Court to express an opinion on the possibility of the patenting of genetic sequences, through a petition for *writ of certiorari*[9], which on November 30, 2012, was admitted, only regarding the question: are human genes patentable?, this being the focus of this work[10].

The decision, by a majority[11], came on June 13, 2013, with the

7 Decision of July 29, 2011, Federal Circuit Court of Appeals, Case n. 09-CV-4515 (2010-1406). Available at: https://www.aclu.org/files/assets/10-1406.pdf. Accessed June 18, 2014.

8 It is important to note that, for procedural purposes, after the Court of Appeals' decision, on July, 2011, there was the first petitioning to the Supreme Court, which revoked the Federal Circuit's decision, determining the case was revisited according to what was decided on Mayo Collaborative Services v. Prometheus Laboratories Inc. Thus, the case was revisited, taking into consideration the Mayo Case, however in regard to the genetic sequences, such a precedent would not be relevant, since that decision was related to a method. After this second decision, a new petition was addressed to the Supreme Court requesting the specific case of the genetic sequences to be analysed.

9 The *writ of certiorari* is the principal mechanism of appeal to the Supreme Court in America, for the selection of cases to be submitted to this court. The Supreme Court has the sole power to decide whether or not to analyse the question, taking into consideration a few aspects, such as if there was a prior decision treating important and relevant question that should have been addressed by the Supreme Court, among others. It is based on the necessity of the standardization of understandings regarding the application of the law. PINTO, José Guilherme Berman C.. *O writ of certiorari.* Em Revista Jurídica, Brasília, v. 9, n. 86. Ago/Set 2007. Brasília, 2007. Available at: http://www.planalto.gov.br/ccivil_03/revista/Rev_86/artigos/JoseGuilherme_rev86.htm. Accessed March 12, 2014. The *writ of certiorari* can be compared to the institute of the general repercussion in the Brazilian law. MELLO, Vitor Tadeu Camarrão. *A repercussão geral e o writ of certiorari:breve diferenciação.* Revista da SJRJ n. 26. Rio de Janeiro: 2009. pp; 139 – 146. Available at: http://www4.jfrj.jus.br/seer/index.php/revista_sjrj/article/viewFile/32/30. Accessed March 12, 2014.

10 Therefore, as for the other questions that were not accepted by the Supreme Court, acting in its appeal competence, the final decision was the one of the Court of Appeals. Since those questions are in connection with the method and impediment for the realization of tests, these are not going to be analyzed, for they are not the scope of this work.

11 The members of the Supreme Court, by the time of the decision were Judge Clarence Thomas; Judge John Roberts; Judge Anthony Kennedy; Judge Ruth Bader Ginsburg; Judge

invalidation of the claims contained in the Myriad patents concerning purely isolated genetic sequences based on grounds that they would be products found in nature, remaining valid all claims concerning cDNA (complementary DNA)[12].

In fact, the Supreme Court used a very specific vocabulary to summarize the issues at stake. It affirmed[13] that Myriad had obtained several patents after the **discovery** of the precise location and sequencing of mutations of the BRCA 1 and BRCA 2[14] genes, which determine a dramatic increase in the risk of developing breast and ovarian cancer. Such knowledge has enabled Myriad to develop applicable laboratory tests ("useful medical tests") for the detection of such mutations. If deemed valid, the USPTO would grant the titleholder the exclusive right to isolate the genes BRCA 1 and BRCA 2 of an individual, as well as give Myriad the exclusive right to create synthetically cDNA from BRCA.

The President of the Supreme Court, Judge Roberts, questioning Myriad's lawyer Greg Castanias, in the oral arguments, noted that the isolated organism could not be considered similar to the transgenic organism, since in the latter there would be a combination of elements with the emergence of something new. In the process of isolating a genetic sequence, there would be only the snipping, exposing only a part of something that already existed prior to human intervention[15]; this understanding tended to require the structural difference, necessary for patenting.

Myriad 's lawyer contested that it was not a pure, simple cut, but only after its creation (revelation of the insulation), could the scientist know where to cut.

Stephen Breyer; Judge Samuel Alito; Judge Sonia Sotomayor; Judge Elena Kagan and Judge Antonin Scalia, who did not agree in part with the decision , since he understood that the matter of molecular biology was beyond his knowledge. In his own words: *"I join the judgment of the Court, and all of its opinion except Part I–A and some portions of the rest of the opinion going into fine details of molecular biology. I am unable to affirm those details on my own knowledge or even my own belief. It suffices for me to affirm, having studied the opinions below and the expert briefs presented here, that the portion of DNA isolated from its natural state sought to be patented is identical to that portion of the DNA in its natural state; and that complementary DNA (cDNA) is a synthetic creation not normally present in nature."*

12 The Supreme Court did not specificaly indicate which claims would be considered invalid.

13 SUPREME COURT OF THE UNITED STATES. *Association for Molecular Pathology et al. v. Myriad Genetics Inc. et al. n. 12-398. Syllabus.* Available at: http://www.supremecourt.gov/opinions/12pdf/12-398_8njq.pdf. Accessed June 02, 2014.

14 The BRCA1 and the BRCA 2 (breast cancer susceptibility) are a tumor supressor human genes that regulate the cellular cycle and prevent the uncontrolled proliferation. Some variations or mutations of those genes are associated with an increase of the risk of breast cancer.

15 Oral Arguments in the Myriad Case, available at the Supreme Court's website, page 61. Available at: http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-398-amc7.pdf. Accessed June 02, 2014.

The invention would be in knowing where to start and where to finish the gene sequence (where to cut the rest of the chromosome). Myriad ‘s lawyer used the analogy of the baseball bat: Similarly, the baseball bat was cut from a tree, that is, it is also found in nature, but the decision about where to start and where to finish was taken by humans. Roberts argued that such analogy would be quite different, since, with the DNA, these are mere cut on top and bottom.

Still, Castanias noted that the location of genes, contained in subparts of the chromosome, was unknown until its isolation among the 8 million pairs of nucleotides. At most, the breaking of chemical bonds, when the isolation process occurs, gives a different structure to the isolated DNA.

Following the questioning, Judge Breyer said that, historically, it is recognized the patenting on the process for extracting a substance from a plant, as well as the new uses that can result from such extract, but the extract itself cannot be patented, which encourages new uses to be developed by science.

Judge Kagan questioned how it would be if the first person who found and isolated a chromosome had it patented; as well as the first person who found a liver had it patented, and so on. Myriad ‘s lawyer replied that there would be no obstacle to patentability with regard to the already mentioned §101.

Chris Hansen, a lawyer on behalf of ACLU, argued that there could be something different from nature and not obvious when the genes were transformed in a way that the scientist decided what it would be like the sequel more than the very nature, which wouldn’t be the case.

The Supreme Court understood, then, that the main contribution of Myriad was only revealing the precise location of the genes BRCA1 and BRCA2, but thise sequences did not present markedly different characteristics than those found in nature. Myriad would have discovered an important and useful gene, but the discovery, even if innovative and brilliant, does not meet, *per se*, the legal patenting requirements. Still, the exhausting process of such a discovery does not meet the requirements of patentability, in the same way, because already known and used widely by the scientific community.

So, to the Supreme Court, the isolated gene sequence would be purely a product of nature not worthy of patent protection. However, the cDNA, a synthetic DNA containing coding portions only, i.e. the exons, does not occur naturally, and could receive protection, not being invalidated claims based on cDNA, except in the case of short sequences of cDNA that do not differentiate substantially from the natural DNA (where there were no introns to be removed).

3. An analysis of the decision

The genetic sequences are an essential tool for fully comprehending living beings, for they encompass all necessary information for their operation, being the basic and fundamental pieces for all that lives.

The requirements for obtaining a patent in the United States are described in Title 35, Paragraph 101, of the U.S. Code, i.e. the invention must be a new and useful process, machine, manufacture or composition of matter, considering a broader interpretation with 3 limitations: the laws of nature, the natural and physical phenomena and the abstract ideas, since those would be basic tools for science, therefore, not subject of appropriation.

In this sense, an invention must: (a) be new; (b) have a utility and (c) not be obvious. In general, we discuss the possibility of patenting 3 basic genetic materials: a) the natural DNA, found in nature, identical to the natural product; b) the isolated DNA, which is the natural DNA with the removal of the histones[16] so the sequence (containing the entire gene for a given function) is detached from the chromosome structure; c) the cDNA, which is a synthetic DNA containing only the coding regions for proteins present in the DNA (an *exon*-only DNA).

In general, when a gene is activated, the sequence is read and copied in the transcription process[17]. Once the transcription process is initiated, the histone proteins must be broken and the DNA strands are separated in the transcription bubble. Note that, at this moment, the natural DNA strand resembles the isolated DNA, even structurally.

Then, the copy of the genetic material is synthesized in a RNA (ribonucleic acid). In sequence, the RNA has its structure modified, including the removal of introns, so that the mRNA (messenger RNA) is created. During the translation process, the mRNA codons are read so that a specific amino acid is incorporated into the protein originated from the nucleotide sequence inside that codon.

The mRNA during translation or protein synthesis, leads to the incorporation of protein amino acids through their codons.

In the creation of cDNA, the reverse transcriptase enzyme is applied on the segment of the mRNA, and, as from a completely natural process, the cDNA is synthesised. Note that the sequences are complementary to each other.

The first argument is that, in the synthetic preparations of biological materials, there is a transformation of the DNA molecule

16 Proteins comprising the nucleosome, which function as the matrix in which DNA is wounded.
17 BOWMAN, Andrew. *Genes 101: Are human genes patentable subject matter?*. XVIII RICH. J. L. & TECH. 15. Available at: http://jolt.richmond.edu/v18i4/article15.pdf. Accessed April 17, 2014. p. 17.

by human intervention into something structurally and functionally different from its natural correspondence. This is because the desired sequence is removed from the remainder of the chromosome requiring the breaking of covalent bonds between the chromosome and its DNA and such chemical alterations promote the creation of a new molecule that does not exist in nature. There is a chemical change in the molecular level, with a modification in the composition of substances (in a physical change, there would be difference in appearance, odor, and no change in the composition). The isolated sequences do not have the regulatory regions; therefore, they are chemically different (different in structure).

Still, some consider that there is a functional difference in so far as they provide a new use of the natural sequences, which can not be manipulated and controlled in the same way. This is a justification, considering a new use.

However, Andrew Bowman[18] suggests that both structural and informational differences should be analyzed, in order to respect the judicial exception of the products of nature. For him, one must adopt the posture of the totality of the circumstances approach. Thus, two perspectives would have to be considered: a chemical perspective and a biological one.

From a chemical point of view, the analysis of the molecular structure is relevant. In this respect, there is a clear difference between the three genetic materials under discussion, since all cases involve the chemical breakdown.

Under a biological perspective, one must analyze the information that the structure reveals. In this case, there is no substantial difference between natural DNA and the isolated DNA since the genetic information encompassed, in both cases, is still the same.

According to Bowman[19], in order for a difference to exist, the isolated DNA sequence should encode a protein sufficiently different from that found in nature. However, for him, the cDNA would be subject to patenting, which is in accordance with the decision of the Supreme Court, although, in the end, it encodes the same protein. It states that the mature mRNA undergoes significant changes during transcription, specifically in regard to the removal of introns. In the "production" of the cDNA, a synthetic DNA is created, being composed only of exons.

Among the three materials, it is easily observed a molecular structural difference, but it must be verified if, in essence, there is a difference in the genetic information they contain.

18 BOWMAN, Andrew. *Genes 101: Are human genes patentable subject matter?*. XVIII RICH. J. L. & TECH. 15. Available at: http://jolt.richmond.edu/v18i4/article15.pdf. Accessed April 17, 2014. p. 18.

19 BOWMAN, Andrew. *Op. cit.* p. 22.

Judge Bryson[20], in his aforementioned opinion, refers to the example of minerals and leaves or plants taken from their origin. In such cases, there may be, the same as in the case of the isolation of the DNA segment, too much trouble and difficulties in the isolation process, but it does not mean that it is patentable subject matter. This is because the leave was created by nature, as well as the genomic DNA. For the isolated material to be patentable one must visualize an additional step that is not superfluous, that is more than conventional, obvious, routine or insignificant.

It is not hard to see the structural difference between the three indicated genetic materials. For example, the BRCA 1 is only 1 of 1773 genes in the population of 81 million nucleotides of chromosome 17; BRCA 2, in turn, is one of the 720 genes that make up the 115 million chromosome 13's nucleotides[21]. The isolated sequence has 7 thousand for the BRCA 1 and 11 thousand pairs, for BRCA2.

As for the chemical structural difference between natural DNA and the isolated DNA, the Supreme Court held that the breaking of chemical bonds would be sufficient to characterize the marked difference of the product of nature.

In regard to the material, functional or biological difference between the natural DNA and the isolated DNA, the US Supreme Court understood that they are not distinguished from each other. The Supreme Court determined that the isolated sequences do not deserve protection, given that they are essentially indistinguishable from the relevant portion of the DNA in question, encompassing the same genetic information.

In concern with the cDNA, which is an exon-only fragment of DNA, the Supreme Court understood that there is a difference from nature. Exons are the DNA fragments necessary for the creation of a protein; they differ from the introns, which do not encode any protein. But, for a protein to be created, the DNA must be transcribed into RNA, which is complementary to this sequence - this is the standard cell pattern. However, this is still not enough, and this pre-RNA, containing non-coding introns, has to be converted into mRNA, with the removal of introns (splicing). This resulting mRNA is then translated into protein.

Obviously, the mRNA cannot be patented, being a product of nature. From this mRNA, rather than translating into the protein, scientists use it to create a sequence complementary to it, which is the cDNA. Thus, since the cDNA is synthesized from mRNA, it contains only the coding sequences, i.e., the exons, differing structurally from the natural or the isolated sequence, which contains both introns and exons. The cDNA then acts as a double-stranded mRNA, being more stable *in*

20 Judge Bryson's opinion. Available at: http://www.cafc.uscourts.gov/images/stories/opinions-orders/10-1406.pdf. p. 88. Accessed April 17, 2014.

21 BOWMAN, Andrew. *Op. cit.*. p. 9.

vitro. However, this is merely temporary, since, once available to use for screening genes or sequences, for example, it is immediately broken, becoming a single stranded structure.

From a hereditary standpoint, it functions as an mRNA containing the same genetic information. Biochemically, namely in terms of structure, the mRNA differs only by the presence of ribonucleic acid rather than deoxyribonucleic acid and the presence of the nitrogenous base uracil instead of thymine present in DNA.

Now, one can not deny the structural difference is clear, but it is nothing more than a mere shift in the coding of the protein, as both the chromosomal DNA, the isolated sequence and the encoded protein, would be considered products of nature, therefore, not patentable. Scientists just created a new step to allow the patenting; they created a subterfuge to the impossibility of patenting the DNA and the mRNA. At the most, these are all processes and products predetermined by nature. That isafter examining the procedure of the cDNA's synthesis, one may find that it is nothing more than a sequence complementary to the mRNA, which is found naturally. This is because the laws of nature predetermine its sequence and function.

It can be concluded then that cDNA is nothing more than an obvious consequence of the mRNA, which occurs naturally; as well as the isolated sequence is a consequence, also obvious, in the purification process.

Still, it should be noted that, in the same way that the isolated sequence is, the cDNA is a basic tool of genetic engineering, preventing, at least to American law, researches based on that cDNA, which is not beneficial to the scientific and technological development. The very decision of Judge Robert Sweet in the 1st instance on the Myriad Case[22], referring to the isolated sequences, based on arguments raised by the scientific community involved, decided that the patenting of those would be a cool trick to circumvent the ban on patenting the natural genetic code. Similarly, the cDNA patenting is a mockery of the impossibility of patenting the natural code and isolated sequence - what happens is the mere displacement of the impossibility barrier. One can not deny the usefulness, but that use is not greater than that found in nature.

4. The Brazilian law standpoint

Brazilian patent law seems to leave no room for doubt, denying categorically the possibility of patenting the isolated gene sequences, including the genome, in art. 10, IX, of the Brazilian Patent Law n. 9279/96

22 BEAUCHAMP, Christopher. *The pure thoughts of Judge Hand: A historical note on the patenting of nature*. Available at: http://www.law.nyu.edu/sites/default/files/ECM_PRO_071307.pdf. Accessed May 09, 2014. p. 3.

(LPI). However, this does not mean one can not determine whether such sequences would be or not actual inventions and would not be the case to adapt the legislation to the American model of interpretation.

The national constitutional principle underlying the industrial property is in item XXIX of Article 5, stating that "the law shall ensure the authors of industrial inventions a temporary privilege for their use, as well as protection of industrial creations, property of trademarks, the company names and other distinctive signs, in view of the social interest and the technological and economic development of the country"[23].

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), of which Brazil is a signatory, states that:

> *Art. 7. The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.*
>
> *Art. 8, 1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.*

The Brazilian Constitution ensures the fundamental right of a protection to guarantee the authors of industrial inventions, and it is up to infraconstitutional law to simply clarify what would or would not be an invention. However, the exclusion of protection of certain inventions by mere legislative policy, although possible and accepted, if made without any basis in the protection of another fundamental right, may violate the constitutional provision that guarantees the right of inventors.

Verifying Art. 5, XXIX, of the Brazilian Constitution, in its final part, there is a purpose to be respected. This finalistic clause shows that the rights relating to industrial property are not derived directly

23 This purpose clause is also found in the US Constitution: *Art. I, S 8, cl 8. Constitution of the United States. Powers of Congress. The Congress shall have power: to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries*.

from the Constitutional text, but rather from the infraconstitutional law, which will only be in accordance with the Constitution if the objectives of (i) targeting the corporate interest of the country (public interest); (ii) promoting technological development of the country; and (iii) promoting the economic development of the country are met.

There is some controversy regarding the language "in view of the social interest and the technological and economic development of the country", contained in item XXIX, of Art. 5, of the Brazilian Constitution, if it would have an evaluative-finalistic content or more of a determinative-conditional content – i.e. if it determines the granting of a patent or if it orientates its purposes. It is understood that one does not exclude the other. In this sense:

> *In regard to item XXIX, Art. 5 of the Brazilian Constitution, the expression "in view of the social interest and the technological and economic development of the country" appears imprecise as to the content that you should report. If not so, one should not discuss it to be indicating an evaluative-finalistic content or conditional.*[24]

Gustavo Tepedino[25] adds that even if industrial (intellectual) property has an artificial content, it must, in any event, take account of the social function or purpose, conditioned such subjective legal situations to all relevant social interests and developments of the human personality:

> *Thus, trademarks, patents and all expressions of so-called "intellectual property" are artificially developed under the molds of a proprietary status, just to attract the protective efficacy that is attributed to private property. Also, in these cases, however, one can not fail to mention the social function which must be performed by these new subjective legal situations, which must also be contingent on the relevant social interests and development of the human personality, greater purpose of our civil and constitutional system.*

This should be understood as the very social function of

24 GRAU-KUNTZ, Karin. *Direito de patentes: sobre a interpretação do art. 5º, XXIX, da Constituição Brasileira*. Available at: http://www.newmarc.com.br/ibpi/d_pat.html. Accessed May 23, 2014.

25 TEPEDINO, Gustavo. *A garantia da propriedade no direito brasileiro.* Available at: http://fdc.br/Arquivos/Mestrado/Revistas/Revista06/Docente/04.pdf. Accessed May 26, 2014.

industrial property law, despite the controversy surrounding its legal status or nature. Technological progress is achieved and free competition guaranteed, when the patent system works (a) as a stimulus and encouragement to inventive activity; (b) as an incentive to the disclosure of technical information generated for the production of the invention by the inventor to the public, because of the contribution to the prior art; and (c) as encouragement to the spread of inventions, there is a balance in the rights conferred by the patent[26].

Thus, when the infraconstitutional law deviates from the possibility of patenting certain inventions (considering that falls within the doctrinal and factual concept, but not legal) which could mean a breakthrough in technological and economic development of the country, one can understand that such legal discrimination is in dissonance with the Constitution, since it neglects the interests of the technological and economic development[27].

Any restriction to a fundamental right (as is the right of inventors, in Art. 5, XXIX, of the Brazilian Constitution) shall comply with the principle of proportionality. Therefore, it is not a simple privilege established by law which must be interpreted narrowly, but a freedom or a fundamental right guaranteed as such, that should be interpreted broadly[28]. That is, a true balance of interests between the right to patent protection, free competition, freedom of initiative and the right to scientific and technological development must be pursued.

When there are one or more fundamental rights at stake - in this case, the right to protection of intellectual property, the value of free enterprise, free competition and the right to scientific and technological development - should they suffer weighting process due to the value they want to protect. In other words, it is possible that fundamental

26 DIAFÉRIA, Adriana. *Patente de genes humanos e a tutela dos interesses difusos: o direito ao progresso econômico, científico e tecnológico.* Rio de Janeiro: Lumen Juris, 2007. p. 176.

27 We clarify that, according to Adriana Diaféria, the final part of item XXIX, of Art. 5, of the Brazilian Constitution does not indicate only a social function to be attended, but a true right of the collectivity. To her, "it is presupposed in the granting of private industrial property rights - which aims to ensure the possibility of absolute exercise of rights to an invention - the protection of a higher legal interest which is the technological, economic, and, in consequence, scientific interest of the country (Art. 5, XXIX, CF). (...) The right of the inventor/patent holder and the right of the community to advance economic, scientific and technologically (...)."DIAFÉRIA, Adriana. *Patente de genes humanos e a tutela dos interesses difusos: o direito ao progresso econômico, científico e tecnológico*. Rio de Janeiro: Lumen Juris, 2007. p. 158.

28 We highlight that it is also a freedom, such as the freedom of initiative or the freedom of competition, and, in that sense, one should not simply apply the interpretation of rules system but the principles weighting system.

rights are restricted, and such restrictions are subject to limitations[29].

Thus, the balance of interests must be undertaken from the perspective of proportionality, which is composed of the subprinciples of suitability, the subprinciple of the need for such measure and the subprinciple of proportionality in the strict sense. The principle of proportionality serves as a parameter to gauge the conduct of the legislature when it concerns limitations to fundamental rights, such as the limitation imposed by infraconstitutional legislation (art. 10 and 18, of the LPI) on the rights of inventors (Art. 5, XXIX, of the Brazilian Constitution).

In this sense:

> *[...] The fundamental right to patent protection in Brazil is subject only to restrictions arising from a qualified legal reserve, as provided in Art. 5 °, XXIX, of the Constitution. Thus, the legal regulation of such right, operated by Law No. 9,279 / 96, (...) is subject to a constitutional filtering threefold: (i) formal: a formal Law is required for regulation; (ii) express content: the requirement that the regulatory law has "the social interest and the technological and economic development of the country" in view; (iii) of subtext: the requirement that the regulatory law performs, thoughtfully, an accommodation between the constitutional values involved in right to patent protection, seeking a great point of maximum achievement of them all; moreover, the law must respect, in the weighting, the core of the intellectual property right, without which there is no limitation, but a true suppression of the fundamental right.*[30]

The first issue to be addressed is the subprinciple of suitability, which consists on the adequacy of the measure adopted to achieve the intended purpose, i.e., there must be consistency in the means-end relationship. "The adequacy of means to ends translates into a requirement that any restriction must be suitable to achieve the persecuted purpose because if it is not able to do so, is to be considered unconstitutional."[31]

29 BARROS, Suzana de Toledo. *O princípio da proporcionalidade e o controle de constitucionalidade das leis restritivas de direitos fundamentais*. 2ª ed. Brasília: Brasília Jurídica, 2000. p. 160.

30 GAMA JUNIOR, Lauro; e BINENBOJM, Gustavo. *O direito à proteção patentária como direito fundamental: interpretações sistemática, teleológica, constitucional e internacional*. Available at: www.mundojuridico.adv.br/cgi-bin/upload/texto820.rtf. Accessed May 23, 2014.

31 BARROS, Suzana de Toledo. *Op. cit*. p. 76.

Thus, limitations of public policy on property rights or privilege, understood also as a fundamental right in our constitutional order, must be in the exact measure to ensure free competition and technological development.

As for the subprinciple of the need of such measure, the restrictive measure is essential to the conservation of itself or another fundamental right that can not be replaced by another equally effective, but less onerous measure.

In regard to intellectual property rights, one must pay attention to the fact that they should be granted broadly, given that there are more effective means of control without presuming the abuse of patent holders, namely, the compulsory licensing, under Arts. 68 and following, of the LPI.

If there are equally effective means, but less harmful or restrictive, that permit the achievement of the same goal, the measure is not reputable - that is, to impose legal limitations on what fits perfectly into the category of invention, being possible for the state to control the use of the privilege granted by the compulsory license, as well as with the possibility of not to impede research, even by legal provision, pursuant to Art. 43, II, LPI, it is not appropriate to exclude that category of invention from the concept of invention by mere public policy. What is meant is that there are other ways of performing the public policy that do not simply seal the possibilities of patenting.

The measure "is required when the legislature could not have chosen otherwise, another equally effective measure that would not limit or limit in the least significant way the fundamental right."[32]

In reference to the proportionality in the strict sense subprinciple, the matter is to indicate whether the measure used is in reasonable proportion to the end pursued, in regards to the idea of balance between the values and assets.

In the specific case of gene sequences, we should take into consideration, then, assuming that there really is an invention at stake[33]:

(i) If the exclusion of the possibility of patenting, based on

32 BARROS, Suzana de Toledo. *Op. cit.*. p. 80.

33 We clarify that regarding the genetic materials, the isolated sequences are not a true invention, for they are mere products of nature; however, the synthetic cDNA, based on the understandings of the Supreme Court, is a true invention. We reserve our understanding that the cDNA encompasses the same genetic information as the mRNA and its stability does not confer it a sufficient marked difference. As for the recombinant DNA, we understand that it is a true invention, although the recombined protein may not be. As for the other biological materials, one should verify the structural and functional difference in order to verify if they are different from nature. If it presents a marked difference, it should be considered a true invention. It should also be taken into consideration if the public policy rules exclusions from inventions are really legit regarding the interests pursued by law.

needs of public policy, a true invention is a suitable measure to achieve the social interest and the technological and economic development of the country;
(ii) If that occurs, whether there are alternative means to such exclusion, and less onerous to the fundamental right in question that are also able to achieve the same purposes;
(iii) If this also occurs, if the degree of importance of holding the ends justifies the degree of restriction imposed on the fundamental right at stake.

This is because the first step to be taken in accordance with national law is to check if the supposed creation is an actual invention, according to Art. 10, I, of the LPI. Thus, the analysis must begin with the distinction between discovery and invention, even for the inspection of the legislative limit of interference in the sphere of the fundamental right of the inventor. In this sense, it is recommended that, since the possibility of patenting some genetic materials may signify a market advantage in the pharmaceutical industry, studies should be conducted in order to determine how much they mean to the technological and economic development, in order to be proposed or not a modification in the Brazilian legislation.

We understand that if there is a competitive advantage in the patenting of these materials, attracting players and investment to countries that grant the patent, it should be made a change in the national practice, so we can offer a more competitive market on the same terms. The IMD World Competitiveness Center, pioneer in the field of Competitiveness of Nations and World Economy Ranking, considers, as a subfactor, in Infrastructure (Scientific Infrastructure), the number of patent applications, patent grants, number of patents in force, intellectual property rights, laws relanting to scientific research to encourage innovation as factors to evaluate the competitiveness of a country. In 2014, the United States of America was placed in the first position, while Brazil was placed in the 54th position, among 60 countries of various levels of development[34].

That is, the limitations of law, by public policy, on the patenting of inventions, such as Art. 10, IX, and Art. 18, III, both of the LPI, without any support in meeting the social function of promoting scientific and technological development, should be avoided.

With respect to the LPI, it expressly enunciates what can not be patented, either because it is not an invention, either by a prohibition. Such restrictions must be interpreted strictly in order to limit the possibility of the inventor's fundamental and constitutional right. That is, in principle, everything is an invention, unless those exclusions

34 Available at www.imd.org/uupload/IMD.WebSite/wcc/WCYResults/l/scoreboard_2014.pdf. Acessed May 11, 2015.

listed in Art. 10 of the LPI[35]. Thus, as a rule, all technical solution to a technical problem (invention) which is new, not obvious to one skilled in the art, and which allows unlimited reproduction without human intervention in each case is an invention[36].

Also, the language in Art. 18, of the LPI, by not considering a few creations as inventions, intends to repute the granting of the privilege in a broader sense, since every and all inventions not mentioned in the legal prohibitions should be patentable subject matter[37].

In this sense:

> *Art. 10. It should not be considered inventions or utility models: (...)*
>
> *Art. 18. It shall not be patentable subject matter: (...)*

Denis Borges Barbosa, contrary to the above proposed, affirms that the laws that grant patent rights should be strictly interpreted, taking into account the reasonableness and prudence applicable to the case[38]. This is because the freedom of initiative is the greater purpose of the law and that all exceptions to that, such as the intellectual property rights, should be interpreted in a strict sense[39]. The author bases his position on Diogo de Figueiredo's teachings[40]:

> *[...] The principles that define freedoms prefer to the ones that condition or restrict them; and the ones that grant powers to the State yield to the ones that reserve powers to individuals, and the ones that reinforce the spontaneous order are preferred over the ones that derogate it.*
>
> *The freedom is obviously of initiative and information,*

35 BARBOSA, Pedro Marcos Nunes; BARBOSA, Denis Borges. *O Código da Propriedade Industrial conforme os Tribunais – comentado com precedentes judiciais.* Furnished by the authors, via e-mail, on December 13, 2013. p. 6.

36 BARBOSA, Pedro Marcos Nunes; BARBOSA, Denis Borges. *Op. cit.*. p. 7.

37 DEL NERO, Patrícia Aurélia. *Propriedade Intelectual: A tutela jurídica da biotecnologia.* São Paulo, SP: Ed. Revista dos Tribunais, 1998. p. 78.

38 BARBOSA, Denis Borges. *Relatório de Análise da incorporação do conhecimento levantado e sua possível aplicação no Brasil Contrato n. 2010/000426. PROGRAMA DAS NAÇÕES UNIDAS PARA O DESENVOLVIMENTO. SERVIÇOS DE CONSULTORIA. PROJETO PNUD/ BRA/06/032. BRASÍLIA. Termo de Referência n. 133963*. Furnished by the author, via e-mail, on December 2013. p. 14.

39 BARBOSA, Denis Borges. *Op. cit.* p. 15.

40 MOREIRA NETO, Diogo de Figueiredo. *A ordem econômica na Constituição de 1988.* Revista da PGE-RJ, n. 42, p. 59. *Apud* BARBOSA, Denis Borges. *Op. cit.*. p. 15.

> *impeded by the privileges and exclusive rights. The spontaneous order is the free flow of ideas and creations, and the spread of technology.*

The author also cites the work of Carlos Maximiliano[41], affirming that the Brazilian Civil law[42] explicitly consolidated the classic precept - *excepctiones sunt strictissimae interpretationis* ("the exceptions are to be interpreted in the most strict sense"). He continues his thought, stating that the same guidance should be given to the rules that grant a privilege to certain people.

In general, for the isolated sequences, these would be mere discoveries for not having any difference from the products of nature, as already explained. Thus, even if there were no legal exclusion in the item IX, of Art. 10, these materials would not be considered as an invention, being mere discoveries, they would be already excluded based on the item I.

Denis Borges Barbosa also points out that the exclusion from patenting of the isolated materials should be in the language of Art. 18, of the LPI, for this would be an exclusion based on public policy:

> *[...] One can not decree what is or is not an invention, since it is a matter of fact – in a classic definition – being a technical solution to a technical problem. The language in Art. 10 indicates this notion, but it can not determine, for example, that a knowledge that leads to a technical solution to a technical problem is no longer an invention. The law can make something that is an invention to not be patentable; but the locus for this is in Art. 18*[43].

We understand that, technically, the association of a particular gene sequence to its function implies a mere discovery - a mere revelation of its function. This discovery, although extremely important, is a progress that must integrate the scientific knowledge basis - that is,

41 MAXIMILIANO, Carlos. *Hermenêutica e Aplicação do Direito.* 15ª ed. Forense: Rio de Janeiro, 1995. p. 225.

42 This understanding is in connection with the 1916 Brazilian Civil Code, which was revoked by Brazilian Civil Code of 2002. However, the Brazilian Civil Code of 1916 being substituted by the 2002 Code has no impact to this position, since it is a principle for the interpretation for laws widely preserved.

43 BARBOSA, Denis Borges. *Relatório de Análise da incorporação do conhecimento levantado e sua possível aplicação no Brasil Contrato n. 2010/000426. PROGRAMA DAS NAÇÕES UNIDAS PARA O DESENVOLVIMENTO. SERVIÇOS DE CONSULTORIA. PROJETO PNUD/ BRA/06/032. BRASÍLIA. Termo de Referência n. 133963*. Furnished by the author, via e-mail, on December, 2013. p. 14.

it only proves what already is in nature. Moreover, the use of a sequence in a specific process or product that is not obvious (not based only in the identified function) could be regarded as an invention, but not the isolated sequence itself - it is a mere discovery.

So, in summary, for the isolated gene sequences, there is a categorical prohibition and, in our view, they would be mere discoveries.

For the other products found in nature, it should be verified in a case to case basis if there is a structural and functional difference from the product of nature.

We also emphasize that not everything found in nature is organic, as it involves the meaning of "life". Therefore, when the language in item IX, Art. 10, of the LPI excludes only the "biological materials found in nature", it leaves room for the appropriation of non-organic products found in nature. Certainly, these products could not be patented because they are mere discoveries, if not present a structural and functional difference, but there is a legislative atecnia that could be avoided by simply deleting the item IX of Art. 10 of the LPI.

Another point that can be highlighted is that the LPI also states that "the genome or germplasm of any natural living being and the natural biological processes" are also not patentable. Thus, a first conclusion about the possibility of patenting in the Brazilian legislation is that we may patent the genetic sequence of a non-natural living being. For that matter, natural beings are the products of nature (those that occur naturally and have not been the result of human inventiveness). Consequently, non-natural beings would be those that would not occur naturally and are not found in nature. As an example, the genetically modified organisms. Thus, the gene sequences, with identified functions, from genetically modified organisms could be embraced by the patent, since not included in the categorical prohibition. Another possibility of patenting would be the recombinant DNA, and sometimes, if distinct from the one found in nature, the recombinant protein.

As for the synthetic cDNA[44], structurally distinct from the natural DNA, we understand that it contains the same genetic information as the mRNA, which is a product of nature, and does not meet the concept

44 We highlight that cDNA is a necessary step in most researches, then being necessary and obvious. "Among the technologies for the analysis of the gene expression, widely used, the most used and economic viable, in terms of quantity and quality of the generated information, are (i) the large scaled sequencing of cDNA libraries, that generate the information known as EST (*expressed sequence tags*); (ii) the technology known as SAGE (*serial analysis of gene expression*); (iii) DNA microarrays or chips (...) The (cDNA) libraries are prepared from isolated mRNA from interest samples, by using the reverse transcriptase enzyme, that generates a DNA complementary to the mRNA" MARQUES, Marilis do Valle; SILVA, Aline Maria da. *Genômica funcional: transcriptoma. In* MIR, Luís (org.). *Genômica*. São Paulo, SP: Atheneu, 2004. p. 123.

of invention.

However, since in the international scenery the cDNA has been accepted as patentable subject matter, we recommend giving this material such treatment, in order to reach homogenization regarding the theme and approximating Brazil in terms of competitiveness.

We also stress that, according to Art. 18 of the LPI, which states the prohibition of patenting a few inventions in regards to public policy, it includes in such prohibitions all or part of living beings, and we could interpret such prohibition to include the genetic sequences as part of living beings.

> *Art. 18. It shall not be patentable:*
>
> *III - the whole or part of living beings, except transgenic microorganisms that meet the three patentability requirements - novelty, inventive step and industrial application - provided for in Art. 8 and which are not mere discoveries.*
>
> *Sole paragraph. For purposes of this Law, transgenic microorganisms are organisms, except the whole or part of plants or animals that express, through direct human intervention in their genetic composition, a characteristic normally not attainable by the species under natural conditions.*

However, this would be a broad interpretation on a restriction to a fundamental right, as seen previously, which should not be accepted. That is, to the restriction it must be given the strictest interpretation that meets the objectives of the law. Therefore, it is not possible to interpret the genetic sequence as a part of a living being, because when the law refered to the genome or genetic sequences, even generically, it did explicitly (Art. 10, IX, and Sole Paragraph of Art. 18, both of the LPI).

In summary, (i) natural or isolated sequences are not an invention; (ii) other biological materials found in nature merely isolated are not an invention; (iii) biological materials that are not found in nature may be an invention (e.g., genetically modified); (iv) non-biological materials merely isolated and found in nature are discoveries and could not be patented; (v) non-biological materials, even if found in nature, could be patented, if they meet the structural and functional difference requirement (marked difference); (vi) the cDNA, which is a biological material (despite our reservation, since, in our view, it would be technically a discovery, however, is not the understanding that has prevailed in American jurisprudence), has been understood as an invention and should not be

confused with the concept of genome and can, therefore, be patented - anyway, it is not a natural material, but rather synthetic - that is, there is no express prohibition in Brazilian law; (vii) the recombinant DNA is an invention and can be patented as it is not a natural material. On the other hand, the recombinant protein that is identical to the one found naturally would not be considered an invention.

The contribution of the Myriad Case for the interpretation of Brazilian law is, given that it established the specific basis for the classification of some genetic materials as discoveries or inventions, it facilitaded the interpretation of Brazilian law. It is so that the Brazilian Patent and Trademark Office (BPTO) has issued new guidelines for the analysis of the patentability of biological materials, which will be addressed to later.

The parameter of interpretation of the law by the BPTO must take into account the principle of legality.

If the current legislation excludes the possibility of patenting biological materials found in nature, even if isolated, including the genome, the administrator can not grant patents for isolated sequences. On the other hand, we do not see in the law, a categorical prohibition for the patenting of the recombinant DNA, the cDNA and the recombinant protein, if present the marked difference.

Chemical compounds found in nature do not suffer protection, pursuant to sections I and IX of Art. 10 of the LPI. Also, the chemical compounds obtained synthetically that match the naturally occurring compounds without distinction are not considered as an invention, in accordance with the provisions of item I of Art. 10 of the LPI, if not biological, or in item IX, if organic.

On November 2012, the BPTO has made available for public consultation the new Patent Applications Examination Guidelines for the Biotechnology Area[45], finally approving, on March 12, 2015, the Resolution 144/2015, establishing the new Order of Examination Guidelines for Patents in the Biotechnology Area ("Guide").

According to this new Guide, in section 1.1[46], which deals with the industrial application requirement, we find that the BPTO believes that the isolated gene sequence with the identified function as a marker to diagnose prostate cancer, for

45 INPI. Diretrizes de Exame de Pedidos de Patente na Área Biotenológica. Available at: http://www.inpi.gov.br/images/docs/diretriz_biotecnologia_consulta_publica_30_11_12_original_0.pdf. Accessed May 27, 2014.

46 The genetic sequences even have their own eletronic listing system, under Administrative Order n. 81/2013. Available at: http://www.inpi.gov.br/images/docs/resolucao_81-2013_-_listagem_de_sequencias.pdf. Accessed May 27, 2014. And also Administrative Order n. 229/09. Available at: http://www.inpi.gov.br/images/stories/Resoluo_228-09-ANEXO.pdf. Accessed May 29, 2014.

example, meets the industrial application requirement by clearly revealing a practical use. But it does not state that it is an invention. Still, in item 4 of the Guide, we have access to the concepts and understandings of the BPTO on the legal text (subsection 4.1), relating the subject matters excluded from patent protection. In this sense:

> *the "whole" (of natural living beings) refers to plants, animals, microorganisms and any living being;*
>
> *"Natural part of living organisms" refers to any portion of the living beings, such as organs, tissues and cells;*
>
> *"Biological materials found in nature" include all or part of living beings, and extracts, lipids, carbohydrates, proteins, DNA, RNA, or parts or fragments thereof as well as any substance produced from biological systems, for example hormones and other secreted molecules, viruses, prions. It is worth mentioning that synthetic molecules identical or indistinguishable from their natural counterparts are also contained in this definition;*
>
> *By "isolated from nature" means any material extracted and subjected to a process of isolation and / or purification;*
>
> *"Genome" is the set of genetic information of a cell, organism or virus;*
>
> *"Germplasm" is the hereditary material set of a representative sample of individuals of the same species.*
>
> *"Natural biological process" is any biological process that occurs spontaneously in nature and where human intervention does not affect the final result.*

Analyzing the item that encompasses organic products, item 4.2.1.1, we find that such products even if produced synthetically, to receive patent protection, may not correspond to a naturally occurring product. Thus, because they are merely isolated products, they lack of

protection. However, if they are enriched, they would be eligible for protection when they have reached characteristics that are not found usually in the species and are based on direct human intervention.

The section 6 of the Guide deals specifically with biological sequences, such as nucleotides, amino acids and proteins. In such section, we note that the BPTO indicates that some requirements should receive special attention, namely: 1) the need to include the biological sequence in the patent application in order to meet the sufficient description requirement (Art. 24); 2) natural occurrence (Art. 10, IX).; 3) clarity, precision and justification (Art. 25) in the way such molecules/sequences are claimed; 4) novelty (Art. 11); 5) inventive step (Art. 13); and 6) industrial application (Art. 15).

We emphasize that the novelty requirement, when related to biological sequences, follows the same general principle, namely, that a sequence of amino acids or nucleotides to not be considered new, face to the prior art, all nucleotides or amino acids should be exactly the same and be in the same order as the sequence known in the state of the art. The nucleotide sequences may be referred to in patent applications in different ways: genes, vectors, plasmids, DNA sequence, RNA sequence, nucleic acid, oligonucleotides, primers, cDNA, and others.

There are different ways to make changes in the nucleotide sequences in order to differentiate them from their natural sequences, and the simple insertion of the term "recombinant" is not sufficient to distinguish it from the natural sequence[47].

Deletion of nucleotides in the middle of a claimed to be modified sequence is sufficient to distinguish it from its natural correspondent - namely the removal of introns, for example, would be sufficient to provide modified structural difference. However, if the deleted nucleotide is at the end of the sequence, the modification is not sufficient, since the resulting sequence would be identical to the natural sequence.

The BPTO further believes that various substitutions of nucleotides in a given sequence may not result in any change in the protein encoded thereby, due to the degeneracy of the genetic code. Therefore, when analyzing the patenting of a sequence, one must assess whether there is an inventive step in modifying (either insertion, deletion or substitution), taking into account the fact that some groups of amino acids have common properties. Thus, the inventive requirement depends on demonstrating an unexpected effect generated by the change in the state of the art.

As for the cDNA, in particular, the Guide addresses to it in item 6.3.6. We note that, according to the same guide, one should give the

47 This is because the recombinant or recombined product may be a mere reproduction of what is already found in nature, being only manufactured in a diferent way rather than the conventional one, by means of an insertion in a host. Or it may be a true product of the recombination.

ESTs the same type of treatment given to the cDNA. In the case of cDNA derived from messenger RNA (mRNA), normally, it is going to be different from the product of nature, as the sequence will present only the exons. Thus, in these cases it can not be considered that the cDNA molecule is equal to a natural molecule, and their patentability should be evaluated based on the requirements of novelty, inventive step and industrial application. On the other hand, when cDNA molecules are derived from mRNAs that lack introns naturally, obviously, the cDNA constitution will be equal to said strand DNA / gene served as a template for the synthesis of the mRNA. Thus, in these cases, the cDNA is not considered an invention, on the basis of Art. 10 (IX) of the LPI. In the cases of cDNA obtained from other types of RNA (such as tRNA, rRNA, etc.), they must be checked whether they are identical to natural DNA, a situation in which they would not be considered an invention.

In other words, it is exactly the understanding outlined in the US Supreme Court's decision in the Myriad Case and can serve as a parameter to the BPTO's understandings, not bumping into any legislative obstacles, as verified. Thus, the understandings outlined in the Myriad Case take relevance as they contribute to the elucidation of the framework of genetic materials, assisting the BPTO in building its understanding within the legal parameters of interpretation under which it may act.

5. Conclusion

This study aimed to sketch the complexity of whether or not to patent some genetic material. Thus, the objectives were: (i) to analyze the Myriad Case, exposing the final decision of the US Supreme Court; (ii) to identify if such decision was correct; and (iii) to analyze if the Brazilian Intellectual Property Law grants protection to gene sequences, demonstrating the impact of the decision in the Myriad Case.

To achieve these goals, the focus was on the analysis of the Myriad Case, in which there was the emblematic decision of the US Supreme Court for not recognizing the possibility of patenting isolated genetic sequences. Therefore, the decision was important to set parameters for distinguishing between a discovery and an invention, specifically with regard to genetic sequences.

In general, the invention is a technical solution to a technical problem, to be the creation of something hitherto non-existent; finding, moreover, is somewhat simpler than the existing disclosure. It is only justified the monopoly of intellectual property, restricting the free competition, when it is necessary to grant protection to inventions, in view of the social function that such granted intellectual property protection must fulfill (promoting scientific and technological development).

When patenting genetic sequences, it is clear that what is at stake, in fact, is the genetic information necessary for conducting research and promoting scientific development, since they are often basic tools for science.

That is, the patentability analysis under the Brazilian legal text must go through an analysis of the legislative policy interests, pondering: the need to ensure the return of investments; the need to protect biodiversity and heritage of a nation; and the need to encourage the development of research for promotion of scientific and technological development, among others.

From the moment the desire to patent these materials is identified as a competitive tool, one should consider whether this is a viable possibility, according to the Brazilian intellectual property legal system. The starting point for such an analysis was the Myriad Case.

In the Myriad Case it was established that the isolated gene sequence was a mere discovery: the identification of the function of a single gene would be just the revelation of something already found in nature, containing information that should serve to common human knowledge. On the other hand, the US Supreme Court stated that the cDNA is patentable matter, since it is not found in nature in that way, once the natural DNA strands contains the introns and exons and the cDNA contains only exons.

We point out that the decision was correct in the sense of removing the protection for isolated DNA sequence, according to American law, but that, technically, the same grounds used to remove protection for the isolated sequence can be used with regard to the cDNA. Clearly, in both cases there is a structural difference from the product found in nature, but for the isolated sequence, the US Supreme Court has not recognized the functional difference. Likewise, the cDNA is complementary to the mRNA (which is not subject to patent), therefore there is no substantial functional difference between those fragments.

This was the prevailing understanding, although technically incorrect.

Thus, in summary:

(i) The product must be truly an invention and not a mere discovery;

(ii) A product identical to the existing product, even if derived from a new source, does not meet the novelty requirement;

(iii) A merely extracted product may not be patented;

(iv) An isolated product should be much more useful than its natural form;

(v) The product will only be considered an invention if present structural and functional differences in relation to a product of natural occurrence;

(vi) The characterization of the functional difference may stem from a significantly higher utility (greater) (new therapeutic and

commercial value).

According to the LPI, to be patentable, an invention must meet the requirements of novelty, inventive step and industrial application (Art. 8). Established that, despite the controversy, we understood that the right of inventors, regardless of its legal nature, is a fundamental right with constitutional protection (Art. 5, XXIX, of the Brazilian Constitution). Thus, the interpretation of what is to be an invention must be broad and any restriction on this right must be strictly interpreted. Therefore, Art. 10, of the LPI is to be interpreted in the strictest possible way since it limits a fundamental right.

It is possible to restrict a fundamental righ - that is, in principle; there is no unconstitutionality in it. However, such restrictions should consider the principles at stake, namely: the free market and free enterprise, the right to intellectual property and scientific and technological development. A restriction to the fundamental right must be necessary, appropriate and proportionate to the objective to be accomplished, taking always in account the possibility of making use of compulsory licensing in the case of patent law abuse.

The BPTO, because it is a public administration office, must act guided by the principle of legality, so it can only act in strict legal terms - that is, it can grant or deny a patent based on strict legal terms.

In this sense, item IX of Art. 10 of the LPI, which deals specifically with the biological materials found in nature, including the genome, considers such products as not being an invention, with voices in the doctrine stating that, in fact, the law only excludes from patenting products that would be considered inventions - that is, the item would be best placed in Art. 18, of the LPI.

Continuing, from a more detailed analysis of the term "found in nature", we find item IX of Art. 10, of the LPI to not be technicaly correct, not even if placed in Art. 18, because it should not exist at all, since "found in nature, although isolated" would signify a mere discovery, which is already encompassed in item I of Art. 10. In other words, the item is unnecessary.

In reference to genetic materials, purely isolated sequences would be simple discoveries, since there is no functional difference from the product of nature.

With regard to the cDNA, the US Supreme Court understood to exist a functional difference. We understand that, although not found in nature in this way, the cDNA simply carries the same information contained in the gene. Similarly to the isolation, cDNA encompasses information that nature has produced, being complementary to the mRNA from which it derived.

The cDNA is the real working tool for genetic engineering (and not the merely isolated sequence), since it is more stable than the

isolated DNA sequence itself. It is the cDNA that is contained in the basic genomic libraries for genetic engineering techniques. Therefore, the decision is innocuous for patent titleholders of isolated genetic sequences, since it is common practice to claim the cDNA in the application also.

Because one can not patent mRNA, because of its natural occurrence, the obvious solution would be to patent the cDNA - that is, it is a true fraud to the patent system. However, as the cDNA patenting was established as possible in world practice, it should be applied such understanding in Brazil as a competitive tool, attracting investors in biotechnology to Brazil, which seek, here, to protect their rights.

What this study aimed to clarify is that the analysis of biological materials, taking as a basis the analysis of genetic material, should always be in a case by case analysis and in accordance with basic principles of the intellectual property system. That is, it must be considered that only the inventions themselves deserve protection and that any patent impossibility of such inventions should find support in consideration with other fundamental rights.

Still, par excellence, products found naturally can not be considered invention, but simple discovery. We add that the differentiation between natural products and products that do not occur naturally can not just be on synthetic or isolated terms, having to present the marked difference (structural and functional). We understand also that the functional difference, as the genetic sequences, will not exist when they transmit the same genetic information as the natural sequence.

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Panor. Braz. law - Year 3 - Numbers 3 and 4 - 2015 - pp. 342 - 357.
ISSN 1075-1343 (print)
ISSN 2318-1516 (online)
DOI: http://dx.doi.org/10.17768/pbl.a3.n3-4.p342

THE STATUTE OF THE CITY AND THE MASTER PLAN: INSTRUMENTS FOR SUSTAINABLE CITIES

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Abstract: The Master Plan is an important instrument to promote significant changes in Brazilian cities in order to achieve a sustainable development and create a new relationship between man and the environment. As far as this planning is concerned, the Master Plan is a basic tool to stablish guidelines to meet citizens necessities, as well as quality of life and social-economic development. For this purpose, citizens supervision and participation in local activities are necessary, so that Constitutional principles and democracy are accomplished. Civil society should be part of the decision-making process concerning enviromental public policies, as well as integrate elaboration, and supervision of these policies, taking into consideration that the public authorities, as well as the society, have to protect and defend the environment for the future generations (article 225, of the Federal Constitution). In this context, this task aims, firstly, evaluare the general guidelines od the Statute of the City (Law nº 10.257/01) and the importance of the Master Plans. Afterwards, adresses the participatory management as a way of implementing the sustainable cities.

Keywords: Statute of the City - Master Plan - Sustainable Cities - Democratic Management.

1. Introduction

The current national urban policy, formalized through the concepts brought by the Statute of the City and the Master Plans, has basal importance to the city plan, in order to build a healthy environment for the present and future generations.

The study of the cities Master Plans aims to organise the proper functioning of the city, combining socio-environmental role, well-being of the citizens and basic needs and, thus, the conduct of municipal public policies for the sustainable development.

Within this context, the present task addresses, first of all, the juridical foundation of the present urban development policy. Evaluates the guidelines of the Statute of the City (Law nº 10.257/01), as well as analyses the city master plans.

Ultimalely, considers the democratic management of the city, emphasizing its importance to the edification of a sustainable city.

2. Urban law and the relationship between city policy and environmental protection

Urban Law is the field in public law which comtemplates the rules and regulations of the urban activities.

Hely Lopes Meirelles warned that, concerning the urban law concept, all the areas where men have essencial role in the community are included. They are: housing, work, circulation and leisure (MEIRELLES, 2006, p. 513/514).

In constitutional matters, the urban law has arisen as an autonomous legal discipline only in the Federal Constitution of 1988, which, in the article 24, subsection I, sets the Union, the States and the Federal District the competence to legislate concurrently concerning the subject.

It is up to the Union, according to article 24, § 1º, to establish the general rules; to the States, the supplementary federal and state legislation, as appropriate (article 30, subsection II).

Besides the article 24, subsection I, which refers exclusively to the legislative competence, the Constitution of 1988 comtemplates the urbanistic subject and others precepts, as, for example, in the article 21, subsections IX and XX, that sets to the Union the competence to elaborate and carry out the national and regional plans of territory ordination and social and economic development, and to the establishment of guidelines to the urban development, including housing, sewerage services and urban transportation.

As if this was not enough, the constituent dedicates an entire chapter to the Urban Policy under the title regarding the Financial and

Economic Order.

In this regard, a warning should be given now – even in a superficial way, as this idea will be discussed later on – that the Constitution of 1988, when relating the general principles of the economic activity, refers clearly to the environment defense.

To José Afonso da Silva, the urban policy aims to build and order a balanced and healthy urban environment, where the qualities of a natural and artificial environment could coexist (SILVA, 2011, p. 1183).

On the other hand, Carlos Alberto Carmello Júnior and Gilberto Passos de Freitas remind us that the relationship between urbanistic activity and the use of spaces in intrinsic, perceiving this as the way to the rationalization of the use spaces, which is conditioned by the environmental preservation necessities (CARMELLO JUNIOR, 2012, p. 155).

Having clarified the concept of urban law and pointed the relationship between the urban policy and environmental protection, we can forward to the analyses of the coastal zone, its territorial occupation patterns and the main social-environmental consequences.

3. Statute of the city: a general view

The Federal Constitution, in the chapter dedicated to the Urban Policy, establishes that the urban development policy, performed by the municipal Public Authorities, according to the general guidelines set out by law, aim to order the full development of the city social activities, as well as ensure the well being of the inhabitants (article 182, *caput*).

The diploma which refers to the constitutional text is the Law 10.257/2001 (Statute of the City).

Though the Statute of the City does not comtemplate neither the concept defining rules nor the imposing specific obligations for the environment custody, unlike what it does to the ownership and use of the soil, its contribution to the environmental protection is expressed.

3.1. Social Role of the Urban Property

According to the article 2nd, *caput*, of the Statute of the City, the urban policy aims to order the full development of the social roles of the city and the urban property.

As it is musty, the constitutional order unites indissolubly the social role and the property right.

Yet there are still those who, nevertheless, intend to evade the environmental laws and regulations under the protection of the individual property rights (MARCHESAN, 2011, p. 340).

Also, there are those who mistakenly claim that the environmental protection represents an intervention to the private property rights.

Antônio Herman de Vasconcellos e Benjamin warns that the environmental protection takes part in the genesis of the property rights, as we can say the Environmental Law is due to the Property Law and the Public Law. It has taught that, in the light of the Federal Constitution of 1988, the established relationship does not represent intervention because the constituent has not conceived first the right to property to recognise the necessity for the environmental guardianship, marking that this is logically previous to that once the right to property does not exist without environmental safeguard, and historically contemporary, as both are recognised at the same moment in an unique normative text. (BENJAMIN, 2011, p. 7/8).

In the present constitutional order, without environmental safeguard, the property right – in its fullness – is not acknoledged. Therefore, there is no intervention, which presupposes the act from inside out, but interference. And, under the Federal Constitution of 1988, this interference is imposed both to the Public Authorities and to the private and it is the fundament of the non-obviation of the environmental obligations.

The apparent inexhaustibility of the natural resources, together with factors from different orders, has led, in the past, to the untrue conception of the predatory exploration of the land and its attributes. More recently, the Constitutions started to contemplate the protection of the environment as presupposed recognition of a valid property right.

It is certain that, from the constitutional foreknowledge of the property right, derive the power of claiming, usage, enjoyment, disposal and transfer. The constitutional text is limited to consagrate the institute, which has its content defined by the infra-constitutional legislation.

The legal literature says that the property experiments both internal and external limits. The first ones are intrinsic and contemporary to the controlling relationship while the last ones are consecutive. Those, as a rule, have the same origin: the social function of the property.

It must not be forgotten that the social function of the property reveals itself not only through negative impositions, but mainly through positive benefits. Concerning the environmental protection, the constituent, article 225, *caput*, from the Constitution, has imposed to the Public Authority and to the community, the duty to defend and preserve it to the present and future generations.

As if that were not enough, the article 170 of the Constitution, when relating the general principles of the economic activity, contemplates not only the social function of the property, but also the environmental defense.

In relation to the urban property, the article 182, § 2º, of the Federal Constitution constrains the fullfilment of the social function to the meeting of fundamental requirements of the city ordination

expressed in the Master Plan.

3.2. Sustainable Cities

The assurance of the right to the sustainable cities is the first general guideline related in the article 2nd of the Statute of the City.

The legislator has proceeded, defining the right to sustainable cities as the right to urban land, to housing, to environmental sanitation, to urban infrastructure, to transportation and public services, to work and leisure, to the present and future generations.

We can thus conclude that urban sustainability is not restricted to the environment, covering the expression of economic, social, cultural and political factors.

Maria Luiza Machado Granziera warns that the matter of sustainability rests on the tripod of economy, society and environment, leaving to the Public Authorities the obligation to provide the balance between these elements, conciliating the economic development with the environment protection (GRANZIERA, 2011, p. 1245).

It must not be forgotten that the guidelines presented by the article 2nd find resonance in the instruments provided by article 4th (which will be analysed in the lines ahead) or, in other words, the instruments serve the implementation of the guidelines, and, consequently, the attainment of the urban policy objective, which, according to the legislator, is to order the full development of the social functions of the city and the urban property.

If so, the subsections I, II and III of the article 4th, which provide, respectively, the use of nacional, regional and state plans of territory order and economical and social development; of municipal planning, related to the guideline provided by article 2nd , subsection I (right to sustainable cities), through which, the urban policy objective is accomplished.

The intrinsic relationship which is established among instruments, guidelines, objectives and guiding constitutional principles of the economic activity allows the interpreter to come to the conclusion that the implementation of the Statute of the City has defense of the environment as a logical and necessary presupposition.

At last, yet referring to the right to sustainable cities, it is important to register that the legislation has expressly mentioned the intergenerational justice, which aims to guarantee that the future generations can enjoy present resources (SILVA, 2008, p. 77).

4. URBAN AND HOUSING POLICY INSTRUMENTS UNDER THE LIGHT OF THE ENVIRONMENTAL POLICY

The urban development policy aims to order the social environmental functions of the city, ensuring the inhabitants well-being, facing the guidelines established in the article 2nd of the Statute of the City.

Several are the current instruments of the urban and housing policy, according to the article 4th, Law nº 10.257, of 2001, which regulates the articles 182 and 183 of the Federal Constitution of 1988.

> *Article 4th – For the purposes of this law, will be used among other instruments:*
>
> *I – nacional, regional and state plan of territory order and economic and social development;*
>
> *II – metropolitan regions, urban agglomerations and microregions planning;*
>
> *III – municipal planning, mainly:*
>
> *a) master plan;*
>
> *b) discipline of the land subdivision, land use and land cover;*
>
> *c) environmental zoning;*
>
> *d) multi-annual plan;*
>
> *e) budget guidelines and annual budget;*
>
> *f) participatory management of the budget;*
>
> *g) sector plans, programs and projects;*
>
> *h) economic and social development plans;*
>
> *IV – tax law and financial institutes:*
>
> *a) urban real estate property tax - IPTU;*
>
> *b) improvement contribution;*

c) tax incentives and financial benefits;

V – law and policy institutes:

a) expropriation;

b) administrative servitude;

c) administrative limitations;

d) real estate protection;

e) foundation of conservation units;

f) foundation of special zones of social interest;

g) grant to real right of use;

h) grant for special use for housing purposes;

i) compulsory fragmentation, building and use;

j) special adverse of urban properties;

l) leasehold land rights;

m) preemptive rights;

n) right to grant costly build and change in use;

o) transfer of the right to build;

p) urban operations in consortium;

q) landholding regularization;

r) free legal and technical assistence to underprivileged communities and social groups;

s) referendum and plebiscite;

t) urbanistic demarcation for land regularization;

u) ownership legitimation.

> *VI – Previous study of the environmental impact (EIA) and previous study of neighborhood impact (EIV).*

To implement the right to housing, urban services, sewage disposal, health, education, leisure, balanced environment for all the citizens, as well as other rights concerning life, the instruments mentioned above are indispensable.

However, the city has, as the main urban policy instument, the Master Plan, once there is, for the effectiveness of the instruments mentioned in the Statute of the City, the necessity of its inclusion in the municipal Master Plans, besides specific municipal laws aiming implementation and application.

4.1. The importance of the Master Plan in the building of a sustainable city

According to the Federal Constitution of 1988, the cities with over 20.000 inhabitants must adopt, mandatorily, a Master Plan as a basic instrument of the development policy and urban expansion (article 182, paragraph 1st). Besides that, for the cities with over 500.000 inhabitants, there is the need for a plan of integrate urban transport, which should be compatible with the Master Plan previously adopted.

The Master Plan should include the fundamental criteria and demands to order the city, aiming to meet the socio-environmental function of property, which has to be defined in the Master Plan.

This way, if the Statute of the City establishes the general guidelines of the urban policy, the Master Plan establishes the specific guidelines, directed to the meeting of the real situation and the local needs.

After being approved by law, the Master Plan becomes part of the municipal planning, focusing on the multi-annual plan, on the budget guidelines and on the municipal annual budget.

> *The fundamental principles, guided by the master plan, reflect the constitutional principles of the urban policy stipulated in the fundamental principles of the Democratic State of Law, of citizenship and humam dignity, in the principles of popular sovereignty (direct democracy-popular participation), equality, aimed at the protection and exercise of the right to the city and also guarantee*

> *a healthy and ecologicaly balanced environment (SAULE JUNIOR, 1999, p. 117).*

On account of being a complex instrument, a multidisciplinary team is needed for its preparation.

To Adilson Abreu Dallari, the Master Plan is a condition to implement several other urban policy instuments (DALLARI, 2006, p. 334).

With explicit strength, it is from the Plan that all the public and private actions to solve city problems will come, in order to achieve "the ideal city of the future" (SOARES, 2001, p. 54).

It is, therefore, a municipal planning that aims the socio-economical development of the city, as well as the environmental balance, in a way that all the inhabitants can have worthy and healthy life conditions.

To the elaboration of the Master Plan, the participation of the population and social representative associations should be guaranteed, besides the publishing of all the produced information, according to the paragraph 4º, article 40, Statute of the City.

Afterwards, a draft law to be approved will be elaborated by the Executive Power, through the City Council, according to the legislative process created by the Organic Law of the City.

The law which creates the Master Plan should be revised each 10 years (paragraph 3º, article 40, Statute of the City).

> *Concerning the way of changing the master plan, the review of this instrument derives from the need to adapt the public policies to the new necessities of the society, which is in constant change, and also, to evaluate the level of effectiveness achieved, in order to promote a better result from that date on. This demand for periodic review has become a legal obligation (SOARES, 2001, p. 56).*

Even during the review period, the Master Plan should meet mandatorily the socio environmental principle of the city, in order to guarantee the right to a sustainable city, adopting measures to ensure the right of the citizens, the ecologically balanced environment, the incentive to the economic activities, quality of life, among other items which are indispensable to the city.

> *The right to the city comprises the inherent right of the people who live in the cities to have the conditions of a life of dignity, to fully exercise the citizenship, to create, to extend the fundamental*

> *rights (individual, economical, social, political and environmental), to take part in the city management, to live in an ecologically balanced, healthty and sustainable environment (SAULE JUNIOR, 1999, p. 118).*

Within this context, the Coastal Zone cities should offer special attention to the urban planning of this area through the Master Plan.

5. Participatory citizenship: the democratic management of the sustainable city

The *caput*, from article 225, of the Constitution, imposes both to the Public Authorities and to the society the obligation to defend and preserve the environment.

> *According to the constitutional rule of the caput of the article 225, the environmental defense by the civil society is not only composed by mere voluntarism and altruism of a few idealists, but is formed by the fundamental legal obligations, revealing the double nature of right and fundamental obligation of the constitutional approach conferred to the environmental protetcion (FENSTERSEIFER, 2008, p. 123).*

The society takes part in the environmental management preserving the environment, as it respects the established rules about the subject, as well as demanding actions or policies from the Public Authorities regarding environmental protection, as the formulation of new protection rules, or, still, the effective proceeding of supervisory authorities, in order to condition and orient the political actions of the public interests.

In this way, the citizens are legitimated to supervise and delate the acts of the government, as well as protect their own rights and those of the collective custody. Ultimately, the citizen should take part directly and actively in the decision-making processes in which their interests are involved.

The society has, therefore, the duty to act in defense of the environment, baring in mind that the social participation is the "instrument truly able to boost the full respect of the environmental law, to transform the quality of life of the population and to preserve the environment for the present and future generations" (ARRUDA, 1997, p. 239).

> *The principle of participation composes one of the fundamental postulates of the Environmental Law.*

> *Although still incipient in our country, the truth is that this postulate is currently one of the main weapon, if not the most efficient and promising, in the fight for a more ecologically balanced environment (RODRIGUES, 2002, p. 255/256).*

Without the participation of the citizens, the concretion of the environmental democracy becomes impossible.

Concerning the environmental issues, the participation should be present, baring in mind the possible repercussion of the collective environmental degradation, as well as the nature of the diffuse transindividual rights (and, therefore, naturally collective), which imposes a democratic process and transparent decision-making about these issues.

In the light of the organizational perspective, the responsability lies with the State to create institutions and suitable procedures which make the popular participation possible, motivating the intervention and popular control of the decision-making involving environmental issues.

In relation to the city planning, the popular participation has gained attention in the Statute of the City, which has tried to join public authorities and society together.

> *The great advance of the law nº 10.257/01 – Statute of the City, was in order to count on the participation of the society in a public planning process, providing a series of instruments to induct the development of sustainable cities, such as: the finance of the urban policy, democratization of the urban management, as well as the ownership regularization (SOARES, 2001, p. 43).*

The Statute imposes the social control over the urban policy as it positions the democratic management among its principles (article 2º, subsection II).

There is, still, express provision that all the instruments prospected in the article 4º, which demand resources from the municipal Public Authorities (such as: master plan, multi-annual plan, previous studies on the environmental impact, among others) should be subject of control guaranteed to the participation of the communities, motion and civil society entities (paragraph 3rd, article 4º).

"The inhabitants of the city and the territories should act in favor of a unique urban space, cohabitaded by millions of individuals who share the same urban and institutional infrastructure" (SOARES, 2001, p. 49).

The Statute of the City determines, yet, that the Master Plan

should count on the participation of the population in its elaboration and supervision process, and also the community associations, through the acess to information, publishing, as well as public audiences and consulting (article 40, paragraph 4th).

> *The master plan as an instrument of participatory planning, to guarantee the right of the community to participate in all the phases of the process, should contain democratic mechanisms which allow the practice of the active citizenship, involving mechanisms related to the elaboration phase, such as the right to obtain information, to present propositions to amendments; public hearings and referendum, as well as its implementation phase and review through the democratic planning system (SAULE JUNIOR, 1999, p. 118).*

The democratic management of the city is guaranteed through the collegiate organs of urban policy, in the national, state and municipal levels; debates, hearings and public consultation; conferences about urban interests, in the national, state and municipal levels; and/or, still, popular initiative concerning draft law and plans, programs and urban development projects (article 43).

Besides, the managing bodies of the metropolitan regions and urban aglomerations will include mandatory and significant participation of the population and representative associations of various segments of community in order to guarantee the direct control of its activities and full exercise of citizenship (article 45).

Thus, concerning the planning of the metropolitan plans, they should be elaborated together, taking on account the interaction between the cities, taking on account that the decisions generate repercussion in everyone, for it is a urban aglomeration, the potencial problems (involving environmental issues or not) are usually the same, and therefore, should be analysed, looking for sollutions in a group, to benefit all the cities involved.

> *The paragraph 3rd of the article 25 of the Federal Constitution/88, establishes that from the common interest metropolitan regions (urban aglomerations and microregions) could be created through the complementary state law. This group of cities aims to integrate the organization, the planning and execution of public functions of common interest, indicating, therefore, ways to new configurations of*

> *the territory and its administration in the perspective to reach the sustainable development through the search of an adequate territory to the managing of ordinary problems. It is all about motivating the inter-municipal solidarity (SILVA, 2006, p. 14/15).*

We come to the conclusion that the legislation imposes the participation of everyone. The citizens are invited to exercise their civil duties, through participatory citizenship, aiming to solve the problems of the community, by the co-management of the urbanistic plans.

The right to the sustainable city will only be feasible when the population gets involved in the decision-making processes of the environmental urban conflicts, aiming the sustainable development of the city, as well as, concerning the urban planning, making it possible and encouraging the popular participation.

The democratic management of the city is imperative to the suitable urban planning.

6. Conclusion

The balanced and healthy urban environment presupposes the coexistence of the quality of a natural environment and the quality of an artificial environment. It is certain that the care with first one has direct repercussion in the protection of the second one to the extent that natural environment suffers the consequence of urban environmental degradation.

The Federal Constitution of 1988, in the chapter dedicated to the Urban Policy, establishes that the urban development policy, whose execution competes to the municipal Public Authority, according to the general guidelines set out by law, aims to order the full development of the social functions of the city and to guarantee the well-being of its inhabitants (article 182, *caput*).

The diploma referred to in the constitutional text in the Law 10.257/2001 (Statute of the City), which, in the article 2nd of the Statute of the City, relates the urban policy guidelines, assigning to the City a special role in the environmental protection.

The guidelines presented by the article 2nd find resonance in the instruments provided by the article 4th. This latter, in the subsection III, paragraph A, the Master Plan foresees that, in the diction of the article 40, is the basic instrument of the development and urban expansion policy.

The Master Plan is, therefore, in a last analyses, the most relevant instrument to make the urban policy concrete. It is from its concepts that the social function of urban property is fullfilled.

The Statute of the City, besides listing instruments of discipline of the use of the land, provides instruments which make the direct democracy concrete, and was chosen by the constituent in the article 1st, sole paragraph, of the Federal Constitution of 1988. To the list of instruments contained in the constitutional text (plebiscite, referendum and popular initiative), the Statute of the City has added other ones, in a list merely provided as an example (article 43).

We can not forget that the conscientious and vigilant participation of the inhabitants, something which is not part of the Brazilian citizenship habits yet, will build sustainable cities.

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Panor. Braz. law - Year 3 - Numbers 3 and 4 - 2015 - pp. 358 - 393.
ISSN 1075-1343 (print)
ISSN 2318-1516 (online)
DOI: http://dx.doi.org/10.17768/pbl.a3.n3-4.p358

CONSTITUTIONALISM AND JUDICIALIZATION OF POLITICS: THE "JUDICIAL" RIGHT TO HEALTHCARE IN BRAZIL

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Abstract: The right to healthcare in Brazil is seriously protected by the courts. Judicialization of everyday implementation of this public policy is a fact. One explanation may be provided by the way judges understand the effectiveness of this right. People hold subjective right to individualized healthcare benefits, and so they hold standing to sue the state in order to achieve it, regardless any consideration of public policies. Through an analysis of the jurisprudence on this issue, this paper aims to provide a critical understanding not just about what is actually happening in Brazilian courts regarding healthcare, but also to criticize it. The conclusion is that a "strong" conception of constitutionalism and fundamental rights may revel itself as "weak," from the standpoint of general equality. Judicialization ends up empting the public debate, leading the task of solving the distribution of scarce resources to a "gowned aristocracy."

Keywords: Judicialization of Politics - Right to Healthcare - Weak Judicial Review - Political Identity

"The law shall not exclude any injury or threat to a right from the consideration of the Judicial Power" is one of the most incontrovertible statements of the Brazilian Constitution.[1] Provided as individual guarantee under Article 5 – inserted in the chapter on "individual rights," those kinds of rights which Bobbio once called "first generation rights"[2] since they demand a negative provision from the State – this norm has been the constitutional basis for *individual* lawsuits against the State in Brazil. These lawsuits aim, however, provisions framed under the "second generation rights,"[3] as far as the claim is for "social and economic rights," such as those stated in Article 6 of the Brazilian Constitution. In other words, the lawsuits claim on individual basis for healthcare, education and housing, rights which require a "positive provision" from the State in a collective basis.[4]

Under the Universal Declaration of Human Rights[5] it is possible to observe the same kind of rule. More than providing substantive rights, such as freedom, equality, non-discrimination, life, safety, freedom from slavery and torture, etc.; the Declaration also ensures two "procedural" provisions. Article 8, with a similar meaning to the Brazilian constitutional provision quoted earlier, establishes that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law;" and, for this to perfectibilize, Article 6 provides the recognition of legal personality to everyone, everywhere. Thus, everyone, everywhere, carries standing to fill out a lawsuit to claim for fundamental rights.

The idea that to each existing right there is a correspondent lawsuit, or action, is not new. It is intrinsic to the theories of subjective rights – remember, for instance, the classic discussion between the theories of the will and interest carried out from Savigny, Windscheid, Jhering and Jellineck –; and it was expressly provided in Article 75 of the former

1 The Brazilian Constitution's English version is available at the Brazilian Supreme Court website. All English quotations from the Constitution are made from there. Available at http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf

2 BOBBIO, Norberto. *A Era dos Direitos*. Trad.: Nelson Coutinho. Rio de Janeiro: Elsevier, 2004, pp. 62-3.

3 BOBBIO, Norberto. *A Era dos Direitos*, 2004, p. 63.

4 LOPES, José Reinaldo de Lima. "Direito Subjetivo e Direitos Sociais: o dilema do Judiciário no Estado Social de Direito."*Direitos Humanos, Direitos Sociais e Justiça*, Ed. José Eduardo Faria. São Paulo: Malheiros, 2002,"pp. 126-7; SILVA, Virgílio Afonso da. "O Judiciário e as políticas públicas: entre transformação social e obstáculo à realização dos direitos sociais." In *Direitos Sociais: fundamentação, judicialização e direitos sociais em espécies,* edited by Cláudio Pereira de Souza Neto and Daniel Sarmento. Rio de Janeiro: Lumen Juris, 2008: 587-99, pp. 589-591.

5 Available at http://www.un.org/en/documents/udhr/

Brazilian Civil Code, current between 1916 and 2002, which literally stated that "to each right, corresponds an action that ensures it."In a similar sense, Kelsen's Pure Theory of Law argues that one only can think of subjective rights by recognizing that there is an obligation of non-interference, what is the same to say that there is subjective right when it is acknowledged that a prior obligation was established first to another person.[6] All these ideas of subjective rights and capacity for moving legal actions are part of the legal imagination: for a Brazilian jurist it is natural to correlate subjective right with action (lawsuit) against someone who has the obligation to provide something. *The question, then, is how to understand social rights in this individualistic context and language.*

We will not deal with theory of action here, though. By writing in a foreign language on a "Panorama of Brazilian Law," and by having as readers international legal and political community interested in better understanding Brazilian law, we are going to draw our panorama from the point of view of what has been called "judicialization of politics." The transposition of the political arena to legal courts is now well spread all around the world – especially in recent decades with the general acceptance of the idea of supremacy of the constitution[7] – in a phenomenon that has been called "new constitutionalism." We acknowledge that the expression "judicialization of politics" is broad and has been used as an umbrella to describe different related phenomena by giving them different meanings.[8] Here, we will limit the focus by the study of a recurring situation in the Brazilian courts.

As pointed out by Hirschl, the judicialization of politics usually "has been accompanied by the concomitant assumption that courts – not politicians or the demos itself – are the appropriate forums for making these key decisions."[9]He differentiates at least three types of judicialization[10]: the first is portrayed in the use of speech and legal practices in the fields considered primarily political, what can be called "judicialization of social relations;"[11] the second is portrayed as the judicialization of decisions on public policy, especially by challenging, in courts, the procedural aspects of public policies, which may be called "judicialization from below," since "it is often initiated by right claimants who challenge public policy

6 KELSEN, Hans. *Pure Theory of Law*. Translated from the Second Edition by Max Knight. Berkeley: University of California Press, 1967., 125-45, 168-71.

7 HIRSCHL, Ran. "The New Constitutionalism and the Judicialization of Pure Politics Worldwide." *Fordham Law Review* 75, n. 2 (2006): 721-54, p. 721. Available at SSRN: http://ssrn.com/abstract=951610.

8 HIRSCHL, Ran. "The New Constitutionalism,"2006, p. 723.

9 HIRSCHL,Ran. "The New Constitutionalism,"2006,p. 722.

10 HIRSCHL,Ran. "The New Constitutionalism,"2006,pp. 723-9.

11 HIRSCHL,Ran. "The New Constitutionalism,"2006,p. 725.

decisions and practices;"[12] and, finally, the third is portrayed as the judicialization of the most important political issues, the "mega-politics – matters of outright and utmost political significance that often define and divide whole politics."[13]

Our attention, by following this classification, is concentrated on three key questions: what kind of understanding of the fundamental rights supports the broad judicial protection of social rights? Is there such a thing as a "weak" way to think those rights which could, paradoxically, make them "stronger?" Finally we wonder, thinking over Hirschl thoughts: *how does the judicialization of public policies influence the most sensitive political issues in Brazil?* Or, raising the question using Hirschl's own terms: how the "judicialization from below" – which interferes significantly in the realization and even in the nature of a given public policy – might end up reflecting on the "mega-politics?"

Those problems are our backdrop. We will face those issues by observing the judicial position in the judgment of *individual* demands for drugs and healthcare provisions that are not provided by public policies.[14] Brazilian courts have given broad effectiveness to the fundamental right to healthcare: It is a paradigmatic case of "judicialization of politics." Worth mentioning that we are not just talking about courts granting expensive or experimental (i.e. with no scientific proved efficacy) treatments – which are granted by courts in a daily basis –, but we are also referring to alternative treatments and ones of controversial essentiality, such as oxygen therapy,[15]

12 HIRSCHL, Ran. "The New Constitutionalism,"2006, p. 725.

13 HIRSCHL, Ran. "The Judicialization of Mega-Politics and the Rise of Political Courts." *Annual Review of Political Science* 11 (2008), p.2. Available at SSRN: http://ssrn.com/abstract=1138008.

14 Therefore, actions in which the plaintiff demands drugs that should be provided according to the public policies' list, but which were not provided because of some problem in the implementation of such public policy will be excluded from the scope of this paper. Vieira and Zucchi refer to these actions as "justified," since the public policy expressly stipulates that such medication should be provided to anyone freely. Our concern in this piece is with the lawsuits they see as "unjustified:" "it would not appear reasonable for people to request medications and healthcare products when there is already an established and high-quality treatment policy. Nor would it appear reasonable to request products of doubtful efficacy and of a cost that is prohibitive to the health system, thereby compromising thousands of other people's access to medications by exhausting the budget" (VIEIRA, Fabiola Sulpino; ZUCCHI, Paola. "Patient Lawsuits and Treatment Provision on the Brazilian National Health Service." *Revista Associação Médica Brasileira* 55, n.6 (2009): 672-83. Available at www.scielo.br.

15 TJ/RS, 3ª Câmara Cível, Apelação Cível n. 70059548180, Rel.: Nelson Antônio Monteiro Pacheco, j. 26.03.2015. In a quick search using the parameter "oxygen therapy" at the TJ/RS website research tool we found more than 700 legal cases that were already ruled just in this appeal court.

speech therapy,[16] acupuncture,[17] hydrotherapy,[18] homecare,[19] IVF[20], ED[21], and even equine therapy[22] – all paid by the public and free healthcare system.

This paperwillnot only *describe* what the Brazilian judges are doing – although we spend a good length doing it. Our goal is to present a *critical* overview: through criticism it is possible to realize what is at stake, especially when the topic is related to law and politics. By means of the judicial realization of the right to healthcare in Brazil case, we are, in fact, raising one of the key political questions: *who should implement the "constitutional promises?"* After presenting in Chapter 1 a descriptive overview of the court rulings in Brazilian courts, in Chapter 2 we will raise some arguments that are completely ignored by the mainstream debates regarding the topic. We believe the overlooked idea of a non-legal protection of rights addresses several essential issues related to the justiciability of social rights. Finally, in Chapter 3, we will bring a word about the (arguably) "legal" reasoning that has been used in courts in cases such as those analyzed here, in order to try to rescue the political and democratic features of the implementation of the Constitution.

1. An Overview on Judicial Rulings Based on the Right to Healthcare in Brazil

On the Constitutional Provision of Right to Healthcare and the Selection of Judicial Decisions Presented

We have already mentioned that the Brazilian Constitution, in force since 1988, imbued with the spirit of the welfare state, in addition to "individual rights" also provides a wide range of "social rights" that demands for a positive action from the State,[23] such as healthcare. The

16 TJ/RS, 2ª Câmara Cível, Apelação Cível n. 70062063896, Rel.: Ricardo Torres Hermann, j. 19.12.2014.

17 TJ/RS, 21ª Câmara Cível, Relator: Des. Francisco José Moesch, Apelação Cível n. 70035728492, julgado em 28.07.2010.

18 TJ/RS, 8ª Câmara Cível, Relator: Des. Ricardo Moreira Lins Pastl, Apelação Cível n. 70047926647, julgado em 24.05.2012.

19 TJ/RS, 21ª Câmara Cível, Rel.: Marco Aurélio Heinz, Apelação Cível n. 70062799317, j. 11.02.2015.

20 TJ/RS, 22ª Câmara Cível, Rel.: Denise Oliveira Cezar, Agravo de Instrumento n. 70058803040, j. 18.12.2014.

21 TJ/RS, 1ª Câmara Cível, Relator: Des. Luiz Felipe Silveira Difini, Apelação Cível n. 70048376131, julgado em 09.05.2012.

22 TJ/RS, 8ª Câmara Cível, Rel.: Rui Portanova, Agravo de Instrumento n. 70060108479, j. 03.07.2014.

23 LOPES, José Reinaldo de Lima. "Direito Subjetivo e Direitos Sociais: o dilema do Judiciário no Estado Social de Direito", 2002, pp. 126-7; SILVA, Virgílio Afonso da. "O Judiciárioe as

pursuit of reducing social inequalities is a national goal reflected in the current Constitution – which is customarily called "Citizen Constitution," precisely because it has numerous social rights guaranteed in its legal text. Social rights, accordingly, are considered a condition for democracy.[24] Yet, more importantly to the practice of law, Brazilian Constitution provides in the first paragraph of the Article 5 that such rights are *immediately applicable*, meaning that those rights are not merely a program, a goal, or a promise, but something that can and should be implemented straightaway: "Paragraph 1. The provisions defining fundamental rights and guarantees are immediately applicable." What this prediction means, in fact, is also one of the concerns raised in this paper.

With regard to the right to healthcare,[25] it is provided in Article 6 in general and more abstract fashion,[26] listed among the social rights; and in the Article 196 in a concretely way.[27] This last statement is in a part of the chapter titled "Social Welfare, which "comprises 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,"[28]having as one of its mostly referred principles the "universality of coverage and service."[29] All this constitutional regulations are at a broader title dealing with what is called "social order," which "is based on the primacy of work and aimed at social well-being and justice."[30]

There is no doubt, therefore, that Brazilian State (whether federal, state or municipal levels)[31] is constitutionally obliged to

políticas públicas: entre transformação social e obstáculo à realização dos direitos sociais," 2008, pp. 589-91.

24 Lopes, José Reinaldo de Lima. "Judiciário, democracia, políticas públicas." In *Revista de Informação Legislativa* 31, n. 122 (Mai/Jul, 1994): 255-265, p.256.

25 Brazilian Constitution (and Brazilian lawyers in general) uses the Portuguese expression "right to health" meaning both an broader idea, the principle, that everybody in the country should be health, and that healthcare should be provided to everyone by the State – which means all Federal, State and Municipal Governments – on a free basis.

26 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.

27 Article 196. Health is a right of all and a duty of the state and shall be guaranteed by means of social and economic policies aimed at reducing the risk of illness and other hazards and at the universal and equal access to actions and services for its promotion, protection and recovery

28 Article 194.

29 Article 194, sole paragraph, I.

30 Article 193.

31 It is worth mentioning that the Brazilian federalism divides the responsibilities for healthcare between the Union (federal government), states and municipalities. Medicines to treat high complexity diseases or with high cost are in the Union's competence. Less complex medicines are, in turn, in states' level of attribution. Finally, the most basic medicines are in municipalities' level.

provide universal healthcare for all Brazilian citizens. In other words, three constitutional provisions read together – the one that says threats to rights cannot be excluded from consideration of the judiciary branch; the one that states fundamental rights are immediately applicable; and the one that declares right to healthcare as universal – are granting the grounds for individual[32] lawsuits filled out by citizens against the government demanding not only for medicines and treatments prescribed by public policies, but also claiming for benefits *not provided* by the public policies, which can include up to experimental treatments with no confirmed efficacy and even treatments that have not been approved by the regulatory agency.

To give an idea of the dimension of the issue, in November 2013 were being handled in Brazilian courts more than 221,000 lawsuits under the right to healthcare label, and of these, only in the state of Rio Grande do Sul (which has around 11 million inhabitants, representing 5.5% of the national population), there were more than 113,000 cases waiting to be ruled by a judicial court. It is more than half of whole country's cases. In its turn, the State of São Paulo, with more than 41 million people (21.7% of the population), was processing over 44,000 cases in the same period. Rio Grande do Sul's numbers are impressive, especially when one considers that in that year, out of R$ 316 million spent by the State Government with drugs, R$ 192 million were to comply with court orders – representing more than 60% of State's budget to healthcare.[33] Putting it in clear terms: *members of the judiciary decided in individual and concrete cases how to spend more than 60% of the budget for that period.* For this reason, considering that the vast majority of cases come from the same state of the federation, we limit ourselves to closely analyzecases from the Rio Grande do Sul's State Court (TJ/RS, acronym in Portuguese). Those should be sufficient to provide an overview on the issue in Brazilian courts.[34] Eventually, we

32 That is, it is not a class action, which details are outside the scope of this work. A good insight into the issue of collective actions can be found at LOPES, José Reinaldo de Lima. "Brazilian Courts and Social Rights: A Case Study Revisited." In *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?*, edited by Roberto Gargarella, Pilar Domingo, Theunis Roux, 185-211. Hampshire: Ashgate Publishing, Ltd., 2006.

33 TREZI, Humberto; OTERO, Julia. "Com 113 mil processos, RS é campeão nacional em ações judiciais na saúde."*Jornal Zero Hora*. November 17th, 2013. Available at http://zh.clicrbs.com.br/rs/noticias/noticia/2013/11/com-113-mil-processos-rs-e-campeao-nacional-em-acoes-judiciais-na-saude-4336052.html See also: CAVALCANTI, Hylda. Brasil tem mais de 240 mil processos na área de Saúde. *Site do CNJ*. April25th, 2011. Available at http://www.cnj.jus.br/noticias/cnj/14096:brasil-tem-mais-de-240-mil-processos-na-area-de-saude.

34 It must be said that there is a lack of detailed quantitative research on the lawsuits in this state. There are some data available about the situation in the states of São Paulo and Rio de Janeiro – the most populous in the country – which will be referred below. Investigatethe

will quote cases ruled by Brazilian Supreme Court (STF), since it is the highest judicial body in the country, which sets the guidelines for the courts and ordinary judges.

We will present also some findings of data research already carried out in the States Courts of São Paulo and Rio de Janeiro – which are the next in the number of individual cases in courts.[35] With respect to this choice, we need to note the absence of quantitative research on the cases of the Rio Grande do Sul's State Court. Thus, in spite of the fact that the data reported here are from different state courts, we believe that they serve to at least illustrate our argument and, more importantly, to enrich the discussion we are proposing here.

Decisions from Rio Grande do Sul's State Court, the Existing Data and the Brazilian Supreme Court

The right to healthcare is articulated as a corollary of the right to life. Health / life connection is the most touching argument present in the observed cases, but it is not the only argument that has based decisions on right to healthcare. By analyzing different judgments from TJ/RS, available on their website, we identified three most frequent kinds of arguments for granting medicines and healthcare treatments: the argument of life, the presumption of truthfulness of the prescription and the immediate applicability of any right (as opposed to the idea that the Constitution has provided merely a program of rights). The latter argument has also been referred by the STF, which, from that, had even grounded decisions based on the "right to hope," as we shall see later on.

The first argument to support large concession of drugs through judicial means can be summarized as follows: life is the greatest good of all – and law protects the greatest good – so that legal or political arguments can never serve to limit such fundamental right.[36] The

reasons why one statehas more than halfof this kind of lawsuits would be a taskfor another article.

35 Data from 2013 shows that from the 221,323 lawsuits waiting for a judicial ruling in the whole country, 113,953 were active in Rio Grande do Sul; 44,690 in São Paulo; and 25,234 in Rio de Janeiro (TREZI, Humberto; OTERO, Julia. "Com 113 mil processos, RS é campeão nacional em ações judiciais na saúde", 2013.

36... *a fundamentalidade do direito à saúde faz com que sua garantia seja a expressão de resguardo da própria vida, maior bem de todos. Alegações de questões principiológicas não se sobrepõem à necessidade de garantir o direito fundamental ameaçado, o que justifica a ordem de fornecimento gratuito dos medicamentos pleiteados*(Apelação Cível Nº 70060969946, Segunda Câmara Cível, Tribunal de Justiça do RS, Relator: Laura Louzada Jaccottet, Julgado em 05/12/2014).

We have kept the original Portuguese in the quotations from court rulings, as well as we have maintained the pattern of Brazilian referral to indicate the case. This was meant convey the original idea and to facilitate the localization of the cases. All court rulings are available at the

equalization between right to healthcare and the "right to life" has also justified the view that no regular norm or statute (such as the regulation of the healthcare system) can limit the right provided by the Constitution.[37]Consequently anything requested in those terms must be provided by the State, even if it is not provided in that way by public policy. In the same vein comes the argument that it is impossible to quantify life, then arguments based on the high costs of some medicine (which in this case had not been approved by the regulatory agency for pharmaceuticals issues in Brazil) do not serve to justify the denial to grant a treatment that may save a life.[38] Still, thirdly, there is the argument that, using a false collision of principles (borrowing Robert Alexy's terminology), opposes plaintiff's right healthcare against public budgetary interest, saying that healthcare is more important than State's finances.[39] Finally, the "right to life" has sustained not only the provision of treatments in life risk cases, but also has justified rulings in cases where a life does not yet exist: based on the "right to life," Courts have granted infertility treatments.[40]

The second group of arguments used to grant the claim is not

courts websites.

37 *I - O direito à saúde é direito social (art. 6º da CF/1988) e dever do Estado (art. 196 da CF/1988 e 241 da CE/1989) e está intimamente ligado ao direito à vida e à dignidade da pessoa humana; tem estatura de direito fundamental, seja no sentido formal, seja no sentido material, nos termos do parágrafo primeiro do consagrado art. 5º da Constituição da República. II - Desnecessária a previsão em lista de medicamentos essenciais ou especiais ou excepcionais da Administração, pois atos normativos não se sobrepõem à norma constitucional* (Apelação Cível Nº 70062771910, Terceira Câmara Cível, Tribunal de Justiça do RS, Relator: Eduardo Delgado, Julgado em 05/12/2014).

38 *O princípio da reserva do possível não se aplica, data vênia, quando se está diante de direitos fundamentais, como ocorre no caso concreto, em que se busca preservar a dignidade da vida humana, consagrado na Constituição Federal de 1988 como um dos fundamentos do nosso Estado Democrático e Social de Direito (art. 1º, inc. III, da Constituição da República). Busca claramente o apelante agregar valor monetário à vida humana, com o que não se pode compactuar. Com efeito, não é argumento para a improcedência o alto custo do fármaco* (Agravo Nº 70057635914, Primeira Câmara Cível, Tribunal de Justiça do RS, Relator: Carlos Roberto Lofego Canibal, Julgado em 30/01/2014)

39 *Alegar o alto custo do medicamento para o ente público se eximir de fornecer o tratamento solicitado pelo autor sobrepõe o interesse financeiro da administração ao direito à vida e à saúde daquele que necessita ser assistido* (Agravo de Instrumento Nº 70062413752, Primeira Câmara Cível, Tribunal de Justiça do RS, Relator: Sergio Luiz Grassi Beck, Julgado em 04/11/2014).

40 *A Constituição Federal de 1988 enumera, dentre os direitos fundamentais de todo o cidadão, o direito à vida. E o legislador constituinte, ao garantir o direito à vida, garante não apenas o direito a manter-se vivo, mas o direito de dar a vida, de gerar um ser humano. ... A própria Carta Republicana tem na família a base da sociedade (art. 226)* (Apelação e Reexame Necessário Nº 70061275285, Primeira Câmara Cível, Tribunal de Justiça do RS, Relator: Carlos Roberto Lofego Canibal, Julgado em 20/10/2014).

based mainly on the right to life or to healthcare, but in the presumption of truthfulness of the prescription – does not matter if it is from a doctor linked to the public system or private one – once the doctor would be in good faith.[41] The sovereignty of the medical prescription submitted by the plaintiff, more than avoiding any considerations of proofs that might sign on the contrary, it turns out to oversimplify the discussion. Such an argument is important because it is here where we can see a minor disagreement among the justices and judges: generally there is no disagreements on the first set of arguments, but here some justices have voted to allow the replacement of the drug or treatment required if the State is able to prove the existence of a similar treatment provided by the public policy.[42]In other words, in general judges do not disagree in granting the treatment, but it is possible to see at least an incipient attempt to make citizens get medication effectively provided by the public policy – usually it is a generic drug with similar effect, but without the label of a big laboratory, so that costs are cheaper for the public system. Moreover, in this case, the government had bought the drugs in large quantities, what reduces the cost and allows greater care to the population with the same budget.[43]

The third argument works to rule out a fairly widespread position especially in the 90s, which understood social rights simply a program for the country, as a goal – and therefore not as an immediately applicable right. The argument is supported on the aforementioned first paragraph of Article 5 of the Constitution, understanding the right to healthcare as having immediate and unconditional applicability, regardless

41 - *A medicação foi receitada com base em exame realizado na parte autora, sendo indicada para o seu caso específico, conforme atestado médico acostado, o que afasta os questionamentos sobre o tratamento ou mesmo a substituição. Ao depois, a afirmação do médico da parte autora não pode sucumbir diante de afirmação em abstrato de possibilidade de utilização de medicamento diverso. Impossibilidade de substituição.*

- O fato de um dos medicamentos pleiteados ser considerado "off label" não impede a determinação de fornecimento pelos entes federados, uma vez que não paira qualquer dúvida de capacidade ou boa-fé sobre a confecção de laudos, atestados e receitas pelo médico assistente da parte (Apelação Cível Nº 70062488291, Vigésima Segunda Câmara Cível, de Justiça do RS, Relator: Marilene Bonzanini, Julgado em 12/11/2014).

42 *A assistência farmacêutica por meio do SUS compreende os medicamentos essenciais (RENAME) e os medicamentos excepcionais constantes das listas elaboradas pelo Ministério da Saúde. Em princípio, não tem a pessoa direito de exigir do Poder Público medicamento que não consta do rol das listas elaboradas pelo SUS, balizadas pelas necessidades e disponibilidades orçamentárias. Hipótese em que o médico da autora admitiu a substituição de medicamento requerido por outro constante das listas públicas* (Apelação Cível Nº 70040643017, Vigésima Segunda Câmara Cível, Tribunal de Justiça do RS, Relator: Maria Isabel de Azevedo Souza, Julgado em 24/02/2011).

43 Linked tothis discussion,isthelobbyingby laboratoriesin the countryto implementitsnew drugs-sometimeswithoutproven effectiveness.

any provision or organizations on laws, statutes, executive orders or regulations of public policies: that tiny phrase on the Constitution is enough.[44]Looking it closely,we see that this is the strongest argument used when the discussion goes to the STF, precisely because they approach the issue as regards constitutional interpretation.

In paradigmatic case[45] the STF, more than addressing the issue concerning with the immediate applicability of rights, also brought a fourth argument: the "right to hope." Although it is not written in the Constitution, this right was used as basis for granting experimental treatment in Cuba. The plaintiffs, as stated in the court decision, suffered from "a very rare disease called retinitis pigmentosa. It is a like glaucoma, because it leads to a progressive loss of vision. But, unlike glaucoma, in which there is surgery and appropriate treatment, in retinitis pigmentosa there is still no cure or treatments. The plaintiffs wanted the Ministry of Health to pay the trip to Havana."[46] Despite some Ministers[47] have state that the system should not pay the trip, as there was no evidence of the effectiveness of the treatment, the case was upheld by majority. The reasoning referred to the already described arguments saying that "the economic aspect"[48] should not "prevail over the rights of citizens, considered the right to life and health," and that "the interpretation of the programmatic rule cannot turn it on an inconsequential constitutional promise,"[49] since it was immediately self-applicable, as provided by the first paragraph of the Article 5.[50] What was new, however, appeared as follows: "in [the situation of] doubt between hope of success [of the treatment] and failure, I get the hope of success, of course. I think this [hope] is a right ... [and is] the function of the Supreme Court protect the dignity of human life.[51]

Understood the panorama and the arguments for court rulings granting treatments through judicial means, we believe it might be useful to now turn the attention to some existing data in Brazil on the issue. We have already mentioned the lack of quantitative research about the judgments

44 The TJ/RS has numerous precedents containing this statement "*immediate and unconditional application of constitutional provision*". See, for instance: TJ/RS, 21ª Câmara Cível, Relator: Genaro José Baroni Borges, Apelação Cível n. 70052026465, j. 19/12/2012. TJ/RS, 21ª Câmara Cível, Relator: Genaro José Baroni Borges, Apelação Cível n. 70052076130, j. 19/12/2012.

45 STF, RE 368564, Relator(a): Min. MENEZES DIREITO, Relator(a) p/ Acórdão: Min. MARCO AURÉLIO, Primeira Turma, julgado em 13/04/2011, DJe-153 DIVULG 09-08-2011 PUBLIC 10-08-2011 EMENT VOL-02563-01 PP-00064 RSJADV set., 2011, p. 51-68.

46 Min. Menezes Direito, RE 368564, 68.

47 Brazilian Justices at the STF are called "Minister."

48 Min. Marco Aurélio, RE 368564, 75.

49 Min. Marco Aurélio, RE 368564, 75. See also Min. Ayres Britto, RE 368564, 87.

50 Min. Ayres Britto, RE 368564, 88.

51 Min. Luiz Fux, RE 368564, 103.

in the state of Rio Grande do Sul from where most of the above reported cases were extracted. However, corroborating our description, research conducted in the State of Rio de Janeiro between 2007 and 2008 concluded that "individual prescription, economic hypo-sufficiency and the urgency of the plaintiffs ... are the main grounds of judicial decisions."[52]

Yet, to illustrate the setting, especially regarding the elaboration of lists of medicines by the government as an instrument of public policy, it should be noted that, according to a research conducted in São Paulo between 2005 and 2009, 66.2% of the medicines requested did not appear in court any public policy's official list.[53] It can be concluded, therefore, that the lawsuits mostly seek to update the public policy, what may be a sign that the policy is lagged. The problem as we see, however, is not the claim to update the list – what could be required in a class action. The problem is the actual use of an individual demand for such proposes. In fact, the list happened to be updated*only for those who file the lawsuit.* This ends up relieving the political pressure over the Executive branch. However, instead of provide the right to everyone, or to those that are in a neediest situation, this actually provides the right just for those who are able to move the Judiciary.

Similarly, other quantitative research that aimed to "analyze the qualitative coverage ... for diseases listed in lawsuits" in São Paulo clearly shows that "there are limitations in terms of coverage," since some diseases listed in lawsuits are not included in any public policy.[54] On the other hand, there are studies suggesting that 73% of the judicially granted medicines may have been replaced by drugs that actually are in the list[55] and so that are provided in a free basis. From this one can infer there is at least some public policy for such diseases. In addition, the inference is strengthened when we see that the Ministry of Health's budget grew 3.2 times from 2002 to 2007 and the share of drug spending rose from 5.4% in 2002 to 10.7% in 2007.[56] Finally, even more impressively, one can realize the growth of public investment in the segment (in this case, considering also the special

52 VENTURA, Miriam et al. "Judicialização da saúde, acesso à justiça e a efetividade do direito à saúde."*Physis: Revista de Saúde Coletiva* 20, n. 1 (2010): 77-100. Available at www.scielo.br.

53 MACEDO, Eloisa Israel de; LOPES, Luciane Cruz; BARBERATO-FILHO, Silvio. "A technical analysis of medicines request-related decision making in Brazilian courts." *Revista Saúde Pública* 45, n. 4 (2011): 706-13. Available at www.scielo.br/rsp

54 VIEIRA, Fabiola Sulpino; ZUCCHI, Paola. "Patient Lawsuits and Treatment Provision on the Brazilian National Health Service", 2009.

55 VIEIRA, Fabiola Sulpino; ZUCCHI, Paola. "Distortions to national drug policy caused by lawsuits in Brazil." *Revista Saúde Pública* 41, n. 2 (2007): 214-222.

56 VIEIRA, Fabiola Sulpino. "Ministry of Health's spending on drugs: program trends from 2002 to 2007."*Revista Saúde Pública* 43, n. 4 (2009): 674-681.

expensive drugs for complex cases): "In 1993, the program distributed 15 pharmacological agents in 31 distinct presentations. This number increased to 109 agents in 243 presentations in 2009. Total Ministry of Health expenditure with medications was R$1,410,181,600.74 in 2007, almost twice the amount spent in 2000, R$684,975,404.43."[57]

Thus, even though there are flaws in the public healthcare service – especially when it is considered under the assumption that it should be universal – one also is able to see that there has been a substantially growth in public investments. There will always be at least some degree of insufficiency on the service, however. In this sense, it is nonetheless interesting the argument pointed out by Vieira when she demonstrates that to treat 25% of patients with chronic viral hepatitis type C – a disease that affects 1% of the Brazilian population – it would be necessary to invest 64% of the total Ministry of Health's expenditure (we mean, of the whole budget, not just of the drug supply line).So if 25% of possible cases were claimed in courts, two-thirds of the entire Brazilian health budget would have been spent to treat 0.25% of the population for just one disease.[58]

Moreover, it is worth mentioning that this framework exposes an increase in inequality, privileges and socioeconomic differences. It has been shown[59] how regions with greater economic development of the country, such as south and southeast, concentrated 85% of court proceedings, even though its population represents 56.8% of the total. By their turn, the less prosperous regions, northeast and north, despite the fact that they count 36% of the population, concentrated only 7.5% of the lawsuits on the issue.

57 CARIAS, Claudia Mezleveckas; VIEIRA, Fabíola Sulpino; GIORDANO, Carlos V; Zucchi, Paola. "Exceptional circumstance drug dispensing: history and expenditures of the Brazilian Ministry of Health." *Revista Saúde Pública* 45, n. 2 (2011): 233-240.

58 VIEIRA, Fabiola Sulpino. "Right to health litigations: a discussion on the observance of the principles of Brazil's Health System." *Revista Saúde Pública* 42, n.2 (2008): 365-9. Available at www.scielo.br/rsp. A similar argument is made by the same author in another article where she shows that "to implement this therapeutic assistance policy to only 1% of the population and for only two diseases would be higher than the total of all levels of government spent on the set actions and health services" across the whole country. (FERRAZ, Octávio Luiz Motta; VIEIRA, Fabiola Sulpino. "Direito à saúde, recursos escassos e equidade: os riscos da interpretação judicial dominante."*Dados* 52, n. 1 (2009): 223-251, p.238).

59 The data presentedare contained ina detailedstudy presented byFerrazand are based onperiodsbetween 2007and 2010 (FERRAZ, Octavio Luiz Motta. "Brazil, Health Inequalities, Rights and Courts." In: *Litigating Health Rights: Can Courts Bring More Justice to Health?* Edited by Alicia Ely Yamin and Siri Gloppen. Cambridge: Harvard University Press, 2011.). An interesting study, which reaches similar conclusions, but restrictedto the Stateof SãoPaulo,can be found atSILVA, Virgilio Afonso da; TERRAZAS, Fernanda Vargas. "Claiming the Right to Health in Brazilian Courts: the exclusion of the already excluded." *Law and Social Inquiry*, Forthcoming, 2008. Available at http://ssrn.com/abstract=1133620 or http://dx.doi.org/10.2139/ssrn.1133620.

The northeast region, with the lowest Human Development Index of the country, has one lawsuit for each 177,704 inhabitants; the South, with the highest HDI, has one for each 11,902 inhabitants.

This picture, we hope, shows that the reality is much more complex than the simplicity with which the courts are dealing with the issue.

2. The (non-)judicial protection of fundamental rights

The intense healthcare protection by the courts in Brazil described above should make everyone – and especially Brazilian people – happy and above all relieved. After all, given the broad and unrestricted effectiveness that the courts have granted to the right to healthcare, it has practically become Brazilian "absolute right;" or, to use an (embarrassing) expression adopted by some judges, the right to health would be our "super-right".[60] However, as we can advance, this is not exactly the case. Things are not so simple, and what appears to be protective fashion, in the end can actually generate perverse consequences.

This *almost* unrestricted effectiveness is commonly illustrated by the existence of a significant number of fancy judicial decisions that require the Executive branch in all three spheres of the federation to *immediately* provide *individualized* healthcare, including, as we have described, treatments with controversial essentiality and high cost drugs that still are experimental. When we refer how "generous" a court is, promptly one should recollect the kind of decision that provides acupuncture or equine therapy, for instance. Nevertheless, we shall refer something else, a detail that really shall relieve Brazilian people: courts do not even require the plaintiff to demonstrate or to proof that their claim was in fact denied by the public system in order to admit the lawsuit.

In procedure law, usually if "A" requires "B" the fulfillment of an obligation "x," "A" carries the burden of demonstrating the occurrence of the failure in the obligation or, at least, she must to show the factual circumstances of *in what manner* "B" violated her obligation. Courts have said, though, that this condition is irrelevant. Meaning if "A" needs the drug "x" she has the *right* to demand it directly at court and has not, therefore, any *duty*to demonstrate that "x" was indeed denied by government or by the public system. This is the dominant understanding of the TJ/RS.[61]Luckily (for court's everyday operation) a major part of

60 A quick research for the expression "super-right" at the TJ/RS Court's website provides us almost two thousand cases. As a instance, see: TJ/RS, Oitava Câmara Cível, Apelação Cível n. 70062642145, Relator: Luiz Felipe Brasil Santos, j.: 12/02/2015.

The expression, here, in the way we are using, has an ironic hue. Some judges take it seriously, though.

61 This understanding is really widespread in the court. As an instance, one might look some

the population is still not aware they have *this* right to healthcare.

Judges should find the reality very strange. On the one hand, they both declare (claiming universality for similar cases) the existence of a "super-right" to healthcare, affirming that citizens can *directly* access the Judiciary as the first door, and they grant treatments far beyond those provided in public healthcare policies. But, on the other hand, they see huge lines of sick poor people looking for a simple bed in a hospital; they read news about lack of beds, doctors and staff; they lament publicly when emergency rooms close; as they also may hear that a friend of his family sold the car to pay the only healing hope for his son. Maybe then they should ask themselves whether the fundamental right to health applies *only*to the ones that fill lawsuits before the Judiciary. Or, are those who obey the administrative organization of health system fools?

A judge might reply: "It's not my fault if the citizen has not filed the lawsuit. I just rule the cases that I have in my court." But this would be a purely cynical reaction. And the cynicism would be to ignore – deliberately – the fact that there are two abysmally different public[62] healthcare systems in Brazil: one dealing with scarce resources,[63]

of this cases: TJ/RS, 2ª Câmara Cível, Relator: Arno Werlang, Apelação Cível n. 70051838977, j. 19.12.2012; TJ/RS, 7ª Câmara Cível, Relatora: Sandra Brisolara Medeiros, Apelação Cível n. 70052503265, j. 09/01/2013; TJ/RS, 22ª Segunda Câmara Cível, Relator: Carlos Eduardo Zietlow Duro, Apelação Cível n. 70052645322, j. 21/12/2012; TJ/RS, 1ª Câmara Cível, Relator: Carlos Roberto Lofego Canibal, Apelação Cível n. 70052573797, j. 20/12/2012; TJ/RS, 21ª Câmara Cível, Relator: Francisco José Moesch, Agravo de Instrumento n. 70051494508, j. 12/12/2012.

São Paulo State Court follows the same token. See: TJ/SP, 6ª Câmara de Direito Público, Relator: Reinaldo Miluzzi, Apelação n. 1017443-98.2011.8.26.0506, j. 31/01/2013; TJ/SP, 2ª Câmara de Direito Público, Relator: Claudio Augusto Pedrassi, Apelação n. 0022091-53.2011.8.26.0405, j. 15.01.2013.

Federal Courts also stand for the same understanding. For instance, TRF-4ª Região, Quarta Turma, Relator: Luís Alberto D´Azevedo Aurvalle, Apelação n. 5000075-41.2011.404.7009, j. 22.01.2013.

Finally, ruling against his comprehension, at the 4th Region Federal Court: TRF-4ª Região, Relator: João Pedro Gebran Neto, Apelação n. 5005791-21.2012.404.7201, j. 20/11/2012

62 Perhaps it would be appropriate to say there are three healthcare systems in Brazil, two public and a private one: The public ones we are referring here in this paper. In the private system, usually people pay monthly for a healthcare company. In this system, the subscribers use other doors in hospitals, other doctors, wait in other lines, and so on. It is a completely different (and usually better) service. Finally, one also can pay her doctor directly when necessary, with no healthcare system at all. This last one happens to be the most expensive.

63 On the cost of rights, Holmes and Sunstein argue: "Rights are familiarly described as inviolable, peremptory, and conclusive. But these are plainly rhetorical flourishes. Nothing that costs money can be an absolute. No right whose enforcement presupposes a selective expenditure of taxpayer contributions can, at the end of the day, be protected unilaterally by the judiciary without regard to budgetary consequences for which other branches of government bear ultimate responsibility." (HOLMES, Stephen; SUNSTEIN, Cass R., *The Cost of Rights*:

which depends on organization and planning and is, thus, "flawed;" and another one perfect, immediate and which coverage is better than any health plan (we dare say) in the world. In simple words: the same Constitution, the same bill of rights, is being applying in Brazil in profoundly different manners. Government (i.e. Executive branches) applies the right to healthcare as a public policy: itcarries out thepublic service bydesigningpoliciesin light of theConstitutional guidelines, prioritizing somemost urgentareaindetriment of others. In this sense, policies involve, by definition, disjunctive choices. On the other side, judges, as already pointed out, apply the right to healthcare as an individual subjective right, as something that the state shall provide to any individual *regardless* of social policies, public choices or any other considerations for the community. It is, therefore, an individualistic – and not a social – approach.[64]

We shall remind that Brazilian Constitution's Article 196 refers that health "shall be guaranteed by means of social and economic *policies*." In the same token, Article 198 goes further and provides the establishment of a decentralized and hierarchical healthcare system (which is regulated by laws, statutes and executive orders). All this regulation establishes competences and procedures between the spheres of the federation, and even establishes how resources and budgets should be used. However, what judges really take into account is the provision saying that healthcare is a *fundamental right* and the provision saying the guarantee of fundamental rights has *immediate application.* And then, the understanding that any judge should recognize them in a simple decision-making operation even in lawsuits filled by individuals makes sense in their own terms. It is because, in their view, the Constitution is not just an empty program, but a document whose normativity and effectiveness citizen reaches through courts.

In brief lines, this is the synthesis of the constitutional culture that frames the thought that justifies *judicial* effectiveness of the fundamental right to health in individual cases moved against the State.

Constitutional Principles, Disagreement and Models of Constitutionalism

Based in our description so far, it would be natural labeling Brazilian judges as *activists*. However,this diagnosis may be refined. In general, activism, and judicial activism in special, is the deliberate action of ruling in favor of *her cause;* what means, she rules in order to implement the political / ethical / moral path *she* deems just, even if this ruling go against some statute or law establishing a different standard.

why liberty depends on taxes. New York: North & Co., 1999, p. 97).

64 This argument will be further developed latter on in this paper.

Tom Campbell, in an acid argument, considers the activist judge as a betrayer: legal system provides guarantees to the judge, ensures irremovability, and facilitates independence, and so on, in order to allow impartiality and equality under the law.[65]But, then, judges respond with *partiality.* The word betrayal is strong, but perhaps adequate. A partial judge has consciously abandoned the law.

Judicial activism in general is an isolated position, which is limited to the point of view of ethics of the judicial function. There are things that a judge *should* do; and others, such as to promote her own cause despite the frames given by a democratic system, that a judge *should not* do. Not surprisingly, the critical description of an activist judge simply says it is a tyrant. The issue of unrestricted effectiveness of the right to healthcare is not just a simple *desire* to give maximum effect to this right, though. In other words, we are approaching here not the individual judges, but a widespread mentality. As we did above, a jurist committed to the description of the Brazilian legal system in these matters would have to simply state: "that's how things work around here." It is, therefore, an established practice, sealed by the Supreme Court and, as in the examples we have cited, carried out (with little self-restraint) by ordinary jurisdiction. Usually descriptions and analysis rests on this dominant understanding, in Brazilian legal practice, of the judicial protection of fundamental rights. What we propose for this section is some exploration on the reverse: the *non-dominant* understanding.

The dominant theoretical area in Brazilian law, which has a decisive influence on how one interprets the effectiveness of the Constitution and fundamental rights, is the post-positivist ideas or neo-constitutionalism.[66] Nomenclatures, though, should not distract us, since any of these labels have reduced explanatory power, mainly when one consider the number of thinkers worldwide who identify themselves with this label. The crucial point, however, is to stress that the dominant standpoint is based on a strong sense of rights (usually formulated as "principles") which become the starting and the arrival point of the application of the law.[67] In this context, the judicial function gains a

65 CAMPBELL, Tom. *Prescriptive Legal Positivism*: Law, Rights and Democracy. London: UCL Press, 2004, p. 117.

66 A worthy account of this model is offered by Riccardo Guastini, when he approaches the "constitutionalization of law". Some features listed by him include a rigid Constitution; legal and judicial assurance of the Constitution; binding (normative) force of the Constitution; "over-interpretation" of the Constitution; direct application of Constitutional norms; consistent interpretation of laws through the Constitution; Constitution influence on political relations. See GUASTINI, Riccardo. La "constitucionalización" del ordenamiento jurídico: el caso italiano. In: CARBONELL, Miguel (Ed.). *Neoconstitucionalismo(s)*. Madrid: Trotta, 2003 (pp. 49/74), pp. 51-58.

67 This sentence deserves a better clarification. Principles would be the justification, the

much greater weight: judges not only have the task to rule conflicts, but to judge them giving maximum effectiveness to fundamental rights. In short, the idea of "effecting" the Constitution is the same to say *judicially* effecting it.

This way to see the law ignores – and in Brazil this news has not yet arrived; and if it has, definitely it is not on lawyers' thoughts – the very existence of *disagreement* on the fundamental rights' meaning and scope.[68] Consider, for instance, the principle of equality: A citizen "A" and a citizen "B" may *accept* with confidence the normativity of the right to equality, i.e. they can identify it as a "ought to be". However, nothing guarantees that both possess identical conceptions of what it means to violate or to carry out the principle of equality.[69] Rather, in a pluralistic society – such as Brazil – the normal and expected is that people disagree on such matters, which are based on political opinions and concrete notions of freedom, equality, solidarity, morality, dignity, etc. Legal principles, such as the ones listed here, hold an open meaning, lacking certainty and clarity.

Thus the idea that judges must carry out and maximize what the charter of fundamental rights prescribes usually does not take seriously the *fact of pluralism* and the *fact of disagreement*. Those are ignored political realities. Moreover, a judge seeking to resolve any conflict between the citizen "A" and the citizen "B" simply cannot rely solely on the right to equality, since *in abstract* both sides agree with this principle.[70] It is a common standard for the parties in conflict. To rule the case, the judge must *necessarily* engage in the development of a *concrete* political conception of the principle of equality, so that this concretion is, now, able to settle the conflict.

We are not even saying that there cannot be a good set of reasons to build an institutional arrangement in which judges have that kind of power – this is contentious and there is ample literature on the subject.[71] What we are actually contending is the absence in Brazil of clear and self-aware reason for that doctrine: it is just accepted as the only and

substance, i.e. the reflective dimension of the rules and ultimately of the law. One reflects on a rule from a set of principles. In this sense it is a starting point. But it becomes arrival point when it leaves the reflective dimension and passes to the dimension of adjudicator of the conflict.

68 Waldron's *Law and Disagreement* is mandatory on this issue (WALDRON, Jeremy. *Law and Disagreement*. Oxford and New York: Oxford University Press, 1999).

69 See ATRIA, Fernando, ATRIA, Fernando. "El Derecho y la contingencia de lo político", *Doxa*, n. 10, 1991 (pp. 319-345).

70 ATRIA, Fernando. "El Derecho y la contingencia de lo político", p. 332.

71 Waldronhimselfno longercriticizes thejudicial reviewas presentedinLaw andDisagreement. He has come to acceptthat the absence orpresenceofjudicial reviewmust take into accountcontextualreasons. See WALDRON, Jeremy. "The Core of the Case Against Judicial Review."*The Yale Law Journal*, 115: 1346, 2006.

obvious option. The silence of other institutional alternatives leads us to think that maybe there are also good reasons to prefer another type of arrangement or, at least, the raise some criticisms on the mainstream.

In any case, what does the *legislative* do but exactly what we point out above referring to judges: "engage in the development of a concrete political conception of the general principle?" When, for instance, a statute passed by the legislative branch grant half price tickets in cultural shows to students or when a statute provides specific rights to persons with disabilities, are not legislators concreting, by certain means, the abstractness of the principles? And if these statutes are enacted in a country with a list of fundamental rights, it is not the case that the statute is actually accomplishing such rights, that is, avoiding the principles of being "empty promises?"

What does not inhabit the thought of Brazilian lawyers, and especially those who apply the law, is the clear sense that *the legislative also interprets, applies and carries out the Constitution*. The existence of a practical and doctrinal state-of-mind which excessively positions in the judiciary the field to resolve moral and political disagreements under the cloak of "legal interpretation," in fact does not adequately consider the legislative as an interpreter of the Constitution.[72]

Considering legislators as a constitutional interpreter and as a figure, at least in principle, legitimate to define the content and scope of fundamental rights has shed some light to what have been called "weak constitutionalism" or *weak-form of judicial review*. For Mark Tushnet, the weak version of judicial reviewis not only the recognition of the *fact of disagreement*, but also the acknowledgement that different branches (executive, legislative and judicial) may provide reasonable and competing interpretations on fundamental rights. In his account, it also recognizes that there is no reason to prevail, *a priori*, one of these interpretations as definitive, especially the judicial interpretation. The idea of prevalence of judicial ruling on the meanings of the Constitution is typical of the "strong constitutionalism", or *strong-form of judicial review*.[73]

Some examples may show better the point. Let us see, for instance, Canadian Constitution: in Canada there is a Bill of Rights (Canadian Charter of Rights and Freedoms) and there is a Supreme Court with powers to control the constitutionality of laws. However, there is also a "notwithstanding" clause, by which the legislative can, provided they fulfill the requirements contained in the Canadian Bill of Rights, enforce a legal provision even if the Supreme Court considers that it is against

72 As a matter of fact, it must be said Brazilian judges are chosen to the position through a competitive and difficult public test. Thus, the criterion is completely technical. Political influences do not play a role. After two years, they reach lifelong tenure.

73 TUSHNET, Mark. *Weak Courts, Strong Rights*: judicial review and social welfare rights in comparative constitutional law. Princeton and Oxford: Princeton University Press, 2008, p. 228.

fundamental rights established in the Charter (the *notwithstanding clause* covers only the rights included in section 2 and between sections 7 and 15). Another example is the Constitution of Australia, since – despite rigid – does not incorporating a Bill of Rights. The Dutch Constitution, by its turn, expressly prohibits judicial review of legislation.[74]

Although it is not our objective to evaluate in details the experience of these countries, it should be noted that each of these arrangements imply consequences that sometimes can make *strong* a model that, in theory, would be *weak*, and by the same token some arrangements may turn in *weak* a seemingly *strong* model. The UK is commonly presented as an example of "weak constitutionalism," even after the advent of the Human Rights Act(1998). This is because, although British judges can perform the control of the legislation in the light of the European Convention on Human Rights (ECHR), they do not have the authority to declare the invalidity of the law, but only its "incompatibility," leaving to the Parliament the final word.[75] However, the Human Rights Act also provides (section 3.1) that: "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." Some believe that this norm, in practice, may grant more power to the British judiciary, turning it *stronger* than some countries with *strong judicial review* model.[76]

In any case, we shall stress these countries have an institutional history significantly distant from the *judicial* protection of fundamental rights. Their constitutional history is far from what we called above "direct application of fundamental rights" through courts, a kind of mantra of the Brazilian Constitutional Law. They serve, here, not just to show, by opposition, Brazilian legal practice regarding judicial application of rights, but also to set a different perspective on the issue.

This character of the Brazilian understanding can be explained in common sense terms: if the Constitution establishes principles of equality, freedom, dignity; and if it also provides that "health is a right of all," then give to the judiciary power to enforce these commandments in each individual case can only be a "good thing." This setting gives to law an appearance that it is committed with "justice." The world with fundamental rights can only be a better world. And if this is so, it also

74 See BAYÓN, Juan Carlos. "Democracia y derechos: problemas de fundamentación del constitucionalismo"**.** In:CARBONELL, Miguel y JARAMILLO, Leonardo García (coord.) *El canon neoconstitucional*. Madrid: Trotta, 2010.

75 For this topic, see KAVANAGH, Aileen. *Constitutional Review under the UK Human Rights Act*. Cambridge: Cambridge University Press, 2009.

76 As an instance, see HIEBERT, Jane L. "Governing like judges?" In: CAMPBELL, Tom, EWING, K.D and TOMKINS, Adam (Eds.). *The Legal Protection of Human Rights:*skeptical essays. Oxford: Oxford University Press, 2011, p. 54.

seems a good idea to judicially protect those rights.

We are trying to say maybe it is not. Definitely from Brazilian lawyers' perspective it is, but perhaps raising some doubts on the "constitutionalism of rights" could actually (paradoxically) help to grant more rights. What do places like the UK, Canada, Australia, Netherlands, New Zealand, Finland, Denmark, Sweden, have in common? These are countries that have no enthusiasm for the constitutional and judicial protection of fundamental rights.[77] They are countries that retain substantially the modern idea of parliamentary sovereignty. Finally, they have a seated culture of individual and social rights. In short: their rights are *weak* in legal-judicial sense but are *strong* (much more than in Brazil, surely) in the political sense, in terms of distribution and allocation of goods and resources.

Of course one could raise the fact that many countries that have a strong constitutionalism (Germany is a paradigmatic example) also have high levels of respect and realization of social rights. No doubt. We do not dispute it. However, in such cases, one also must ask whether this state of affairs arise from the constitutionalization of rights (and its judicial protection) or from the community's political commitment to building a welfare state. Examples of weak judicial review do not point out that strong judicial review countries in general are countries with unsatisfactory achievement of economic and social rights. But these examples indicate, at least, that the judicial protection of fundamental rights – especially social rights – is not a decisive element for the social promotion of these rights: it is not a *necessary* condition.

Hirschl and Rosevar refer, for example, the cash transfer program carried out by the Brazilian government since 2003 ("Bolsa Família"). The program, according to the authors, had a significant impact on poverty reduction in the country. They conclude that this improvement in social indicators took place directly from government policies of a left government, usually more committed to social rights, and not from a constitutional reform or from the active role of the courts.[78] Although this example requires some further research, the essence of the argument seems satisfactory: if the aim is to promote social equality and achieving social rights, there is relevant evidence that electing a government committed to this purpose is more effective than relying on the "juristocracy" placed in courts the task to maximize the fundamental rights.

77 HIRSCHL, Ran and ROSEVAR, Evan. Constitutional Law Meets Comparative Politics: socio-economic rights and political realities. In: CAMPBELL, Tom, EWING, K.D and TOMKINS, Adam (Eds.). *The Legal Protection of Human Rights:*skeptical essays. Oxford: Oxford University Press, 2011, p. 213.

78 HIRSCHL, Ran and ROSEVAR, Evan. Constitutional Law Meets Comparative Politics, 2011, p. 214.

This argument brings to the realm of politics not only the resolution of moral disagreements, but also the resolution of disagreements about the best way to (re)distribute resources. But, then, politics needs to work. If this is so, the attention of Brazilian jurists should turn less to the catalog of fundamental rights and more to the formal part of the Constitution, which involves the division of powers, federalism, share of duties and responsibilities, etc. It is paradoxical, but Tushnet may have a point already in the title of his book *Weak Courts, Strong Rights*: in the name of fundamental rights, it is worth looking less for fundamental rights, as a judicial term. In the name of fundamental rights, rather than focusing energies in discuss *how to judicially carry out these rights* – the issue that grasps most legal publications in Brazil – it would be better to question *which institutional role should play the judges* so then the whole country can be closer to the "promises" stated in the Constitution.

How could the judiciary, then, protect rights?

The judicial application of the right to health in Brazil does seem to be a *sui generis* case. The strong judicial review is characterized in general by the existence of a formal procedure for judicial review, a catalog of fundamental rights and the constitutional jurisdiction authority to interpret the Constitution; or by a combination of elements that give judges more power to give concreteness to the constitutional principles. But when it comes to economic and social rights, even countries of strong constitutionalism routinely engage in significant *deference* to public policies implemented by the government (in the broad sense). The idea that every citizen has an individual right to claim a health treatment *regardless* of the community and *without the need* to demonstrate that the public service has first actually failed in providing the care is something that probably would surprise lawyers and political scientists around the globe: how is so that nobody thought this before? If a singular judge can save us with a pen, the most complex political and social problems are solved!

But, if judges are not going to solve all social matters with individual rulings; which is the judicial branch's role?

Tushnet criticizes American constitutionalists for they cannot see that the judiciary can indeed play a role in the protection of social rights. But what motivates Tushnet's criticism is the fact that his fellows whenever reject the relationship between judges and social rights are actually thinking in terms of strong-form of judicial review,[79] that is, in a way to directly guarantee the right to the citizen through courts,

79 TUSHNET, Mark. *Weak Courts, Strong Rights*, 2008, p. 247.

as in Brazil, what would sound unacceptable to American mainstream. Tushnet's argument do not even touches the transmutation of a social right in an individual one, as we are trying to stress throughout this paper. He only argues that mechanisms of weak-form of judicial review may be useful to assist in the achievement of economic and social rights: courts do not need to be (always) strong.

In the area of social rights, the Constitution of South Africa took a realistic path. Section 27 states: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights".[80] Therefore, it is required from the government the implementation of reasonable measures to *progressively achievethe realization* of social rights. This view, in fact, considers the scarcity of resources and the very reality. There is no magic: the judicial review, even controversial, can focus on the reasonableness of public policy, which involves, by definition, a focus on promoting *general* social rights.

In the Constitution of Ireland, social rights are part of the "principles of social policy" and the application of these principles "shall not be cognizable by any Court under any of the Provisions of this Constitution."[81] Social rights are here *non-justiciable*; however, they may be the subject of a *judicial declaration* that demonstrates Parliament and Executive have failed in the realization of public policy. Legally, this is a *weak* measure, but maybe able to politically impact society and influence the agenda of the branches responsible for electing the means to effect social rights and, mainly, to influence the people themselves.

In its turn, the Constitution of Spain has also posited such rights in the realm of the "governing principles of economic and social policy." However, their Constitutional Court recently, and in the context of the government's austerity policies, suspended the rule restricting access to public health care to illegal immigrants. The Court found that the government was not able to prove the financial impact which could justify the damage to public health. Here, again, is the *public policy* what is under review, in a general fashion, and not specific individual cases.[82]

In light of these cases, we can already observe certain range. On the one hand, is the complete absence of the judiciary with regard to social rights – whether it comes to the public policy as a whole, or to individual and particular cases. In the center, there are mechanisms of

80 Tushnetgives the exampleof judicial review, in South Africa, onpublic policies forhousing. Seehis commenton the caseSouth Africav. GrootboominTUSHNET, Mark. *Weak Courts, Strong Rights*, 2008, pp. 242-243.

81 TUSHNET, Mark. *Weak Courts, Strong Rights*, 2008, pp. 239-40.

82 Tribunal Constitucional de España, Auto 114/2014, Recurso de Inconstitucionalidad 7089-2013, j. 08.04.2014.

weak judicial review, which can provide some hints to the role judiciary branch can have. And, on the other hand, there is the Brazilian legal practice, which understands the right to healthcare as an individual right, creating a unique health system for accessing "justice."[83] In the same way Tushnet would like their American colleagues observe the experience of weak constitutionalism, we also would like to see Brazilian constitutional theory adopting – or at least engaging in debates with – a skeptical attitude towards strong judicial review and, in particular, with the mantra of the direct application of fundamental rights.

3. Mega-politics and the Brazilian political identity

What are the meanings and consequences of the existence of two systems through which social rights are implemented in Brazil? Such a course of action increases or decreases the implementation of social rights? What is the character of the Brazilian Constitution and political system, given the way in which social rights are implemented and understood by the three powers? To answer questions like these, we have tried so far to raise a double criticism, since legal and political. Now, we want to change from a descriptive account to an argumentative one.

The criticism from the *legal* standpointhas at least three elements to be highlighted, all related to what we call legal reasoning problem: the way of reasoning in these cases, in our view, is no longer legal. This is because, first, it is treating a collective (or social) concept under the individual point of view and with individualistic framework. It is what Atria calls "de-socialization"[84] of social rights. In his account, it is just by de-socializing the social right that one can fully comprehend an individual lawsuit filled out in terms of individual subjective right: "what reaches the Court is not a social right, it cannot be a social right, but an individual claim, which expresses not the idea of a higher form of community but actually express a denial of it: the plaintiff's claiming for his own interest to be attended even at the expenses of all the other's concerns."[85] That is, the right to health, how reported here, is seen from an individualistic perspective and not from a social one.[86] Social rights'

83 Here there is a double meaning in Portuguese: "accessing justice" means both accessing justice itself, as a substantive fair share; and it also means to reach the judiciary branch, that is, to stand for lawsuits in order to claim for rights. Between the lines we may see what is said: it is *just* though the judiciary that justice is achieved.

84 ATRIA, Fernando. "¿Existen Derechos Sociales?" *Discussiones: Derechos Sociales* n. 4 (2004): 15-59.

85 ATRIA, Fernando. "¿Existen Derechos Sociales?", 2004, p. 52. This is our free translation from the original in Spanish.

86 Silva refers to a research which studying cases of granting drug in individual lawsuits found that in 93% of the decisions judges used the argument that the right to health was an

collective and relational feature is lost, and the right is transformed into a consideration that is due to the individual apart from the rest of society – for this reason Lopes believes that, in addition to a de-socialization, through an individual judicialization of social rights we are also facing a "de-politicization."[87]

The legal reasoning is not threatened only because the understanding of a collective right is made in individual terms. Secondly, there also is a confusion regarding the dogmatic of fundamental rights. In general, the Brazilian legal community accepts the distinction between legal rules and legal principles and the use of balancing method to apply these principles. Indeed, this has been the theoretical basis to support the *justiciability* of social rights. The balancing doctrine suffers many objections, but even if one accepts it, she must conclude that it actually does not support the Brazilian judicial attitude in implementing the right to health. To balance means checking how heavy each principle at stake is in relation to each other, so that in the end, the judge can figure out a rule that will guide the solution of the given case.[88] In other words, it is a kind of *comparison* between two principles. The procedure, thus, depends on the concrete facts involved in the case (i.e. it needs proof and evidence); but more importantly, it also depends on a serious approach to the tension between the eagerness to implement the social right – which is on one side – and the respect to the general equality and the legislative democratic decisions – which are on the other side. If judges treat the right to health as a legal rule of immediate application, as if the Constitution had already said everything in terms of the right to health, they are not *balancing* anything: there is no tension and consequently there is nothing to be compared with, since they just consider one side of the scale.

Finally, thirdly, the only way to describe the reasoning used in these cases is to call it, as does Lopes, "charitable reasoning."[89] It is understood as casuistic, concrete, exceptional, made for the good of the individual that receives it;[90] yet, precisely because of its exceptionality,

individual kind of right. He also concluded that, in general, judges were not concerned with knowing the existence of a possible public policy for the disease discussed in the case (SILVA, Virgílio Afonso da. "O Judiciário e as políticas públicas: entre transformação social e obstáculo à realização dos direitos sociais.", 2008, p. 595).

87 LOPES, José Reinaldo de Lima. "Brazilian Courts and Social Rights: A Case Study Revisited", 2006, p. 205.

88 ALEXY, Robert. *Teoria dos Direitos Fundamentais*. Trad. Virgílio Afonso da Silva. São Paulo: Malheiros, 2008, p. 97.

89 LOPES, José Reinaldo de Lima. "Em torno da 'Reserva do Possível."*Direitos Fundamentais: Orçamento e Reserva do Possível*, edited by Ingo Wolfgang Sarlet, Luciano Benetti Timm, 155-73. Porto Alegre: Livraria do Advogado, 2008, p. 171.

90 More than one author emphasizes pity that judges feel in individual cases. Pity that sometimes can be realized in the judges' ruling justification itself (LOPES, José Reinaldo de Lima. "Brazilian Courts and Social Rights: A Case Study Revisited", 2006, p. 206;Tessler,

it cannot be universalized. Universality, though, is one of the features that show the justice of a decision in terms of consistency. Legal rulings under a democratic regime should not be based on judgments *ad hoc*.

Charity's casuistry generates a lack in the public debate: no one is politically responsible or accountable for the realization of social rights in a systematic way. Here it is the criticism we have called *political*. If criticism in legal terms is to say that the way in which judicial rulings have been handed down in this area do not hold themselves even within the legal doctrine that firstly based them; political criticism is to say that such a course of action is contrary to the democratic national identity, generating a draining from the public debate and, in the end, contributing to the deterioration of democracy: instead of adding more people in public space, in fact it only strengthens a "juristocracy" distanced from the people.It is not the people who make the decisions on redistributive issues, but a gowned aristocracy devoid of political responsibility in the public sphere. Judges, at least in Brazil, have no incentive to take on responsibilities in terms of resource allocation or public justification in general and political terms.[91]

If social rights are understood as necessary for democracy's improvement – since they give conditions for a lot of people fall within the public space – so decisions about public policies indeed affect the national identity. Here Hirschl's division between "judicialization from below" and "mega-politics" referred in the beginning merges: the implementation of social rights, therefore, is not just a debate on budget, but it is also a discussion of the political identity of a country, it is a discussion on who counts as people, who takes the decisions, who are accountable for these decisions and, finally, who can exercise control over such decisions.

This becomes clearer when one considers social rights through the prism of "distributive justice." Since Aristotle distributive justice is understood as a criterion to justify the unequal treatment in order to achieve justice.[92] So, it is not a simple numerical equality, which is

Marga Inge Barth. "Medicina baseada em evidências e o direito à saúde."*Revista de Doutrina da 4ª Região* 29 (Abr. 2009). Available at http://www.revistadoutrina.trf4.jus.br/artigos/edicao029/marga_tessler.html).

91 As stressed earlier, Brazilian judges, except for the STF which are selected by Presidential indication and approved by the Congress, have lifelong tenure and are selected through public competition on legal knowledge LOPES, José Reinaldo de Lima. "Brazilian Courts and Social Rights: A Case Study Revisited", 2006, pp. 186-187). So, they are actually approved to the position through a "technical" test in which political considerations do not play a role.

92 ARISTOTLE. "Nicomachean Ethics," Book V, 2, 1130b30 and Book V, 3, 1131a25.In:*The Complete Works of Aristotle*, edited by Jonathan Barnes, 1729-1867. Princeton: Bollingen Series LXXI 2 , Volume Two. Sixth Printing, 1995.

carried out by "rectificatory justice" that considers parties as equals.[93] Distributive justice, then, demands a *predicate* through which the distribution can be made unevenly in order to reach justice.

The traditional, common sense, judiciary's role is to resolve rectificatory conflicts: the description of the judiciary as the branch that holds the task of judging conflicts between individuals in terms of commutative justice, in their bilateral relationships, is trivial. In this case, the conflict is not political in the sense used here in this paper, insofar as it just involves two individuals, in their own personal interests, within their individuality and without a greater relationship to public goods.[94] However, the reasoning is different when it comes to judging cases of distribution (or in this case would be better to say *re*-distribution) of public goods. If redistribution requires a predicate, it is always related to the whole which is distributed. The whole (i.e. what is distributed) is always kept in the horizon. In the case of social rights, the predicate is the need: to each citizen some part of the public goods in accordance with their social need. It shall be noticed that the whole (public goods), in this narrative, are always kept in consideration: citizens receive some part of the concrete whole and not some part of any vague infinite right. In other words, redistribution is made with reference to the whole, in order to increase public involvement in the public sphere. It is different in the rectification case, in which the decision is made with no predicate: is equality for equality in the crude sense, without any regard for the whole, since there is no whole but only the relationship between the parties involved in the specific conflict. Commutation and distribution follow different standards.

Redistribution is the political quarrel par excellence. It is representative of the community's internal debate performed in order to reach decisions on what to do with the public goods: in this sense it is, then, "mega-politics – matters of outright and utmost political significance that often define and divide whole politics."[95] The claim for social rights appears, therefore, not as the conflict with another private, in relation to particular goods, but as the conflict – or demand – filled

93 ARISTOTLE, "Nicomachean Ethics," Book V, 4, 1132a5.

94 LOPES, José Reinaldo de Lima. "Brazilian Courts and Social Rights: A Case Study Revisited", 2006, pp. 191-196;LOPES, José Reinaldo de Lima. "Judiciário, democracia, políticas públicas." In *Revista de Informação Legislativa* 31, n. 122 (Mai/Jul, 1994): 255-265. 255-7; BORGES, Danielle da Costa Leite; UGÁ, Maria Alicia Dominguez. "As Ações Individuais para o Fornecimento de Medicamentos no âmbito do SUS: Características dos Conflitos e Limites para a Atuação Judicial."*Revista de Direito Sanitário* 10, n. 1 (Mar./Jul. 2009): 13-38, pp. 25-29. Available at www.scielo.br

95 HIRSCHL, Ran. "The Judicialization of Mega-Politics and the Rise of Political Courts." *Annual Review of Political Science* 11 (2008), p. 2. Available at SSRN: http://ssrn.com/abstract=1138008

out in relation to the whole social body.[96]

A recurring argument between those who have a favorable view to the justiciability of social rights is precisely articulated in terms of reducing inequality. The argument is articulated as if what was actually at stake with the judicialization was a questioning on the form of how redistribution of public goods is made.[97] In other words, judicialization is presented as a progressive way to reduce inequality: encumber the rich to provide basic services to the poor.[98] Such an argument, however, seems fallacious insofar as judicial decisions are carried out primarily with the budget that would otherwise be used in that same area, i.e. in healthcare, but to benefit a larger group of poor people, and not just a specific person that could reach courts. The predicate – the criterion of distribution – is overlooked since the judicial order is not considering all other citizens, but just that one whose have filled out the lawsuit. Therefore, the judicialization does not increase redistribution, and does not generate a clash between "rich and poor," but only foster an internal fight between the poor.[99]

The political question saw from the point of view of redistributive justice is how to reduce inequality; or, in a political statement, is how encumber richer and favor poorer in order to meet the goal of reducing inequalities. The ultimate end – reducing inequality through healthcare provision – is defined by the Constitution, and it seems to be no major disagreements on this.[100] The question, then, turns to a consideration on the means, and not on the ends. Social rights are for everyone, but the

96 LOPES, José Reinaldo de Lima. "Judiciário, democracia, políticas públicas, 1994, pp. 255-262; LOPES, José Reinaldo de Lima. "Em torno da 'Reserva do Possível", 2008, pp. 155-159; LOPES, José Reinaldo de Lima. "Direito Subjetivo e Direitos Sociais: o dilema do Judiciário no Estado Social de Direito", 2002, pp. 124-129; LOPES, José Reinaldo de Lima. "Brazilian Courts and Social Rights: A Case Study Revisited", 2006, pp. 191-196.

97 LOPES, José Reinaldo de Lima. "Direito Subjetivo e Direitos Sociais: o dilema do Judiciário no Estado Social de Direito", 2002, pp. 138-40.

98 VENTURA, Miriam et al. "Judicialização da saúde, acesso à justiça e a efetividade do direito à saúde", 2010, p. 91.

99 LOPES, José Reinaldo de Lima. "Judiciário, democracia, políticas públicas, 1994, pp. 257-8; LOPES, José Reinaldo de Lima. "Direito Subjetivo e Direitos Sociais: o dilema do Judiciário no Estado Social de Direito", 2002, pp. 138-40.

Not to mention another aspect that could be used against this alleged progressive standpoint: judiciary may be conservative rather than progressive, working as an institution to preserve ancient privileges (Lopes, "Brazilian Courts," 194; LOPES, José Reinaldo de Lima. "Em torno da 'Reserva do Possível", 2008, pp. 140-141). Hirschl presents several cases in which important social changes were barred by courts worldwide (HIRSCHL, Ran. "The Judicialization of Mega-Politics and the Rise of Political Courts", 2008)

100 VENTURA, Miriam et al. "Judicialização da saúde, acesso à justiça e a efetividade do direito à saúde", 2010, p. 84.

Constitution does not say who first,[101] neither does it say how: it just states the ideal, but not the path to reach it. Thus, the political question is *how* to implement this goal and *for whom* first. It is a question on the means.[102]

When we stress the political hue of redistribution being a performance in public space, we can be better understood if one recollects the idea of the political outlined by Hannah Arendt in her book "On Revolution," mainly her emphasis on the "public space" as the field where political action is possible.[103] Arendt's emphasis on the formal aspect of politics – and the absence of references to the substance of the action – is what allows the existence of pluralism. However, when the tough decisions – those that can cause conflict about the redistribution of resources between rich and poor – are removed from the public space and allocated in courts (which in this case cannot be considered a "public space" because they do not allow "political action"), the acceptance among different social groups is hampered. The social bond begins to break: there is no more understanding of how to distribute public goods, but there are just demands and conflicts about what to receive (as an *individualright*, we shall underline). The grammar is not anymore about *us*; but it is just about *me*. Once more, the connection between social rights and mega-politics is seen.

Redistributing hurts and pains: those in a more advantaged position do not like redistribute. And to keep the bonds in such society redistribution in a way must be accepted as legitimate by those who have more. This will only happen in the public sphere, i.e. in politics, and not just by the desire of a group of "technician" lawyers and judges pretending that political issues are legal ones. Doing redistribution in the particular case (lawsuits, for instance), without attacking the issue as a whole, only generates a fake-redistribution among the disadvantaged layers, having the side effect of ensuring the maintenance of the *status quo* for those more favored, who, then, do not participate in the redistribution at all.

The rulers (politicians, not judges) – who, in principle, are accountable before the people that elect them – do not feel, and are no longer seen by the population, as responsible for the operation of the system. In fact, they end up accepting the taking of their competences by the judiciary.[104]In turn, the judges also are not politically accountable

101 LOPES, José Reinaldo de Lima. "Brazilian Courts and Social Rights: A Case Study Revisited", 2006, p. 204.

102 The political debate can also be on the ends, of course – in which case the conflict is even more severe. However, in most of the time, the community's internal question, the everyday politics, is concerned with the *re*-distribution of public goods.

103 ARENDT, Hannah. *On Revolution*, intr. Jonathan Schell. New York: Penguin Books, 2006, p. 19, p. 25, pp. 132-133.

104 Hirschl defends the argument that there is support from politicians to the judges' growth of

before the people (remember that they are not elected in Brazil and have a lifelong tenure, besides other privileges and protections) and they do not have the burden of justifying the political criteria for the redistribution that they are doing in practice: they do not accept calling it "politics," but call it "law."Consequently they approach it in a technical, and not in a political, fashion. Moreover, judges only act when provoked in a lawsuit, so that, in their narrative, they just "implement the Constitution" in the specific and concrete case.

By this technical – merely legal and not political – self-understanding, the judiciary turns out to hide the political aspect of the discussion. However, behind something they call legal, it is just charity: using the legal "technical" term "right" they ignore the political and distributional aspects of the situation.[105] They actually are doing politics, but without the burden of accountability before the people. In this way, the discussions are reached just by some juristocrats, in a hermetic realm; and not in the public sphere, where everyone is able to participate.

4. Conclusions

It is symptomatic to see that most of the articles on the subject in Brazil are launched with the following problem: "how to limit the judiciary?"[106] This not only shows who has effectively exercised the power to decide and implement public health policies in Brazil, but in a subtle way also shows that the judiciary is accumulating the functions that should be in the Executive branch (implementing public policy) and in the Legislative branch (deciding public policy).[107] On the other hand, those who stand for a more favorable view on the individual justiciability of social rights, are dedicated to write about how the judiciary can "democratize" itself or to technically develop tools to be able to implement its own rulings in a more just and democratic way.

power (HIRSCHL, Ran. "The New Constitutionalism and the Judicialization of Pure Politics Worldwide, 2006).

105 LOPES, José Reinaldo de Lima. "Judiciário, democracia, políticas públicas, 1994, p. 255.

106 TESSLER, Marga Inge Barth. "Medicina baseada em evidências e o direito à saúde, 2009; .LOPES, José Reinaldo de Lima. "Judiciário, democracia, políticas públicas", 1994;BORGES, Danielle da Costa Leite; UGÁ, Maria Alicia Dominguez. "As Ações Individuais para o Fornecimento de Medicamentos no âmbito do SUS, 2009, among others.

107 It is still interesting to see the shock of a Federal Court's judge reporting that she was invited to a medical congress as a "specialist" to discuss issues as "perspectives around ... 1) coated stents vs. uncoated ones for acute coronary syndrome; 2) monoclonal antibodies for the treatment of psoriasis; and 3) calcium for prevention of hypertension in pregnancy and its consequences" (TESSLER, Marga Inge Barth."Medicina baseada em evidências e o direito à saúde, 2009).

That is, on the one hand we see that the judiciary actually has exercised powers that, in principle, should be exercised by other powers[108] which are, in their turn, more accountable in the public sphere. And, on the other hand, we see that the judiciary has been trying to catch up, and growing its legitimacy, in order to exercise such power. In other words, it is incorporating typical legislative procedures (public hearings, for example) and executive ones (hiring technical professionals from different areas, for instance) in its quotidian work: the judiciary is turning itself into a great power, which accumulates legislative, executive and judicial tasks.[109]

If on one hand such measures help the judiciary to better handle the distributive aspects involved in cases that deal with social rights – for, as Hirschl points out, judicialization "has been accompanied by the concomitant assumption that courts – not politicians or the demos itself – are the appropriate forums for making these key decisions"[110] – such procedure raises the question: instead of match the Executive and the Legislative, would not be better – and more according to the Constitution – allowing such powers exercise their functions by themselves?

One of the judiciary's defenders argument is the inertia and the ineffectiveness of the legislative and executive in the implementation of social rights.[111] Rights under the Constitution cannot be just in the promise, they argue.[112] The inertia and inefficiency, however, does not seem to be an argument that is sustained by itself. First it cannot be universalized: certainly the judiciary would not agree with the legislative and the executive judging the lawsuits that are lying in courts' shelves for years throughout Brazil. Second, with the increasing judicialization, it is the judiciary that will begin to be ineffective (as it already actually is) due to the increase in the number of cases. And finally mere a judicial order does not solve the real problem, but just shifts it: to pay for the medicine provided by judicial order it is necessary to take the money and investment from another area (education, security, etc.) if not from health itself.

In fact, what judges do in these individual cases is to express a political disagreement with the public policy established in the public

108 VENTURA, Miriam et al. "Judicialização da saúde, acesso à justiça e a efetividade do direito à saúde", 2010, p. 96.

109 LOPES, José Reinaldo de Lima. "Em torno da 'Reserva do Possível", 2008, p. 172.

110 HIRSCHL, Ran. "The New Constitutionalism and the Judicialization of Pure Politics Worldwide, 2006, p. 722.

111 BARBOZA, Estefânia Maria de Queiroz; KOZICKI, Katya. "Judicialização da política e controle judicial de políticas públicas."*Revista Direito GV* 8, n.1 (Jun, 2012): 59-85, p. 73. Available at www.scielo.br.

112 Min. Marco Aurélio, RE 368564, 75. See also Min. Ayres Britto, RE 368564, 87. See also: SILVA, Virgílio Afonso da. "O Judiciário e as políticas públicas: entre transformação social e obstáculo à realização dos direitos sociais.", 2008, p. 588.

sphere by the legislative and implemented by the executive. Actually they are saying that they believe that Brazil should have more money for health, and not for other things. In a sense it is a kind of arrogance (in the absence of a better expression) which comes between the lines of Hirschl's quote. For the judiciary, the budget was not "properly"[113] distributed and it is up to the judges, in that standpoint, to *solve* the social problem[114] – the implicit discourse here is a self-understanding that only the judges (and not all the powers, or the population itself) can or should implement the Constitution. The only criteria they have to say that the budget was not properly distributed is by the fact that they themselves disagree with the budget – that is, they disagree with the criterion of distribution, but they raise this disagreement in terms of legality and not in terms of politics.

In other words, judges in these cases are trying to establish a policy, but in a hidden way, and not at the public realm. The judiciary becomes a political arena,[115] but not a public one. In fact it excludes the people from debate about the distribution. And such a policy does not come with typical arguments of policy (distributive), but with individualistic and charitable arguments.[116]

However, is not only the judiciary that holds the task to implement the Constitution.Certainly the individual lawsuits of social rights will not solve the problem as a whole. It would help more if it fulfilled its role to apply the distributive criteria instead of trying to create or change them. Rather than trying to be executive and legislative, why not let each branch fulfill its own constitutional role?

There is some hope for lucidity, however. We believe the question on the individual actions demanding social rights in Brazil can begin to take a more rational course. The STF recently selected an exemplary case of this controversy to judge it in a special procedure called in Portuguese "Repercussão Geral." In this procedure – which is quite new in Brazilian law – the Court decides one singular case as an example of the issue (it is not collective action, however; it is still one regular individual case) as if they were ruling all similar several other repetitive cases about the same matter. That is, in this kind of judgment

113 BARBOZA, Estefânia Maria de Queiroz; KOZICKI, Katya. "Judicialização da política e controle judicial de políticas públicas.", 2012, p. 73.

114 BARBOZA, Estefânia Maria de Queiroz; KOZICKI, Katya. "Judicialização da política e controle judicial de políticas públicas.", 2012, p. 65.

115 BARBOZA, Estefânia Maria de Queiroz; KOZICKI, Katya. "Judicialização da política e controle judicial de políticas públicas.", 2012, p. 65.

116 We emphasize again that this criticism applies only to cases of individual actions that postulate social rights individually. The lawsuits challenging public policy as a whole deserve a different approach, especially because they allow the judge to see the relational whole (distributive) of the question. In collective action, at least in principle, there is no room for charity.

broader arguments are also analyzed, including by listening to experts on the subject and interested social groups. Despite the fact that the case is still the judgment of an individual and concrete case, it is used as a parameter for all other similar, so that arguments are not limited to individual right, but they also raise distributive arguments. Two casesare under this procedure right now. The "Recurso Extraordinário No. 566471," which discusses the supply of high-cost medicines that are not included in the public policy's list and the "Recurso Extraordinário No. 657718" which discusses the provision of medicines that were not approved or which does not have a register in the regulatory agency. It is possible that such judgments, which have not yet occurred, will consider the distributional and political aspect of the issue, and not just the individual or charity arguments.

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Panor. Braz. law - Year 3 - Numbers 3 and 4 - 2015 - pp. 394 - 420.
ISSN 1075-1343 (print)
ISSN 2318-1516 (online)
DOI: http://dx.doi.org/10.17768/pbl.a3.n3-4.p394

RIGHTS, DEMOCRACY AND DEVELOPMENT: THE JUDICIAL SYSTEM'S ROLE IN DEVELOPING COUNTRIES

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Abstract: This article seeks to discuss whether and how the judicial system has been assuming a new institutional role in the design of public policies aimed at promoting of Economical Social and Cultural Rights (ESCR) in developing countries. Considering that these rights are crucial for human and social development, the article discusses the ways in which the judicial system might interfere with the process of development.
Alongside a theoretical debate, the article presents a functionalist comparative study of the public interest litigation in Brazil, India and South Africa. It focuses on how judges seek to promote ESCR as well as on the benefits and problems of their intervention in public policies created by democratic governments and legislatures.
The diagnosis that judicial systems around the world play different roles from the ones recommended by the economic neoliberal mainstream shows that several different institutional arrangements are possible and that some of them might be more adequate to the reality of the developing world. Therefore, the article hopes to provide insights to rethink global governance and the current knowledge on law and political economy from a new paradigm.

Keywords: Judicial System - Economical Social and Cultural Rights - Public Policy - Development - Democracy

1. Introduction

During the 1990s, in the context of a recovery of the liberal thought, economic mainstream was based upon the notion that economic development depended on the enactment of laws which would assure predictability to economical transactions. Law should, therefore, guarantee property rights and the enforcement of contracts. By properly applying legal rules and dictating the rules of the economic game, institutions were deemed responsible for reducing transaction costs and uncertainty.[1]

This institutionalist approach fostered international efforts to promote institutional reforms in developing countries. The World Bank, for instance, promoted a package of reforms which prescribed a set of specific economic policies which should be implemented in developing countries. Reforms were made in a "one size fits all" fashion, as if policies that had promoted economic growth in developed countries should also impel developing countries[2] to finally develop. One of the major focuses of institutional reform was the judicial system, which was considered essential for the protection of property rights and for assuring the predictability needed in order to sustain continued economic growth.

This formal and allegedly neutral role assigned to the judicial system by the neoliberal mainstream, however, does not correspond to the current role played by Courts in many developing countries. In some countries, such as Brazil, it is clear that Courts have started to act in a more pro-active way, taking the initiative to design public policies and to decide about complex and polycentric issues involving the allocation of scarce resources.[3]

In fact, the historical recognition of human and fundamental rights has led to significant changes in the juridical culture, with the inclusion of economic, social and cultural rights (ESCR) in the constitutions of countries worldwide. These changes have also reached the developing world, where States were financially and structurally incapable of actually enforcing those rights. This tragic combination of constitutional promises of ESCR and States that are not capable of enforcing them has led civil society to seek the effectiveness of their rights[4] in the judicial system.

Therefore, the main objective of this article will be to discuss whether and how the judicial system has been assuming a new role in developing countries as an important institution in the designing of

1 TRUBEK, (2012)

2 PISTOR & MILHAULPT (2008)

3 TAYLOR (2008)

4 LIMA LOPES (2006), pp. 190-191; VERÍSSIMO (2006), pp. 67-68.

public policies regarding the promotion of ESCR. Considering that these rights are absolutely fundamental for achieving human and social development, ultimately the article addresses the question of whether and how the judicial system can be a key institution to intervene towards achieving development.

The article is divided in five sections. The first section is aimed at contextualizing the different roles assigned to the judicial system in the different moments of developmental history. The second section will explain the concept of development adopted in the article and why good democratic institutions are essential for achieving it. The third section will argue that the judiciary assumes a relevant position in achieving development because it grants individuals means through which they may hold accountable those who are dully fulfilling governmental representation. In the fourth section a comparative study will be developed with the aim of identifying similarities and differences in judicial adjudication of ESCR undertaken in Brazil, India and South Africa. Finally, the last chapter of the article will conclude affirming that, should ECSR be object of litigation, the solution must be built jointly by the Courts, the government's representatives and society.

This article represents an effort to move beyond the Brazilian case and to foster policy debates amongst developing and developed countries about the important role the judicial system might play in the developmental process. In the context of the emergence of a new state activism, different institutional means to achieve development must be identified, analyzed and compared in its successes and failures.

In fact, the existence of an alternative institutional arrangement to the judicial system, different from that recommended by the economic neoliberal mainstream, demonstrates that there may be different arrangements, more adequate to the reality of the developing world.

2. The different roles assigned to the judicial system

The judicial system may be defined as the governmental branch responsible for enforcing the law, interpreting and adapting it to concrete cases and solving disputes and conflicts. Although quite appropriate, this definition may suggest that judges and Courts have been playing one single role in society ever since their creation – what could not be more deceiving.

It is important to notice that many different roles have been assigned to the judicial system, according to the different types of functions it was considered able to fulfill in the construction of a specific kind of society. In different times and places, ideologies and politics were responsible for the shifts in the way judges and Courts operated. As one key institution of the modern state, the judicial system cannot be

disregarded when it comes to the discussions about development.

In fact, studies on the phenomenon of development did not always regard judicial system as a central concern, sometimes looking at it as more of an accessory. It is nevertheless possible to identify the different legal theories often implicit in the various economical and political projects of mainstream development professionals,[5] and consequently the different roles assigned to the judicial system in each one of them.

In this sense, following Trubek and Santos[6], it is possible to identify three different moments in the history of the relation between law and development: (i) the classic developmentalism (1950-1980); (ii) the neoliberal reaction (1980-1995); and (iii) the new developmental state (1995-the present).

During the first moment, the classic developmentalism, States were the main economic driver, responsible for inducing social transformations and for changing and channeling economic behavior. Policies were implemented in order to promote industrialization, to stimulate the blooming of internal economic market and to direct resources to strategic areas. States sought to create national plans, reallocate resources, invest and manage key sectors and control foreign capital.

In this moment, law was seen in an instrumental fashion, as a tool to support state's policies and to generate economic growth. In this sense, law had distributional purposes: it was aimed at allocating resources among social and economical groups in order to implement national economic policy objectives.

Therefore, Public and Administrative Law gained importance, allowing the creation of a powerful state bureaucracy – employed by the Executive and Legislative branches in the regulation of economy and in the definition of national economic policies. This was done quite freely, sometimes even affecting private rights, and without judicial review since in that period, as Kennedy puts it, "the judicial assertion of rights against postwar development policies was by and large a nonproblem".[7]

During the 1970s, developmental states started to show signs of extenuation. In spite of all efforts, most Latin America, East Europe and Asia countries were still underdeveloped. The US legal elite interpreted this phenomenon as a result from a series of cultural and institutional resistances that prevented legal professionals from adopting a more pragmatic and antiformalist attitude towards law. According to that understanding, efforts were made to build a more pragmatic local

5 The idea according to which it is possible to "reverse engineer the legal theory of mainstream development professionals from their economic and political projects" is here taken from KENNEDY (2006), p. 102.

6 TRUBEK & SANTOS (2006)

7 KENNEDY (2006), p. 104.

legal culture in developing countries. The reforming agenda focused on legal education and emphasized the need for law professionals – including judges – to weigh and balance competing social interests and development objectives.[8]

Notwithstanding, the transplant of a whole new legal culture to developing countries has proved to be a difficult task to accomplish, without mentioning that this could be seen as some sort of imperialist imposition on third world countries from the developed world. Moreover, even though the emergence of human rights and a new focus on formal rights had lead human rights advocates to assert formal rights across the developing world, "national judges in the third world remained largely passive in face of such claims".[9]

As this model of State interventionism started to wear out and many developing countries faced serious fiscal crises in the late 1970s, new ideas started to gain terrain from the 1980s onwards. Under the influence of the Washington Consensus, the emergence of neoliberal ideas brought to light a strong belief in markets as necessary and sufficient arenas to the development of economy. In this context, the "new institutional economy" grew in importance, based on two theoretical pillars: the weberian legacy[10] and institutional approach.

Weber, by the end of the XIX century, had concluded that the best kind of law to support a capitalist economy would be one that provided investors with predictability. Thus, ideal law should be formal and rational, comprising general universal rules, and organized around a professional and autonomous bureaucracy, in order to guarantee the existence of companies with limited liability as well as the enforcement of contracts.[11]

The institutional approach to development, in turn, drew attention to the importance of institutions, the rules of the economic game, which reduce uncertainty and transaction costs by structuring incentives to agents' behavior.[12] Even though institutions might be both formal (law) and informal (culture, traditions and ideologies), in the neoliberal context of the end of the XX century, the main ideas of institutionalist authors were simplistically interpreted, resulting in an institutional fetishism under the slogan *"institutions matter"*. Institutions came to be seen mainly in a formal and under-humanized way, as if they were structures external to the markets.

Law, therefore, was responsible for creating markets and for ensuring a safe and predictable environment for investors. It assumed the task of imposing limits to the state's regulations and on the discretion

8 KENNEDY (2006), p. 112.
9 KENNEDY (2006), p. 123.
10 PISTOR & MILHAUPT (2008)
11 TRUBEK (1972)
12 NORTH (1990)

of public administrators, seen as the cause of economic distortions. The protection of private property, the incentives to competition and the reduction of transaction costs became the focus of developing countries.

Completely new legal regimes were necessary in order to build down import substitution regimes, privatize state-owned enterprises, establish financial institutions, and support new capital markets, thus supporting free markets, guaranteeing free trade and constraining the discretion of the State. The focus shifted from public to private law and the legal discourse switched from distributional and social concerns to the quest for formalization, elimination of corruption, fiscal discipline and economic efficiency.[13]

International institutions such as the World Bank started to support and finance institutional standardized reforms in several countries, in a "one size fits all" fashion, based upon the notion that the good law, well enforced, would result in good economic results.[14] Legal reforms and legal transplants became ever more frequent, in pursuit of the integration of developing countries to the global economy. The main focus of such reforms was the judicial system as an essential institution for the protection of property rights and the enforcement of contracts.

Courts grew in significance as they gained powers of judicial review and began to challenge the decisions made by the Executive or the Legislative branches on the basis of protecting individual property rights, enforcing contracts and guaranteeing the predictability and stability of the business environment. At that moment, there was little or no room for discussing civil rights or the political role of law in the protection of minorities and of people living in extreme poverty. Judicial review was based upon a formalist approach to law along with a judicial policy analysis borrowed from neoliberal economics.[15]

By the mid 1990s, however, the bad results of the neoliberal program to the development of third world countries fueled criticism to this vision of Law and Development. Indeed, many countries that had adopted neoliberal policies went into economic crisis. This has lead to the conclusion that, although markets might be the main mechanism of efficient distribution of resources in a society, they are certainly incapable of creating, by themselves, the conditions for their success. Identifying market failures, scholars such as Stiglitz started to sustain the need for the state's moderate intervention.[16]

There is certain consensus that while the State should not be the main economic engine, it should neither be the neoliberal minimal State. It should rather be medium-sized State that acts as the economy's ally,

13 KENNEDY (2006), p.
14 PISTOR & MILHAUPT (2008)
15 KENNEDY (2006), pp. 141-142.
16 TRUBEK (2010), pp. 5-7.

oriented towards maintaining a social democratic market, integrated with the world economy.[17]

It is widely acknowledged, moreover, that the legal reforms and transplants, undertaken without due attention to the particularities of local institutions were not effective or created results considerably different from the expected. Thus arose the notion that reforms should be gradual, incremental and always context-specific.[18]

Since the end of the 1990s, therefore, the world seems to be experiencing the emergence of a third moment in the Law and Development movement, marked by the understanding that law must correct market failures and that legal reforms must be done with attention to local existing institutions.[19] Law has remained, as in the two previous moments, an instrument of development policy and a vehicle for weighing and balancing complex policy analysis. In this new moment, however, "law has also become an end in itself"[20]. Law, human rights and the rule of law are no longer considered as development tools, but as development objectives, as part of the very definition of what development is.

Indeed, as will be explained subsequently, income and economic growth are now considered as only one of the many aspects of development. This has lead to an expansion in the concept of development: if before development meant economic growth, today it has incorporated other dimensions, such as those regarding human, social, political and legal development.[21]

As a result, development policy-making has currently started to encompass a new social agenda and has turned its attention to the implementation of legal institutions such as "elections, Courts, judicial review, and local human rights commissions and the legal framework for a robust 'civil society'"[22]. This more enhanced policy role for law has important effects on the judicial system, that is now able to play a more robust role in weighing acquired rights against justifications for development policies.

The extent to which judicial systems in developing countries actually make use of this new prerogative, the way they do it and the difference that a more active judicial system might make in the development outcomes of countries are questions that remain

17 KENNEDY (2006), p. 156.

18 In this regard, see EVANS (1995), on the idea of "embedded autonomy" and PRADO & TREBILCOCK (2009), on the concept of "path dependence". For a more general view on the results of the institutional reform movement, see TAMANAHA (2010).

19 TRUBEK & SANTOS (2006), pp.7-9.

20 KENNEDY (2006), p. 158.

21 In this regard, see SEN (2010)

22 KENNEDY (2006), p. 159.

unanswered and to which the present article aims to contribute.

3. Development and the importance of good democratic institutions

This article is grounded in a broad concept of development, typical of what has been referred to as the third moment of Law and Development. Thus, differently from the traditional view that asserts development as the achievement and maintenance of economical prosperity, here development shall be considered as the guarantee of individual liberties[23] through good democracies[24] which allow individuals to act as agents of change.[25]

Granting individual freedoms means reducing or abolishing the socioeconomic restraints imposed on individual's choices and, therefore, assures individuals autonomy to choose whether and how they will enjoy their rights. Accordingly, development includes the increase in levels of education and intellectual independence, which allow individuals to break free from societal restraints.[26] In this sense, individuals shall be able not only to make their own choices, but to form their interests considering a larger scope of options.

This concept of development does not disregard the importance of economical growth for development, but qualifies it as being only one among the necessary means to achieving the objective of development, which is the expansion of individual capabilities. Indeed, the lack of resources restricts governmental capacity to promote social policies aimed at grating all individuals' equal capacity to freely enjoy their rights. Accordingly, the lack of a minimum income restricts individuals' capacity to choose whether and how to enjoy their rights, whereas the possession of a minimum income may potentially enlarge the enjoyment of those rights.[27]

However, despite the importance of economical prosperity, it should not be considered the aim of development.[28] High productivity and income do not guarantee by themselves quality of life, equal distribution of wealth and the enjoyment of individual liberties. An example of this statement can be observed in the difference between

23 SEN (2004)

24 INGLEHART & WELZEL (2005)

25 SEN (2004)

26 INGLEHART & WELZEL (2005), p. 24.

27 An illustration of this assertion is the following situation: poverty recurrently deprives individuals from medical solutions to easily treatable diseases. Should all individuals possess a minimum income, they could choose whether or not to resort to medicine instead of being automatically condemned to suffer from the diseases consequences.

28 STIGLITZ (1998), p. 76-78.

Brazilian GDP and HDI: while Brazil has the 7th higher GPD of the world[29], it is ranked 85th place in global HDI.[30] [31] In other words, Brazil's economical prosperity does not guarantee that every person in the country is fully capable of exercising their freedoms.[32]

Therefore, this article does not ignore the importance of economical prosperity in achieving development, but assumes that it is not the only or main aspect which should be considered in measuring development. In this sense, the concept of development adopted is broader and aimed at guaranteeing ample individual freedom.

As previously mentioned, the guarantee of individual freedom means providing individuals the possibility to make their own choices without socioeconomic limitations and according to values they regard as important. Asides from its intrinsic importance, individual freedom is crucial because it not only enables individuals to shape their own lives, but also allows them to participate in social matters and influence collective outcomes[33]. Thus, individual freedoms are both means and ends of development.[34]

Concurrently, the achievement and maintenance of development depends on the existence of good democratic institutions, which are the only ones that can actually grant individuals equal capabilities to participate in public matters and to influence in policy drafting and implementation, as well to evaluate the legality and responsiveness of government actions.[35] Amongst other factors, the quality of democratic institutions lies upon a competitive electoral system[36], transparent governmental affairs, *rule of law*[37] and assured means of direct civic

29 Information obtained from the Human Development Report 2013 from the United Nations Development Program, accessible at http://www.pnud.org.br/arquivos/rdh-2013-resumo.pdf.

30 Information obtained from the International Monetary Fund website, accessible at http://www.imf.org/external/pubs/ft/weo/2012/02/weodata/index.aspx.

31 India and South Africa are also good examples: while India has the 10th higher GDP in the world, it is ranked 136st place in global HDI; while South Africa has the 29th higher GDP in the world, it is ranked 121st place in global HDI.

32 According to research published by IBGE (Brazilian Institute of Geography and Statistics), 31% of Brazilian society has educational delays and 40% does not have access to water, sewage and electricity. Information obtained at http://www.ibge.gov.br/home/estatistica/populacao/trabalhoerendimento/pnad2011/default_sintese.shtm

33 SEN (2004), pg. 13-25

34 SEN (2004), pg. 13-25

35 DIAMOND & MORLINO (2005), p. xi.

36 In a good quality democracy, all political parties must be able to participate in a free, fair and regular electoral competition. Without such an electoral system, societies' interests cannot find true governmental representation. DIAMOND & MORLINO (2005), pg. vii.

37 In this context, the concept of rule of law adopted is the same as endorsed by DIAMOND & MORLINO, which consists in "*under a rule of law all citizens are equal before law, which is fairly and consistently applied to all by an independent judiciary, and the laws themselves*

political participation.

Therefore, concerns with the quality of democracies go far beyond representation mechanisms and procedures. As a matter of fact, vertical accountability[38] plays a central role in democracy because it grants civil society means to intervene in political actions and institutions, and diminishes the difficulties originated by the shift from direct to representative democracy.[39] Because it is a government designed by society for society, citizens considered individually or collectively are the only true holders and evaluators of their interests.[40]

In this sense, designing and implementing democratic institutions is not sufficient *per se*. It is crucial for a good democracy that institutions be designed context-specific and, more importantly, considering mass culture. To be truly effective, democratic institutions need to stimulate society's participation, account with their trust and meet their expectations and values. Individual cooperation and submission to democratic institutions are directly related to their acquaintance with the rules and institutions which affect their lives[41].

Therefore, considering that development is aimed at guaranteeing ample individual freedom and that it can solely be achieved with civic engagement and participation, a political system which institutionalizes mass culture and provides plural means of controlling power is crucial. In other words, democracies of good quality are the only known political systems capable of truly enabling the achievement and maintenance of development as outlined in this article.

Nevertheless, in some new democracies, which often present weaknesses in their democratic outcomes,[42] society has been losing faith in traditional representative institutions which are directly associated to the democratic performance, such as the executive and legislative branches.[43] In this scenario, the Judiciary has been assuming

are clear, publicly known, universal, stable, and nonretroactive". DIAMOND & MORLINO (2005), pg. vii.

38 Accountability is the possibility of elected governmental representatives be held responsible for their political decisions. There are two forms of accountability: vertical and horizontal. Vertical accountability is carried out by voters in elections when choosing who will be the subsequent governor. In other words, citizens exercise vertical accountability when they do not reelect a politician who did not meet societies' expectations during exercise of mandate, or when they reelect a politician which met societies' expectations during exercise of mandate. Horizontal accountability, on the other hand, is carried out by other governmental actors which have constitutional or legal authority to do so. DIAMOND & MORLINO (2005), pg. xv-xvii.

39 DIAMOND & MORLINO (2005), pg. xiii.

40 DIAMOND & MORLINO (2005), pg. xiii.

41 MOISÉS (2010), p. 4.

42 Existence of corruption and lack of full enjoyment of individual fundamental rights are examples of weaknesses in democratic outcomes.

43 MOISÉS (2010)

an important role in promoting rule of law and accountability of the elected representatives, ultimately aiding government in regaining societal trust and cooperation. As will be subsequently shown, this is a new role assumed by the judiciary and that, despite its notable benefits, has suffered severe criticism.

4. Judging policy and ESCR in the Developing World

With the wide recognition that individual and social rights, the rule of law and good democratic institutions are relevant for the achievement of development, the judicial system is becoming an increasingly relevant political player. Judges and Courts now share a broader foundation to constrain the discretion of the Executive and of the Legislative in their policy decisions.

By questioning complex policy decisions that involve the allocation of scarce resources the judicial system influences policy drafting and implementation. It also assumes a relevant position because it has become a participative arena trough which individuals may hold accountable those who are fulfilling governmental representation.

Specially in developing countries, where governmental representative organs are not always responsive to society's wills and have lost their trust[44], judges have recurrently been called upon to intervene in political matters, recognizing rights, intervening, designing and implementing public policy.[45]

Thus, the Judiciary system has assumed a double role in development: firstly, it has become an additional political arena where rights may be conquered and guaranteed, and secondly, it is one of the only governmental organisms that still counts with considerable societal trust. In this sense, judges not only have acted in removing barriers imposed on the enjoyment of individual liberties, but also aid government in recovering societies' trust and desire to intervene positively in public matters.

This has been done through *judicial adjudication* of ESCR's, which aims not only at establishing liabilities and repairing damages, but also at promoting institutional change in order to avoid future disrespect of rights and damages. In the past decades, the number of lawsuits on this behalf has greatly increased in many countries.[46]

44 VERÍSSIMO (2006), pp. 67–68.

45 LIMA LOPES (2006), pp. 190–191.

46 For examples, see GLOPEN, Siri; SKAAR, Elin & GARGARELLA, Roberto. "*Democratization and the Judiciary: The Accountability Function of Courts in new democarcies*". London: Frank Cass Publishers, 2005; SABEL, Charles F. & SIMON, William H. "*Destabilization rights: How public law litigation succeeds*". 117 Harvard Law Reviw. 1016 2003-2004; and GLOPPEN, SIRI. "*Social Rights Litigation as Transformation: South African*

The judicial adjudication of ESCR's has been criticized in many different ways. Most commonly, it has been questioned on the grounds of the legitimacy of the judicial system to decide on the design and implementation of public policy, since its officials are not elected by the popular vote in democratically held elections. According to this view, this pro-active posture from the judicial system violates the postulate of the separation of powers and encroaches the powers of the Executive and the Legislative spheres in its political decisions.[47]

Unlike that, however, judicial action in related to ESCR may be considered a democratically legitimate mechanism that has the potential to prevent other governmental branches' inertia in guaranteeing and implementing constitutional rights, by giving voice to minorities or marginalized sectors of society that haven't been able to promote responsiveness in the traditional elected institutions.[48] The rise in the number of these lawsuits shows that social participation in the formulation and implementation of public policy has been intensified.[49]

ESCR litigation has also been subject to the so called the neo-institutional claim: since the judicial system is an important guarantor of predictability and property rights, judicial interference in policy matters would raise transaction costs, which would repel investors and interfere with economic development.[50] The idea according to which judicial decisions should follow economic efficiency criteria, however, is quite problematic. For one, it is not an objective criterion; thus, it seems impossible to develop an adequate method of decision-making, able to guarantee that all variables are weighed and that would not allow for judges to include ideological variables into the equation. Secondly, adopting economic efficiency as the main criterion for judicial decisions would mean to ignore other relevant variables such as the existing inequalities between individuals.[51]

Lastly, one frequently pointed and problematic issue regarding ESCR litigation relates to the institutional capacity of the judicial system to deal with the complexity of making policy decisions. Because the judicial system has been originally designed to solve private bilateral conflicts, its structure and procedures would not be appropriate to solve issues involving distributive justice, scarce public resource allocation, and with potential collective impacts. It is argued therefore that success in ESCR adjudication depends on a radical change in the traditional model of adjudication currently used by the judiciary, with the inclusion

Perspectives". Bergen, Chr. Michelsen Institute, 2005.

47 BADIN (2011), pp. 36-44.

48 SUNSTEIN(1988), UNGER(1996), SABEL(2003-2004) and FISS*Court*(1979-1980).

49 BADIN (2011), pp. 36-44.

50 VERÍSSIMO (2006), pp. 76-77.

51 BADIN, (2011), p. 33.

of more collective values. For that reason, at least in Brazil, propositions to modify the adjudicative process have been discussed.

It is important to highlight that this article does not advocate an inconsequent judicial activism. Indeed, it is imperative to consider the potentially irrational results judicial activism may produce. Empirical research on social rights litigation in Brazil shows that the judicial interference in public policy matters can produce irrational effects on public policy itself, as well as on public budget allocation. Also, especially because of individualistic litigation of ECSR and of the rather unequal access to justice, litigation tends to favor those who, for financial reasons, need the judicial remedy less, therefore not promoting effective social change.[52]

In spite of all criticism, however, judicial adjudication of ESCR's is presently a growing and probably irreversible phenomenon. So far it has eventually enabled the recognition and enforcement of rights and systemic change. The public debate it produces has itself a great positive potential. Hence, while the debate may focus on the strengths and weaknesses of the judicial system, it seems more productive to look at the problem from a different perspective.

Indeed, this approach does not allow for the comparison between the judiciary and the many other institutions that, in practice, are also making policy decisions and electing the means by which the constitutional ends should be reached.[53] Judges and Courts compete with public administrators, legislators as well as with market participants for decision-making. Each of these arenas has procedural and structural singularities that create different environments for decision-making in terms of symbolism, ability, political capital and timing.

This allows for the replacement of an analysis centered in the problems of the judicial adjudication of ESCRs for an analysis based on the concept of institutional dialogue. Thus, the question is no longer "is the judicial system able to take political decisions?", but "how, in specific cases, the different branches interact to the historical construction of arguments in favor of certain political decision?".

The idea of an institutional dialogue, supported by Mendes[54], depends on overcoming the rigid interpretation of the separation of powers according to which the legislative branch create laws, the executive branch applies them and the judiciary judges conflicts according to them. This rigid approach to the system of checks and balances, worried with determining which branch should have the last word on each issue, is anachronistic and insufficient to describe a world where instead of a linear and finite process there is a permanent and

52 SILVA & TERRAZAS (2011), pp. 825-853; WANG (2008).
53 BADIN (2011), p. 52.
54 MENDES (2011)

cyclical political tension – for example: the fulfillment of a judicial decision depends on the executive's political will; and even after a judicial decision solves a concrete dispute, legislative might respond to the judicial understanding by altering the laws.

Hence, the design and implementation of public policies emerges from a more intricate, dialectical and permanent interaction of the different governmental branches, which dispute for political force and exchange arguments. The collective process of decision-making derives from a circular mechanism in which political and deliberative tensions influence each other mutually and in which there is no last word on any issue.[55]

It is important to notice that, while research points to the fact that currently there is more room for a more pro-active judicial system, the elucidation about whether Courts and judges actually do intervene in policy matters, the quality with which they do it and the social consequences of that pro-active posture depend largely on specific empirical studies.

5. The judicial adjudication of ESCR in a comparative perspective: Brazil, India and South Africa

In an attempt to stimulate the subject herein addressed, this section will develop a comparative study on judicial adjudication of ESCR undertaken in Brazil, India and South Africa, and subsequently will carry out a brief analysis on food security policies implemented in these countries.

The comparative study shall be conducted according to a functionalist methodology and the aim will be to compare judicial adjudication of ESCR undertaken in Brazil, India and South Africa with respect to what kind of conflicts involving ESCR are addressed before national Courts and what are their outcomes.[56] Therefore, judicial adjudication of ESCR in Brazil, India and South Africa will be primarily contextualized, that is, their origin and constitutional grounds will be explained, and in the sequence they will be discussed considering how they have been practiced. The policy analysis in turn, will briefly describe the background and development of food security policies carried out in each of the three countries with the aim of identifying strengths and weaknesses of the different governmental branches when formulating and implementing public policies.

The choice of developing a comparative study with Brazil, India and South Africa took into consideration three main aspects: firstly,

55 MENDES (2011)

56 MICHAELS, Ralf, "The Functional Method of Comparative Law" (2005). *Duke Law School Faculty Scholarship Series.* Paper 26, p. 5.

the three countries chosen are members of the BRICS, international cooperation group formed by economically strong developing countries, and this comparison may contribute for self-understanding and deepening of their cooperation relationship; secondly, these countries possess different cultural and political backgrounds, which favors the encounter of different outcomes from the judicial adjudication of ESCR; and lastly, the judicial adjudication of ESCR carried out in these countries is widely known by scholars who study judicial systems.

5.1. Judicial adjudication of ESCR in Brazil

Brazil´s Federal Constitution came into force in October of 1988 as a result of the transition to democracy from a military dictatorship that had began in 1964. This new political document, responsible for designing the State and recognizing individual and social rights, had birth in a moment when social demands were urging against approximately 20 years of brutal censorship and offense of individual and collective rights. At the moment, translating demands from all social movements into the constitution text was a symbolical and legitimizing act.[57]

Many different interests and social demands were included in the constitutional text, which ended up with 30,5% of its norms aimed at designing public policy.[58] It is[59] the constitution with the highest percentage of public policy norms in the world.[60] One of the main consequences of this *constitutionalisation*[61] of rights and public policy is that it encourages excessive judicial adjudication since the Federal Constitution of 1988 grants broad access to the judiciary whenever rights are being violated or have not been ensured by the government; and given the disbelief of Brazilian society in the legislative and executive branches as protectors and promoters of constitutional rights.

Therefore, Brazilian judiciary is constantly sought to solve conflicts related to the substantial *constitutionalisation* of rights and

57 MENDES (2005), p. 452.

58 Two Brazilian Political Scientists, Rogério Arantes and Cláudio Couto, classified constitutional rules as *policy* and *polity*. According to their classification, *polity* rules *(i)* define the concept of State and Nation; *(ii)* declare individual and political rights; *(iii)* define the "*rules of the game*"; and *(iv)* declare material rights aimed at achieving well being and equality. *Policy* rules, on the other hand, design public policy. ARANTES & COUTO (2009), pp. 17-51.

59 According to Arantes e Couto, from 1988 to 2008 Brazil´s Federal Constitution was amended almost 40 times, growing 28% from its original size, being 70% of this growth public policy norms.

60 The second runner up in percentage of public policy in its content is Mexico´s 1917 Constitution, with 17% public policy norms. ARANTES & COUTO (2010), p. 554.

61 According to ARANTES e COUTO, the term "*constitutionalisation*" implies that rights and/or public policy are being placed in the constitution and, therefore, are acquiring constitutional stats and protection.

public policy and to the consequent recurrent amendment of the constitution. Indeed, because of the Courts, in special the Federal Supreme Court, constant fearless practice of Judicial Review, the judicial System has assumed central role in the national political arena.

Because the judicial review system in Brazil combines the concrete and diffuse system practiced in the United States of America with the abstract and concentrated system adopted by the Federal Republic of Germany, any judge may declare the unconstitutionality of federal, state or municipal laws and decrees while sentencing concrete disputes, and the Federal Supreme Court (STF) may analyze the constitutionality of federal and state laws and decrees which are abstractly challenged by persons or organizations authorized to do so[62].

This mixed judicial review system combined with the broad judicial autonomy and the lack of mechanisms capable of bonding judicial decisions to higher Courts' precedents[63] allows judges to render decisions according to their personal preferences. Consequently, decision making regarding ESCR is widely disperse and contributes for unequal responses to similar cases.[64] In addition, a research carried out by Silva and Terrazas[65] demonstrates that judicial decisions might benefit individuals who posses wealth above average due to a considerable disparity in access to the judiciary.

Therefore, even though Brazilian judges have been willing to promote judicial review, outcomes of judicial adjudication of ESCR have produced contradictory results, especially due to scarce access to the judiciary and lack of equality in decision making.

5.2. Judicial adjudication of ESCR in India

India is well known for its judicial effectuation of constitutionally guaranteed fundamental rights[66]. Indeed, as occurs in Brazil, the

62 The topic 3.2. has been written considering the Federal Constitution of Brazil, the Laws 9.868/99 and 9882/99, and the following articles: MENDES, Gilmar Ferreira. Controle de Constitucionalidade: uma análise das Leis 9868/99 e 9882/99. Revista Diálogo Jurídico, n. 11, fevereiro/2002, ROSENN, Keith S. Judicial Review in Brazil: Developments under the 1988 Constitution. 7 Sw. J. L. & Trade Am. 291 2000 and MENDES, Gilmar Ferreira. O Controle da Constitucionalidade no Brasil. Available at: http://webapp.pucrs.br/pagdisc/83000/Controle_de_Const.%20Gilmar%20Mendes.pdf

63 TAYLOR (2008).

64 WATANABE (2006)

65 SILVA & TERRAZAS (2011)

66 Judicial Adjudication of ESCR in India is widely known as Public Interest Litigation (PIL). However, as the term PIL has multiple meanings, this article chose to refer specifically to judicial adjudication of Economical, Social and Cultural Rights. In Brazil, for example, the term PIL may be used for litigation involving collectivities, governmental bodies and/or ESCR; in India, on the other hand, PIL refers solely to ESCR litigation.

constitutional framework considering the recognition of fundamental rights and the outline of the Judiciary Systems' competences summed up with the social distrust in the representative governmental branches has stimulated an energetic practice of judicial activism by Courts of India[67].

The Constitution of India was edited in 1947 as a result of the countries' conquest of independence from Britain and was aimed at establishing a "*sovereign socialist secular democratic republic*". In order to achieve this goal, the constitution recognized that all citizens should enjoy fundamental rights, which would be protected by an independent judicial system.[68] This scenario has granted Indian judiciary, specially the Supreme Court, great power to influence in policy drafting and implementation, to hold accountable governmental officials and even to participate in law-making[69].

Since the first cases of ESCR litigation in the 1970s, its practice has changed considerably until the current days. Initially ESCR litigation was usually filed by benevolent individuals in favor of underprivileged people against action or omission from the representative branches of government which had violated constitutional fundamental rights. At that time, judiciaries' response consisted in recognizing rights and holding government accountable for violating such rights.[70] A second moment of judicial adjudication of ESCR in India started in the 1990s and was aimed at protecting a broader scope of rights.[71] These lawsuits were usually filed by specialized NGOs and lawyers against defendants that were no longer exclusively governmental organs or representatives, but also private parties. Despite the considerable increase in the number of lawsuits filed, judges did not feel intimidated and were fearless in rendering decisions considering political matters.[72] Finally, presently ESCR litigation is filed by any person and destined to protect an even greater scope of rights. The number of lawsuits has increased significantly, leaving judges overwhelmed with the workload and the lack of supporting judicial infrastructure.[73]

Judicial adjudication of ESCR in India has performed an important role in achieving social justice. Due to the flexible procedures designed by the Supreme Court for cases involving public interest,

67 RAJAMANI (2007), p. 294; DEVA (2009), p. 30.

68 DEVA (2009), p. 21.

69 RAJAMANI (2007), p. 294.

70 DEVA (2009), p. 27.

71 The second moment of LIP in India aimed at protecting fundamental rights, but was also destined to seek, *inter alia*, the end of sexual harassment at workplace, good governance, relocation of industries and the general accountability of the government. DEVA (2009), p. 28.

72 DEVA (2009), p. 27-28.

73 DEVA (2009), p. 28-33.

underprivileged people have been able to access the judiciary system and see their rights be recognized and effectuated. Moreover, judicial adjudication of ESCR has acted in promoting accountability, in inducing parliament to overcome legislative vacuums, and in recognizing rights such as education, health and pollution-free environment.[74] Not only did it aid in recognizing rights or promoting efficiency and transparency in governmental affairs, but it also aided the judiciary system in regaining societal trust.[75]

However, judicial adjudication of ESCR in India has also caused some inconvenient. Problems are related to the workload, lack of judicial infrastructure to handle all lawsuits relating to ESCR, deficiency in social participation and lack of knowledge to solve specific technical and political matters. Furthermore, the flexibility and ample access to judiciary has stimulated the misuse of judicial adjudication of ESCR for private instead of public benefit.[76]

Despite the troubles caused by ESCR litigation in India, academics and Courts continue to endorse this practice due to its abilitity of promoting social justice. Solutions to the pointed problems have been debated and some measures, such as the imposition of fines to hazardous litigants, have been implemented.[77]

As seen, judicial activism is widely practiced both in Brazil and in India, in spite their different cultures and political backgrounds. Not only are their judiciary system active in recognizing and effectuating rights, but they are currently seen by the people as a *locus* for discussing political matters. However, the different constitutional background of both countries has led to different types of responses from the Judicial System to political matters: even though Brazilian Courts are proactive in recognizing and guaranteeing rights, they are less eager than Indian Courts in flexibilizing and creating new procedural and substantive norms.

Accordingly, judicial adjudication of ESCR in both countries meet difficulties. While in India the ease of accessing and obtaining positive responses from Courts with respect to ESCR has stimulated an avalanche of lawsuits, the decentralization of the judicial protection of ESCR in Brazil stimulates these rights be adjudicated individually, receiving unequal responses.

5.3. Judicial adjudication of ESCR in South Africa

South African judicial adjudication of ESCR, on the other hand,

74 RAJAMANI (2007); DEVA (2009)
75 DEVA (2009), p. 32.
76 DEVA (2009), p. 35.
77 DEVA (2009), p. 37.

is well known because it combines a constitution which amply recognizes rights with a timid judicial intervention in protecting these rights.

The current South African Constitution is fairly new: it was first drafted in 1993 by a democratically elected Constitutional Assembly and came into force in 1996 after being certified by the new South African Constitutional Court. In its origins is the democratization process that followed the end of the apartheid system and, therefore, was aimed at abolishing parliamentary sovereignty and social discrimination and inequality[78] through the separation of powers and the guarantee of ESCR.

Not only did South African Constitution recognize an ample list of ESCR, it expressly stated that Courts might declare rights and grant appropriate reliefs when rights are being violated.[79] Moreover, the Constitution establishes guidelines that must be followed by the Courts when interpreting laws and the Constitution, consistent in the promotion of "*values that underline an open and democratic society based on human dignity, equality and freedom*" and in consideration of relevant international norms.[80] However, despite having a forward Bill of Rights, South African recent authoritarian and segregation experience with Apartheid still haunts Courts inducing them to intervene timidly in the protection of ESCR with fear of trespassing the border of separation of powers.[81] The Supreme Court of South Africa has judged few lawsuits involving ESCR and has responded with ambivalent solutions.

In the first ESCR lawsuit filed before South African Supreme Court, *Soobramoney vs. Minister of Health,* regarding the right to emergency health services, the Court declared that conflicts regarding budgetary matters were not amongst the Judiciaries' competences and, therefore, should be dealt with by the executive branch[82]. Three years later the Supreme Court faced another ESCR lawsuit, *Republic of South Africa vs. Grootboom,* concerning the right to housing. Differently from the previous ESCR case, despite not directly enforcing the parties' rights, the Supreme Court declared government was obliged to establish policy that made universal enjoyment of such right effective in all national territory.[83] Even though *Grootboom* was the milestone for the judicial active protection of ESCR in South Africa, the case *Minister of Health and Others vs. Treatment Action Campaign and Others* (TAC) represented an even greater step in that direction. In this opportunity the Supreme Court declared State was required to, when

78 EBADOLAHI (2008), pp. 1565-1566; GLOPEN (2005), pp. 8-9.

79 View section 38 of South African Constitution. EBADOLAHI (2008), p. 1566.

80 EBADOLAHI (2008), p. 1566; KENDE (2003), p. 141.

81 See EBADOLAHI (2008), GLOPEN (2005), KENDE (2003)

82 EBADOLAHI (2008), pp. 1580-1581; GLOPEN (2005), p. 10; KENDE (2003), pp. 145-146.

83 EBADOLAHI (2008), pp. 1582-1583; GLOPEN (2005), pp. 10-11.

feasible, supply anti-retroviral drug to HIV-positive pregnant woman and their newborn child. Therefore, not only did the Supreme Court declare the justiciability of the right, but enforced it[84].

Despite the development undertaken in ESCR judicial protection in South Africa, Courts are still reluctant to enforce individual and collective constitutional rights due to their fear of disregarding the principle of separation of powers. As Siri Glopen points out, the responsibility for this ambivalent behavior from South African Courts cannot be imposed on the legal system because Courts from Countries with less permissive constitutions, such as the Indian Supreme Court, are more proactive in protecting ESCR.[85] The answer may reside in the Countries' recent apartheid experience or on its judges' background.

As can be noticed in all three countries analyzed, the wide *constitutionalization* of rights combined with the lack of responsiveness or distrust in the representative governmental branches has stimulated citizens to find solution of conflicts involving ESCR in the Judicial System. However, judges in South Africa are more wary than Indian and Brazilian judges in protecting ESCR when it requires entering the grey zone of the separation of powers.

There is noticeably no right answer when it comes to the limit of judicial intervention in ESCR protection because all of the three described systems possess positive and negative impacts. While in India and Brazil there are more means for effectively guaranteeing, protecting and effectuating rights, in South Africa the difficulties caused by judicial intervention in political matters are less noticeable.

5.4. Comparative study on food security policy

This section will briefly analyze the implementation of food security policy in Brazil, India and South Africa. Considering that the scope of this study is only to comparatively analyze how different governmental branches from these countries influenced the design and implementation of a specific public policy, the case description shall be done briefly.[86]

The choice for studying food security policy took into consideration two main reasons: firstly, the access to sufficient food capable of assuring a healthy life is a basic right without which one cannot fully exercise its capabilities; and secondly, all of the analyzed countries in this article have implemented food security policies and have done it in particularly different ways.

84 GLOPEN (2005), p. 11.

85 GLOPEN (2005), p. 13.

86 For more details about food safety policy implemented in Brazil, India and South Africa, see SOUZA & CHMIELEWSKA (2011)

All of these three countries have recognized the right to adequate food by signing and ratifying the International Convenant on Economic, Social and Cultural Rights (ICESCR). At the national level, South Africa and Brazil have expressly declared the right to adequate food in the constitution. India, in turn, had the right declared by the Supreme Court as an interpretation of the article 21 of the Constitution, which guarantees the right to life and personal liberty[87].

In India the Judiciary has played a leading role in designing and implementing the Food Security Policy. The unreasonable levels of hunger and malnutrition tolerated by the government led individuals to request the Supreme Court to recognize the universal right to sufficient food and the Court, in accordance to its previous decisions regarding ESCR, declared that every individual has the right to sufficient food. Accordingly, to guarantee enforcement of its decision, the Supreme Court appointed independent commissioners that would be responsible for measuring the levels of hunger and for monitoring governmental actions towards the fulfillment of the right to sufficient food. However the reports produced by the commissioners have been employed by the Supreme Court in further decisions rendered on the right to sufficient food, they are often incomplete due to the refusal of some State governments to answer the commissioners.[88]

This scenario has led Food Security Policies in India to be highly decentralized and uncoordinated: the several policies which are designed and implemented by each State government are not related to a single centralized policy framework. There have been some attempts to promote dialogue and coordination among the different State implemented food security policies, but a structured and coherent dialog has not yet happened[89].

In South Africa, the right to food was recognized by the 1996 Constitution and was uniformly tackled by the National Integrated Food Security Strategy (IFSS), which was implemented in 2002 with the scope of harmonizing all the existent and disperse food-security programmes. IFSS is a multi-sector policy which provides a general structure for governmental intervention in safety nets and food emergencies; household food production and trading; nutrition and food safety; income opportunities; analysis and information systems; stakeholder dialogue; and capacity building[90]. Accordingly, IFSS possesses a decentralized structure which involves all governmental tiers and civil society. Despite the advantages inherent to multi-tier and multi-stakeholder policy strategies - such as the resort to multiple

87 SOUZA & CHMIELEWSKA (2011), pp. 13-15.
88 SOUZA & CHMIELEWSKA (2011), pp. 13-14.
89 SOUZA & CHMIELEWSKA (2011), pp. 16.
90 SOUZA & CHMIELEWSKA (2011), p. 6.

solutions to tackle a multifaceted problem and the earshot monitoring of large scale programmes -, IFSS has been facing difficulties in coordinating the programme due to implementation problems, resource limitations, timid social participation and departmental rivalry[91].

In Brazil food protection policy is outlined in laws pertaining to the Zero Hunger (Fome Zero) Programme, which was created in 2003 with the scope of acting in four areas: food access; coordination, mobilization and social control; income generation and strengthening of small agriculture. Along with Zero Hunger, in 2010 Brazilian government created the National Food and Nutritional Security Policy (PNSAN) which established the principles and objectives of governmental actions towards food security[92]. Both Zero Hunger and PNSAN account with multi-stakeholder coordination mechanisms which count with the participation of society and all three governmental tiers (federal government, state government and municipalities). The PNSAN has two main coordination bodies: the Interministerial Chamber on Food and Nutritional Security (CAISAN), which is composed by members of the executive branch, and the Counsel on Food and Nutritional Security (CONSEA), which is composed by governmental and civil society representatives. While CONSEA has the scope of discussing the main policy subjects involving programmes and budget, CAISAN analyzes the policy drafted by CONSEA for designing and implementing policy programmes. This system has allowed qualified social participation and the design of public policy *bottom up*, that is, context specific and according to true societal needs. However, Brazilian multi-tier and multi-stake holder has also been facing some problems due to the difficulty of guaranteeing that all governmental organs involved truly cooperate with the programmes designed[93].

Therefore, the executive branches from Brazil and South Africa adopted a multi-tier and multi-stakeholder strategy to implement food security policies. A multi-tier policy is aimed at tacking a problem with multiple actions – *eg*. in food safety policy, it is possible to combine programmes such as conditional cash transfer and agricultural training for small producers – and a multi-stakeholder policy counts with multiple participants in drafting, implementing and monitoring the policy. If successfully implemented, these multi-tier and multi-stakeholder policies are hands down more promising than other policies. However, as has been felt in Brazil in South Africa, their coordination is challenging. Differently, in India, where the judicial Food Security Policy was designed and implemented by the Judiciary, the lack of political will to implement the decisions resulted in the existence of

91 SOUZA & CHMIELEWSKA (2011), p. 6.

92 SOUZA & CHMIELEWSKA (2011), p. 12.

93 SOUZA & CHMIELEWSKA (2011), pp. 19-21.

several decentralized and crumbled policies.

In this sense, some fruitful conclusions may be extracted from this brief description of the food security policy implemented in Brazil, India and South Africa. Initially, all cases analyzed indicate that the international pressure and the consequent constitutional recognition of rights promote significant pressure on government in guaranteeing that it be fully enjoyed by all individuals. Another conclusion that may be deduced from this description is that different cultural, social and economical contexts may require diverse policy solutions. In respect to the different branches participation in policy design and implementation, it is clear that the ideal arenas for this task are the executive and legislative branches. Despite the problems currently faced by Brazil and South Africa in Food Security Policy implementation and monitoring, their examples indicate that policies may be ideally implemented when they count with a plurality of solutions and actors.

On the other hand, the Indian example on food security policy makes it clear that when the representative governmental branches are silent or violate rights, the judiciary may intervene in recognizing and enforcing those rights. If Supreme Court had not recognized and enforced the right to sufficient food, the lack of political will in India to tackle hunger and malnutrition would have left individuals powerless and without means to enjoy the mentioned right. Nonetheless, Indian Food Security Policy would probably be more effectively implemented if there were a true dialog and participation between the Supreme Court and other government branches.

6. Conclusion

As has been seen, the judicial system has historically been assigned different roles in society. During the 1990s, neoliberal economic mainstream proposed that judges and courts should act to guarantee property rights and contracts, in order to promote development. More recently, however, mainly in developing countries, the judicial branch has become more active, guaranteeing individual and collective rights and, therefore, interfering in policy decisions regarding resource allocation which are taken by the Executive and Legislative branches.

This article has attempted to foster the debate over this new political role played by the judicial system and its possible importance in the promotion of development – considered to encompasses economic growth as well as the recognition of individual and social rights, the rule of law and good democratic institutions. Thus, this article has focused on the judicial adjudication of ESCR, as constitutionally recognized rights whose effectiveness depends largely upon the design and implementation of public policy.

With the support of the comparative analysis of Brazil, India and South Africa, it has been shown that the judicial adjudication of ESCR may potentially terminate continuous violations of rights perpetrated by the representative branches of government. However, judicial intervention in public policy might be erratic, as shown by the example of the judicial adjudication of ESCR in both Brazil and India. It is also possible to conclude that the design and implementation of public policies should be designed in a dialectical and permanent interaction of the different governmental branches. Nevertheless, this coordination between governmental branches should not disregard the importance of public participation and new institutions must be context-specific and in accordance with society's values.

It is also clear that further empirical and comparative studies are essential in order to enlarge the understanding on the different institutional arrangements that are able to improve the political participation of the judicial system, making it able to improve democracy and to promote development.

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Panor. Braz. law - Year 3 - Numbers 3 and 4 - 2015 - pp. 421 - 439.
ISSN 1075-1343 (print)
ISSN 2318-1516 (online)
DOI: http://dx.doi.org/10.17768/pbl.a3.n3-4.p421

THE BRAZILIAN 'ECOLOGICAL-ICMS': A PES SCHEME BASED ON DISTRIBUTION OF TAX REVENUE[1]

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Abstract: The scope of this legal brief is to analyze the Brazilian legislation concerning the 'Ecological-ICMS', the 'ecological' State value-added tax imposed on the circulation of goods and services – ICMS. Using a deductive method, it was identified this tax mechanism operates as a type of 'payment for ecosystem services' (PES) scheme in practice, offering the possibility to stimulate environmental protection by distributing revenue from ICMS collected by States to Municipalities that promote conservation of ecosystems and biodiversity. This type of measure was motivated by the need to address challenges in providing economic compensation for Municipalities that undertook environmental protection measures in Brazil, and can serve as a form of positive incentive for the conservation and sustainable use of biodiversity.

Keywords: Convention on Biological Diversity (CBD) - Ecological-ICMS - Distribution of revenue - Qualitative and quantitative criteria - PES scheme

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1. Background

1.1. The status of biodiversity in Brazil

Brazil is a country with rich biodiversity and vast forest areas. Nonetheless, as many developed and developing countries, Brazilian biodiversity has been vanishing, and to implement legal measures to cease negative actions and promote the positive ones is a challenging task. In this regard, providing economic incentives that address the underlying causes of biodiversity loss is part of this challenge.

Historically, deforestation has been one of the greatest environmental problems in Brazil, not just by eliminating biodiversity, but also as the major cause of greenhouse gas emission. The creation of conservation units as well the promotion of a PES Scheme, like the Ecological ICMS (the 'Ecological' Value Added Tax on the Circulation of Goods and Interstate and Intermunicipal Transportation and Communication Services), has the scope to cease environmental degradation, and also intends to restore those already degraded, by providing an economic incentive to Municipalities that undertake conservation measures in their territory.

1.2. The legal history of this legal measure

Some Municipalities that undertake environmental protection measures have considered themselves to be in an economically disadvantaged position by having part (or most) of its territory restricted due to its use for public water supply, even to neighboring Municipalities, or for the creation of conservation units. Municipalities in the Brazilian State of Paraná have been the catalysts for change, mobilizing the creation of the Ecological-ICMS, which emerged as a way to compensate those Municipalities deprived of the use of their lands for conservation purposes.[2] As an example, the Municipalities of Piraquara, Campo Magro and São José dos Pinhais, in the State of Paraná, are in the top 10 national rank revenue receivers from Ecological-ICMS.

1.3. The Brazilian legal system

Tax law deals with the study of taxation, from the creation of a tax or levy to the collection of the tax revenue or to the moment when

2 THE NATURE CONSERVANCY. Ecological ICMS: history and perspectives. Available at: http://www.icmsecologico.org.br/index.php?option=com_content&view=article&id=74&Itemid=77. Access in 28/02/2014.

the obligation to pay the tax ceases to exist, either by its payment or by an extinctive cause of the tax credit. The distribution of tax revenues, however, is not the object of tax law, but rather of financial law and eventually administrative law.[3] Given that the legal system must be analyzed and interpreted in a coherent way, it is important to consider these two branches of law (Financial Law and Tax Law) by different principles and legal instruments, regardless of their theoretical and didactic divisions.[4]

The Brazilian Constitution is founded by democratic republican principles, with executive, legislative and judiciary powers, constituted by 3 government spheres: Union (federal entity), States and Municipalities (local governments). The Union is the only entity that can create tax competences, through the Constitution, but each sphere has its own competence to charge different taxes. Part of the tax revenue received by the State is redistributed to Municipalities according legal criteria. In this regard, the distribution of tax revenue to promote environmental goals is considered as one type of possible positive incentives, which has in fact been implemented in Brazil since the beginning of the 1990's, as will be analyzed in this case study. The Ecological-ICMS does not change the distribution of tax competences, since it does not influence on the power of the federal government to introduce and charge their own taxes, but merely the distribution of tax revenues by States.[5] This brief background aims to present that the Ecological-ICMS is considered part of Financial Law, asserting criteria of distribution of the revenues by States.

In Brazil, the Federal Constitution regulates the allocation of tax revenues under articles 157 to 162, in Section VI, Chapter I, Title VI (related to the national tax system). In addition, articles 157 to 162 of the Constitution regulate the relationship between the Municipalities, States and the Union, and not between the government and the taxpayer. This means that it is only possible to dispose about distribution of tax revenues after it has been collected by the competent political entity. The competence to institute and charge ICMS rests solely and exclusively to the States, pursuant to article 155, II, of the Constitution. On average, revenue arising from ICMS collection represents 90% of total tax revenues, constituting one of the most important sources of State's income. This means that States depend substantially on revenue from ICMS to provide services and fulfill obligations such as maintenance of

3 CARRAZZA, Roque Antonio. *Curso de direito constitucional tributário*. 14ª edição, rev. ampl. e atual. São Paulo: Malheiros, 2000. p. 445.

4 CARVALHO, Paulo de Barros. *Curso de direito tributário*. 18ª ed. rev. atual. São Paulo: Saraiva, 2007. p. 18.

5 MORAES, Alexandre de. *Constituição do Brasil interpretada e legislação constitucional*. 7. ed. atual. até a EC n°55/07. São Paulo: Atlas, 2007. p. 1938.

public facilities, salary payments, investments, etc.

Article 158, IV, of the Constitution states that twenty five percent of ICMS revenue belongs to Municipalities; article 158 states that revenue assigned to Municipalities, referred to in subparagraph IV, will be credited according to the following criteria:

> (I) - three fourths (3/4), at least, in the proportion of value added in transactions involving the movement of goods and the services rendered held in their territory;
>
> (II) – *up to one fourth (1/4), according to State law provisions* or, in the case of the territories (rarely applied), federal law.

Therefore, it can be inferred that one-sixteenth (1/16) of all State ICMS revenue may be transferred to Municipalities according to discretionary criteria of State law. State governments have been using this provision as the legal basis to create means to promote environmental protection, such as the Ecological-ICMS, which represents a special way to distribute ICMS revenue to Municipalities. Therefore, the next step is to evaluate the criteria used by States to transfer portion of revenue from the ICMS to certain Municipalities, according to their degree of development of environmental sustainability.

It is important to stress that this measure does not mean the creation of a new tax, and that the duty of taxpayers to pay the tax is not connected to environmental protection as for example, polluting, deforestation, etc. *The Ecological-ICMS is a form of allocation of revenues from the collection of the tax according to criteria established in State law as a way to encourage environmental protection***,** as envisioned in article 158, IV, of the Brazilian Federal Constitution, and later on regulated by specific State law. It can be characterized as a legal and effective instrument to allocate the tax revenue to Municipalities to perform environmental sustainability, maintenance and/or recovery of degraded areas of environmental preservation or degradation phase.[6]

It should be noted that Municipalities must fulfill the legal requirements to receive the share of Ecological-ICMS by the States, but do not have the duty to invest the amount received from Ecological-ICMS in environmental preservation related activities. Municipalities are free are free to apply the resources in any areas, stimulating investments in infrastructure, health, education and also environment protection.

The Ecological-ICMS aims to compensate the cost of the opportunity of the soil exploration by the distribution of tax revenue to Municipalities which contribute for the environment preservation, ensuring a positive externality.[7] An advantage is that this mechanism

6 BRITTO NETO, José Gomes de. A utilização do ICMS ecológico como um instrumento de política pública para a manutenção do meio ambiente sustentável. *Revista da Escola Superior da Magistratura de Sergipe*, n. 6, 2004, p. 89-100.

7 ALTMAN, A. *Pagamento por serviços ambientais: aspectos jurídicos para a sua*

does not affect directly the market, neither competition, as would be the case of the creation of a new green taxes leading to additional tax charges.

However, despite the positive incentives, the main challenge to implement the Ecological-ICMS is considered to check and control if the Municipalities are really fulfilling the requirements of the State Law to receive revenue according to the criteria established. This is cited by the States as an excuse to not implement such measures, stating the lack of budget for supervision.[8]

In other words, it is possible to affirm the omission of the State on acting in favor of environmental protection, without assuming proper conduct as stated by article 225 of the Brazilian Federal Constitution. On the case of Rio Grande do Sul State, effectively, there is a financial crisis with high public debt affecting investments on infrastructure, health and education. Nonetheless, other States, like Minas Gerais and Paraná, are also debtors[9] and implemented the measure properly, concluding that no excuse must be accepted for the omission on adopting the Ecological-ICMS.

2. Elements of the legal measure

The key players for the implementation and effectiveness of the Ecological-ICMS are the States and Municipalities. The State Congress and the State Executive power must be engaged to approve the State Law adopting legal criteria for the distribution of tax revenue. After approving the law, the State Environment Ministry (in Brazil, called the State Environment Secretary) will be the supervising agent to determine which Municipalities are fulfilling the requirements and are thus entitled to receive the allocation of the respective revenue. Municipalities are the core of the Ecological-ICMS mechanism. They are the most interested entity on this system because they are recipients of revenue, and must be the mobilizers (pressure agents) for the approval of State Law. In addition, in order to actually receive the tax revenue, Municipalities need to provide evidence to be effectively protecting the environment, fulfilling all the criteria established in the State Law. The next section will analyze the specific legislation enacted by three different Brazilian States concerning the implementation of Ecological-ICMS, based on the Constitutional provisions outlined above.

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aplicação no Brasil. p. 1.

8 This is the opinion of the Government of the State of Rio Grande do Sul, when the author and State's Representative have met in 2012.

9 BANCO CENTRAL DO BRASIL. *Endividamento de Estados e Municípios*. Available at: http://www4.bcb.gov.br/fis/dividas/lmdividas.asp. Access in: 19/03/2014.

2.1. The case of the state of Paraná

The first State that implemented Ecological-ICMS was Paraná in 1991. This was facilitated by the fact that the Parana State Constitution provides under article 132, special treatment in the distribution of the share of ICMS revenue to Municipalities that have in their territory the following types of areas: i) protected areas, or that are directly influenced by them; and, ii) water sources for public supply. Given that this State was pioneer in adopting this type revenue-sharing technique, it will be the main focus of the analysis undertaken in this paper. Article 132 of the Constitution of Paraná was later on regulated by Complementary Law (CL) n. 59/91, and Executive Decree n. 974/91, providing that 5% of the total percentage that Municipalities were entitled to receive from ICMS revenue would be distributed based on the following criteria:

(i) 50% to Municipalities with environmental conservation units;

(ii) 50% to Municipalities with water sources for public supply.

Article 2, of the CL n. 59/91, states that Municipalities which fulfill both criteria will benefit from greater financial compensation.[10]

The Ecological-ICMS legislation in the state of Paraná aims:

(i) to increase the quantity and the area of protected areas (conservation units) and other specially protected areas (quantitative dimension);

(ii) to regulate planning, implementation and pursuit of sustainability of conservation units (qualitative dimension);

(iii) to encourage the creation of ecological corridors, connecting vegetation fragments;

(iv) the adoption, development and institution building, both at the State and Municipal levels, with biodiversity conservation;

(v) pursuit of tax justice for environmental conservation.[11]

In the case of item "iv", it means the possibility of creation of a relationship between the State's and Municipality's Environmental Secretariats. It is not necessary to create a specific institution for the implementation of Ecological-ICMS, but to coordinate between the payer and the beneficiary. Paraná uses a public institution named IAP – Paraná Environmental Institution for inspection and control of the

10 ZEOLA, Senise Freire Chacha. ICMS – instrumento de proteção e conservação do meio ambiente. *Revista de Direito e Política*, v. 8., jan-mar/2006, p. 55-78. p. 60.

11 W. LOUREIRO, ICMS Ecológico: a consolidação de uma experiência brasileira de incentivo a Conservação da Biodiversidade (1997) Available at: <http://ambientes.ambientebrasil.com.br/unidades_de_conservacao/artigos_ucs/icms_ecologico_-_a_consolidacao_de_uma_experiencia_brasileira_de_incentivo_a_conservacao_da_biodiversidade.html> Access on: 07/03/2009.

revenues to be distributed to the Municipalities. About the item "v", it means that environment protection must be considered on the effective distribution of the revenue by the State, according the criteria of the State Law. The Ecological-ICMS is a mean to distribute the revenues respecting the environment, considered a collective right by the Brazilian legal system.

Any Municipality in Paraná State can benefit from Ecological-ICMS resources, through the creation of conservation units, or increase of the surface area of conservation units already created by the Municipality itself or by another federal entity, or also by improving the quality of the conservation units, or other specially protected areas. To facilitate the exercise of the Ecological-ICMS, the percentage rates set for each Municipality is calculated through a specific formula that measures the 'Biodiversity Conservation Coefficient – BCC'. With regard to the conservation units, the process works from an evaluation of the quality of the conservation unit, which will result in the determination of a score. This score, if positive, represents a financial increase to the Municipality.[12]

Therefore, to receive the apportioned tax revenue, some criteria are considered for calculation purposes, provided by the Ordinance n. 134/97, of the Environmental Institute of Paraná – IAP. It has been called Management Category and Conservation Factor, with the following scores: Ecological Stations (between 0.8 and 1.0); Biological Reserves (between 0.8 and 1.0); Parks (between 0.7 and 0.9); Federal, State or Municipal Forests (0.64); Relevant Ecological Interest Area (0.66); Environmental Protection Area (0.08); Indigenous Lands Area (0.45) and Special Areas of Regulated Use (0.30).[13] Conservation units at all levels should be evaluated under the quantitative and qualitative aspects, each year, and new ones must be registered on the State Register of Conservation Units, to determine the transfer of revenue to Municipalities.[14]

It should be noted that the Ecological-ICMS has proven to be effective in the State of Paraná. Between 1992 and 2000, there was an increase of 1.894,94% on the surface of Municipal conservation units; of 681,03% in State conservation units; of 30,50% in Federal conservation units and indigenous lands, and 100% on State Private Natural Heritage Reserve (PNHR). There was also an improvement in

12 BRAZIL. Paraná State Conservation Units Scores. Available at: <http://www.uc.pr.gov.br/modules/conteudo/conteudo.php?conteudo=56>. Access in: 17/03/2009. See also BRAZIL. Decree n. 2791/Paraná - 27/12/1996, for precise informations, due to the complex arithmetic formula.

13 CAMPOS, L. P. R. ICMS Ecológico: experiências nos Estados do Paraná, São Paulo e Minas Gerais e alternativas na Amazônia. Apud ZEOLA, op. cit., p. 62.

14 ZEOLA, op. cit., p. 62.

the quality of preservation of Municipal, State and PNHR parks.[15] In addition, the adoption of this measure accounted for significant increase in the revenue received by some Municipalities, mitigating, to some extent, the reduction of productive activity in their territory due to the existence of conservation units. For instance, in the Metropolitan area of Curitiba, capital of Paraná, there were significant discussions about the burden of the Municipalities that have significant portions of their territories inserted in watersheds for regional supply and, therefore, have limitations in land use. The city of Piraquara was one of the most benefited with increased revenue amounting to 99%.[16]

Thus, the experience with Ecological-ICMS in Paraná has not only been pioneer but has also proven to have functioned as a positive incentive to maintain different forms of conservation areas and to protect watersheds, providing increased financial support to Municipalities that undertake these activities. In the section below, the experiences of other states in the implementation will be briefly analyzed. Despite not being as significant as the experience of Paraná, making a comparative analysis with the experiences of other States can provide important insights on the functioning and challenges of this type of measure.

2.2. The experiences of other states

The Law of the States of São Paulo, Minas Gerais and Rio Grande do Sul will be analyzed, considering the importance of these States in the Brazilian scenario. Other States that also adopted this system to encourage environmental protection include Santa Catarina, Mato Grosso, Mato Grosso do Sul, Pernambuco, Rondônia, Pará and Amapá.

2.2.1) The State of São Paulo was the second to adopt the Ecological-ICMS, through Law n. 8.510 in 1993. It established that a percentage of 0,5% of the tax revenue from the ICMS should be allocated to Municipalities with protected areas, and other 0,5% to Municipalities with water reservoirs for the generation of electricity. In relation to conservation units, the legislation provides benefits to Municipalities with territories integrating conservation units created by the State, excluding the areas created and managed by other federal entities. The legislation also envisions management categories to generate

15 LOUREIRO, Wilson. *ICMS Ecológico: a consolidação de uma experiência brasileira de incentivo a Conservação da Biodiversidade*. Disponível em: <http://www.ambientebrasil.com.br/composer.php3?base=./snuc/index.html&conteudo=./snuc/artigos/icms.html.> Acesso em 07/03/2014.

16 C. HARDT, et al. (2008) Gestão metropolitana: relação com a população e com a qualidade hídrica. ABEP <http://www.abep.nepo.unicamp.br/encontro2008/docsPDF/ABEP2008_1735.pdf> at 01/02/2014.

benefits, excluding the Private Natural Heritage Reserves (PNHR). However, the law of São Paulo has not adopted the *qualitative criteria* of conservation, which would allow better use of the mechanism in favor of the consolidation of conservation units, as happens in Paraná.[17]

In São Paulo, the calculation of the index (for revenue distribution) is responsibility of the Secretariat of Environment and its publication is made by the State Treasury. The calculation takes into account environmental and social factors of each Municipality and each protected area. Social factors are also considered for calculating the percentage of revenue, such as the population size, the value added and tax revenues of the Municipality. Among environmental factors, the area of the conservation units and the size of the areas occupied considering the restriction of use of these spaces are considered.

The amount of revenue distributed has been higher year after year, as informed by the Secretariat of Environment of the State of São Paulo[18]:

- 2010 - R$ 92.071.487,84;
- 2011 - R$ 101.338.415,02;
- 2012 - R$ 108.041.161,07;
- 2013 - R$ 123.035.805,85.

This increase in the amount of Ecological-ICMS distributed shows the increased concern of the Municipalities to fulfill the criteria of the State Law, which is the basis for the calculation of the distribution of the revenue.

2.2.2) The State of Minas Gerais adopted the Ecological-ICMS through Law n. 12.040 of 1995, also called the *Robin Hood Act*. Such legislation put in place, in addition to the criteria of the conservation units (protected areas) and watersheds for public supply, environmental sanitation, collection and disposal of garbage and historical heritage as possibilities of allocation of revenue to Municipalities under this initiative.[19]

17 LOUREIRO, Wilson. *ICMS Ecológico: a consolidação de uma experiência brasileira de incentivo a Conservação da Biodiversidade*. Disponível em: <http://www.ambientebrasil.com.br/composer.php3?base=./snuc/index.html&conteudo=./snuc/artigos/icms.html.> Acesso em 07/03/2014.

18 SECRETARIA DO MEIO AMBENTE DO ESTADO DE SÃO PAULO. ICMS Ecológico. Available at: http://www.ambiente.sp.gov.br/cpla/icms-ecologico/. Access in 19/03/2014.

19 BRAZIL. Law n. 12.040 of 1995 (State of Minas Gerais). Article 1 - The share of revenue from tax collection (...) will be distributed in the percentages and periods indicated in Annex I of this Law, according to the following criteria: (...);

VIII - Environment: considering the following: A) the portion of a maximum of 50% (fifty

The method used in Minas Gerais is similar to that adopted in Paraná, but differs by inserting, beyond the criteria of conservation and public watershed, supply and sewage waste treatment, with concern for environmental sanitation.[20] However, The State of Minas Gerais did not adopt qualitative variables for the calculation of indices that Municipalities are entitled to receive, thereby not providing an incentive to use more effectively the Ecological-ICMS benefit for the consolidation of conservation units.

Comparing the situation of Minas Gerais Municipalities before and after insertion of the Ecological-ICMS, there seems to be also a positive impact. Studies showed an increase in the percentage of tax revenue distribution, and in the number of Municipalities receiving ICMS transfers. However, studies also pointed out the need to consider the quality factor as a tool of evaluation of the composition of conservation, through the use of qualitative criteria.[21] In addition, the area of conservation units was increased by slightly over 1 million hectares in five years (1996 to 2000), a 62% increase. However, the Ecological-ICMS is not considered the only reason for this increase in the number of conservation units, which can also be attributed to efforts by Municipalities to recognize existing units that had not been regulated by the State.[22]

2.2.3) The State of Rio Grande do Sul established Ecological-ICMS through Law n. 11.038 in 1997, amended by Law n. 12.907

percent) of the total will be distributed to Municipalities whose systems of treatment or final disposal of garbage and sewage, licensed with the State environmental agency operation, meet at least, respectively, 70% (seventy percent) and 50% (fifty percent) of the population, and the maximum value to be assigned to each Municipality shall not exceed the relevant investment, estimated based on the population served and average cost "per capita" prescribed by the State Board of Environmental Policy, of the landfill, waste composting plant and wastewater treatment station systems;

B) the remaining funds will be distributed based on the Municipal Conservation Index , calculated in accordance with Annex IV of this Act , considering the State, Federal and Private conservation units as well as the Municipal units that may be registered, observed the parameters and procedures defined by the State environmental agency; (...). Free translation by the author.

20 TREMEL, Rosângela; PEREIRA, Patrick da Luz. ICMS ecológico: a materialização do princípio do protetor-recebedor*, Revista Jurídica Consulex*, Brasília, n. 198, abril/2005, p. 49-51.

21 ARANTES, V. A. et al., Analysis of the ecological ICMS in Minas Gerais State by the political cycle perspective (2013) 13, 1, *Revista de C. Humanas*, p. 121-136. Available at: http://www.cch.ufv.br/revista/pdfs/vol13/artigo8vol13-1.pdf. Access in: 01/03/2014.

22 LOUREIRO, Wilson et. al., *The Ecological Value-Added Tax: Municipal Responses in Parana and Minas Gerais*, Brazil. Available at: http://www.icmsecologico.org.br/images/artigos/a024.pdf Access in: 01/03/2014.

in 2008. The allocation of revenue from ICMS according to the following percentages: "Article 1 - The rate of participation of each Municipality in the share of 25% of the revenue (...) will be obtained according to the following criteria:

> *(...) III - 7 % based on the ratio between the area of the Municipality, multiplying by three (3) the environmental conservation areas, indigenous lands areas and those flooded by dams, except in the hydropower areas located on the Municipalities, calculated on the last day of the calendar year referred the investigation, reported in square kilometers, by the Division of Geography and Cartography of the Secretariat of Agriculture, Livestock and Agribusiness; (Amended by Law No. 12.907/08)".*

Thus, this State did not establish an objective criteria, adopted by the States of Minas Gerais and Paraná, because the distribution was limited to the area of the Municipality in relation to the area preserved. This demonstrates the absence of a qualitative variable and a limited legislation related to the details to fulfill the requirements.

The impact of the Ecological-ICMS in Rio Grande do Sul is not transparent and the government has published no reports to date. In addition, there is a challenge regarding the lack of knowledge by the Municipalities of the measure, due to lack of political will of the State to encourage the fulfillment of the criteria. Rio Grande do Sul does not differentiate the Ecological-ICMS from the total revenue distribution.[23][24]

3. Lessons learned and remaining challenges in achieving the target

According to article 158 §, II, of the Brazilian Federal Constitution, States have the power to legislate concerning the allocation of ¼ of the

23 THE NATURE CONSERVANCY. Available at: http://www.icmsecologico.org.br/index.php?option=com_content&view=article&id=79&Itemid=77. Access on: 12/02/2014.

24 In July 2012, the author of this article proposed to the Government of the State of Rio Grande do Sul, on a meeting with the Secretary of Development, in the State Administrative Office in Porto Alegre, RS, to amend the legislation, to implement a legal text that would make the criteria more qualitative and effective for the promotion of a sustainable environment. However, the attempt remains frustrated by the apparent lack of interest of the current Government in this subject.

25% of ICMS revenue, and to stipulate criteria for the allocation of this revenue. Some States have drawn up this prerogative and passed State legislation creating certain criteria that encourage Municipalities to adopt environmental protection measures. The Ecological-ICMS is not a tax imposed by States, as one might interpret, but only a way of sharing revenue to the Municipalities.

Despite not being able to solve immediately all national environmental problems, the Ecological-ICMS is a measure found by the States to promote environmental development in a sustainable manner. As can be concluded by the analysis of this brief, the Ecological-ICMS is a positive incentive to encourage environmental protection, but its effectiveness depends on:

i) adequate State Law;

ii) use of quantitative and qualitative criteria to determine the allocation of funds to Municipalities;

iii) strengthen the process of regularization, planning, implementation and maintenance of conservation units, sanitation and consequently, improving the quality of the environment and the life of society, reaching the main focus of Aichi Target 3.

iv) awareness of Municipalities about the incentive, in order to fulfill the criteria and apply for the benefit;

v) political will.

The Ecological-ICMS can be characterized by a positive incentive, but, despite its positive effects for environmental conservation, it is probably not sufficient to reduce the most active and broadly deforestation, pollution, etc., considering the great extension of Brazilian area. The area upon which Ecological-ICMS can be exercised must be extended in order to achieve a broader protection. In practice, in Paraná and Minas Gerais States (The States of Parana and Minas Gerais), the results had been very positive. In Paraná, the results achieved are more significant, as a result of the more sophisticated model of Ecological-ICMS implemented in that State, which imposed better qualitative criteria. In Paraná, it is reported Ecological ICMS raised the number of conservation units, improving the environment preservation: from 1992 to 2000, there was an increase of 1894,94% in surface units of Municipal conservation, 681,03% in State conservation units, 30,50% in Federal protected areas and Indian lands.

As noted, the States do not maintain uniformity in the criteria adopted in State Law, when they encourage environmental protection. Qualitative and quantitative criteria, especially the former, should be included in the elaboration and adoption of these Laws. The more precise and specific legislation is the more benefits it can provide. The more and better criteria, more qualified is the legislation, providing the

possibility of better allocation of efforts to promote the environment protection.

Political will is also a challenge for the establishment and implementation of the measure, as it depends on the executive State power to take the initiative for the proposal of legislation and its approval by the State congress. In addition, Municipalities also play a key role, firstly by exercising political pressure for States to adopt criteria for Ecological-ICMS. In addition, they must fulfill the criteria of the law in order to be able to benefit from allocation of tax revenues, and the more they comply, the more revenue they will receive. However, they have no legal obligation to use the revenue received specifically for the protection of the environment directly. Municipalities are free to use these resources for other public services such as education, health and infrastructure.

This lack of binding spending obligation is positive for the Municipalities, which depends mostly of the revenue to keep the public services, including environment protection. On the other hand, in Municipalities with other sources of revenues, the revenue arising from the Ecological-ICMS might be just a complement, and could be used for environmental purposes. This spending obligation could be directed to Municipalities with good social and economic conditions, or not dependent of the Ecological-ICMS only.

There is strong public participation on the implementation and effectiveness of the Ecological-ICMS, in the approval of the State Law, and the inspection of the criteria fulfillments to the distribution of the revenue. Basically, the public sector is the great engine of the measure. The conservation units are created by the Municipalities, with prior public consultation, in order to support the definition of the location, the size and the most appropriate boundaries for the unit (Article 5, Federal Decree n. 4.340/2002).[25]

An important issue is the high variation of the effects of the Ecological-ICMS due to the value added generated by a particular area of land. If the value added and primary production per hectare have low average levels, the conservation option seems more attractive in terms of ICMS revenue. For certain Municipalities in Minas Gerais would be financially attractive to create protected areas. For others, the motivation for setting aside land for protection would have to come from other factors, meaning that is more economic advantageous not to keep protected areas.[26] Thus, the design of the tax allocation criteria

25 BRAZIL. Federal Decree nº 4.340/2002. Available at: http://www.planalto.gov.br/ccivil_03/decreto/2002/D4340.htm. Access on: 19/03/2014.

26 GRAN, M. G. *Fiscal Incentives for Biodiversity Conservation: The ICMS Ecológico in Brazil*. Available at: https://www.cbd.int/financial/fiscalenviron/brazil-fiscalicms-iied.pdf. Access in: 30/03/2014. p. 31.

is very important in order to make conservation a more economically advantageous option and should be done with caution.

Finally, it has been pointed out that a large portion of Municipalities are not aware about the Ecological-ICMS[27], showing a lack of dissemination about this incentive measure. This can be considered a great challenge for the effectiveness of the mechanism.

4. Key lessons learned

The Ecological-ICMS can represent a positive incentive, as a mechanism that provides distribution of tax revenue and works as a form of PES scheme in practice. It is implemented through Brazilian State Law, characterized by the transfer of tax revenue from States to local governments (Municipalities) in reward for measures to promote biodiversity conservation and sustainable use, such as the establishment of protected areas, protection and maintenance of watershed and other conservation activities.

This type of measure can be effective in protecting intergenerational rights to a healthy environment and exhaustible natural resources, consistent and in harmony with the CBD, taking into account national socio economic conditions. This mechanism is an economic incentive for Municipalities to promote the environment protection. It is innovative as it provides additional funding specific for environmental protection, without creating new taxes or financial burden on tax payers, allowing for States to incentivize Municipalities to undertake conservation efforts.

Resuming:

- The Ecological-ICMS is an incentive that can stimulate local governments (Municipalities) to take measures to promote biodiversity conservation and sustainable use, consistent and in harmony with the CBD, taking into account national socio economic conditions. It provides financial support to Municipalities that undertake conservation activities, without creating additional financial burden to tax payers.
- The Ecological-ICMS is not a green tax, but a type of a PES scheme based on distribution of tax revenue. This mechanism is based on the Federal Constitution and State law, and part of the mechanism of tax revenue distribution by the States to Municipalities. This type of incentive depends on adequate

27 UHLMANN, V. O.; ROSSATO, M. V.; PFITSCHER, E. D., Conhecimento dos gestores públicos sobre o instrumento de política pública ICMS ecológico nos municípios da quarta colônia de imigração italiana do RS, *Enfoque: Reflexão Contábil UEM – Paraná*, n. 29, v. 2, 2010, p. 83-102. Available at: http://periodicos.uem.br/ojs/index.php/Enfoque/article/view/11396/6236. Access in 01/03/2014.

State legislation containing both quantitative and qualitative criteria, and on enforcement and monitoring of the fulfillment of such criteria.

- Initiatives of different States in Brazil show a positive response to this legal measure, leading to substantive increase both in the number of protected areas and other types of conservation measures, and on tax revenue received by Municipalities.
- To achieve effective implementation of Ecological-ICMS, it is necessary not only to focus on the approval of the necessary legal framework, but also on implementation and capacity building of the State's Environmental Agency and the Municipalities.
- For better implementation, a case-by-case analysis must be undertaken to evaluate whether the incentive will be effective. A badly conceived mechanism might make it more economically advantageous to convert the area for other purposes, generating value, instead of keeping it protected.
- Political will is a challenge for the implementation of this measure, which relies on the State Government to introduce the legislation project, and to support its approval by the State legislative power. Municipalities might be the pressure agent to force State's governments to implement the Ecological-ICMS.

5. Conclusion

The distribution of tax revenue, prescribed in the Brazilian Federal Constitution, is the basis of this measure. Among the Brazilian States that have Ecological ICMS schemes, Paraná and Minas Gerais are considered to have the most advanced legislation, including both qualitative and quantitative criteria determining the terms of distribution of tax revenue for Municipalities. Considering the experience of these and other States in Brazil, as São Paulo e Rio Grande do Sul, the adoption and implementation of this type of measure, with adequate legislation, could represent an important contribution to the achievement of the goals of Aichi Target 3, generating new ways of financing biodiversity conservation and sustainable use without creating new taxes and financial burden on taxpayers.

The Ecological-ICMS can be a positive measure to promote the conservation of the environment. However, this mechanism faces a great challenge of implementation, which must be analyzed case by case. States without positive incentives measures need to approve an entire Ecological-ICMS legal system. Other States with an already ongoing system must improve State Laws to qualify the positive measures.

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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.

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PBL

Online
October, 2015

Print issue
October, 2015

Year 3 | Numbers 3-4 | 2015

PBL

www.panoramaofbrazilianlaw.com

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

Year 3, Nos 3-4, 2015