

PANORAMA OF BRAZILIAN LAW

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

LA PERSONNE MORALE SELON LE DROIT INTERNATIONAL PRIVÉ BRÉSILIEN ACTUEL

Carmen Tiburcio

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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. More than twenty years have passed and now a group of the next generation of Brazilian law scholars has undertaken to resuscitate and keep alive the idea of the Panorama by means of a permanent electronic journal. Professor Carmen Tiburcio, who contributed to the original Panorama and later substituted me as head of the Private International Law Department of the Rio de Janeiro State University, together with Raphael Carvalho de Vasconcelos and Bruno Rodrigues de Almeida, both professors of international law at the UFRJ are leading this important initiative. Today, much more than two decades ago - Brazil, one of the BRIC countries - has become an important player in the international economy and its legal system an important factor in the proper development of international commercial relations. May this effort prosper for years and generations to come.

Jacob Dolinger, 2013

EDITORIAL NOTE

In 1992, a group of prominent Brazilian scholars led by Professors Jacob Dolinger (Universidade do Estado do Rio de Janeiro) and Keith Rosenn (University of Miami) created the journal *Panorama of Brazilian Law* as an attempt to provide reliable legal information on Brazilian law for non-Portuguese speakers. Originally planned as a yearbook, the ancient PBL presented papers related to several branches of Brazilian law written by respected authors. Due to several reasons, this groundbreaking project did not go ahead at that time 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 2015, on a renewed effort to narrow the gap of academic knowledge between Brazil and other legal systems, together with the annual number in which 17 articles were featured, the ever first legendary 1992 issue of *Panorama of Brazilian Law* became available online. Now, the editors present this fourth issue of *Panorama of Brazilian Law*, composed by 18 articles covering several branches of the Brazilian legal order, available in the electronic magazine format (www.panoramaofbrazilianlaw.com) which allows a broader perspective for the broadcasting of articles and reaching of a greater number of potential researchers. For this fourth issue, papers written in English, French, Italian and Spanish were submitted. 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 issue 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 pleased with the present success and positive repercussions of the project and hope to provide foreign researchers an ultimate way to access Brazilian law.

Finally, we could not fail to mention that this fourth issue comes in a moment of sorrow. In an international perspective, there is the dawn

of irrational and xenophobic movements, which can only lead to the suffering of the most vulnerable. Locally, Universidade do Estado do Rio de Janeiro, *alma mater* of this project, is amid a struggle for its very survival. On top of that, our dear friend and colleague Bruno Almeida has much prematurely left us, what fortifies the sense of urgency that all should have in life. Therefore, this present number of Panorama of Brazilian Law seeks to accomplish many things: To reinforce that knowledge is the key tool to overcome fear, bringing the different peoples together. To prove that some battles are worth fighting and that our beloved Universidade do Estado do Rio de Janeiro, for all that it represents, must not (and surely will not) perish. To overcome the loss of a fondly friend, by carrying on one of its projects.

Brazil, May 2017.

Raphael Carvalho de Vasconcelos
Alexandre Sales Cabral Arlota

LA PERSONNE MORALE SELON LE DROIT INTERNATIONAL PRIVÉ BRÉSILIEN ACTUEL

LEGAL PERSONS UNDER CURRENT BRAZILIAN PRIVATE INTERNATIONAL LAW

Carmen Tiburcio

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Cet article s'origine d'une conférence présentée à L'Université de Toulouse, France, à 2010, pour laquelle l'auteur tient à remercier Lucas Hermeto pour sa collaboration dans les recherches. Gabriel Almeida, Isabella Jordani et Stela Porto ont aussi contribué dans les recherches de droit brésilien.

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Resumé: Pour déterminer la nationalité des personnes morales, il faut déterminer certains critères. Le Droit International Privé reconnu trois, qui sont: i) de l'incorporation; ii) du siège social; et iii) du contrôle. Au Brésil, il est adopté le critère de l'incorporation. En conséquence, une société brésilienne est celle qui a été incorporé au Brésil et qui a son siège administratif dans ce pays. La juridiction brésilienne sera alors compétente pour juger de ce qui se réfère à des entreprises brésiliennes, mais pas seulement pour eux. Les tribunaux brésiliens peuvent également juger les personnes morales étrangères qui y ont une agence, une filiale ou une succursale au Brésil.

Mots-Clés: Nationalité - Personnes morales - Etreprises étrangères

Abstract: Private International Law traditionally acknowledges three criteria to determine the nationality of legal entities, which are the place of: i) the incorporation; or ii) the registered office; or iii) its control . Specifically in relation to the Brazilian Law, a company is deemed as Brazilian, should it had been incorporated in Brazil and should it have its headquarters in that country. Brazilian courts will, thus, be competent to exert authority and rule matters related to Brazilian companies.

However, Brazilian courts may also settle controversies regarding legal entities which have an agency, a branch or a subsidiary in Brazil.

Keywords: Nationality - Legal entities - Foreign companies

1. INTRODUCTION

La personne morale est un important sujet d'étude du droit international privé et public. Il y a plusieurs exemples de cette convergence, comme le cas *Barcelona Traction*, décidé par la Cour Internationale de Justice de la Haye¹, les divers traités bilatéraux pour éviter la double imposition et ceux qui garantissent la protection réciproque des investissements. D'ailleurs, chaque fois de plus, il y a moins de différences entre ces deux branches du droit².

L'objectif de cet article est de faire une brève analyse du droit international privé brésilien et de ses quatre grands sujets d'étude (la nationalité, le statut des étrangers, le conflit des lois et le conflit des juridictions) concernant la personne morale, ce qui a des conséquences aussi dans le cadre du droit international public. Ainsi, l'article sera divisée en quatre chapitres, qui correspondent aux quatre grands sujets de la discipline.

2. LA NATIONALITÉ DES PERSONNES MORALES

Une question très importante est celle de déterminer la nationalité des personnes morales, car une société étrangère est celle qui n'a pas la nationalité locale. Dans ce domaine, il convient d'analyser les critères qui permettront la détermination de la nationalité des personnes morales. Il y en a plusieurs, dont les plus importants sont ceux: i) de l'incorporation; ii) du siège social; et iii) du contrôle. Citons-les.

Selon le critère de l'incorporation, la personne morale a la nationalité du pays où elle s'est constituée. C'est le critère en général adopté dans les pays du common law (en Angleterre et aux États-Unis, par exemple)³. Cette

1 *Barcelona Traction, Light and Power Company, Limited*, arrêt, C.I.J. Recueil 1970.

2 Andreas F. Lowenfeld, *Public law in the international arena: conflict of laws, international law, and some suggestions for their interaction* / by Andreas F. Lowenfeld. Recueil des cours, Volume 163 (1979-II), p.321: «My first message, at least at a personal level, is that, the study and practice of private international law is highly relevant to the study and practice of public international law – and vice versa».

3 Cf. sur la question: Jacob Dolinger et Carmen Tiburcio, *Direito Internacional Privado: parte geral e processo internacional*. Rio de Janeiro: Forense, 2016, p. 246; Henri Battifol et Paul Lagarde, *Droit International Privé*, t. 1, 6.ed. Paris: Librairie générale et de jurisprudence, 1974, p. 254. V. aussi, sur le modèle adopté aux États-Unis et en Angleterre: *Restatement Second, Conflict of Laws*, 297; A. V. Dicey et J. H. C. Morris, *The Conflict of Laws*, 8. ed. Londres:

méthode est critiquée, toutefois, à cause de son trait formaliste, qui permet aux fondateurs de choisir, de manière arbitraire et voir abusive, la nationalité et, par conséquent, la loi qui régira le statut juridique de l'entreprise⁴.

En effet, ce critère tend à stimuler la fraude. Ainsi, si la nationalité de la personne morale est définie uniquement à partir du lieu de son incorporation, les étrangers pourront exercer des activités réservées aux nationaux sous couvert d'une personne morale localement créée⁵. Le critère doit être tempéré. Plus récemment, toutefois, on constate que le critère de l'incorporation a gagné importance à cause du droit communautaire. L'article 58 du Traité CE⁶ détermine que les entreprises constituées dans l'un des États membres auront la nationalité de celui-ci, à condition qu'elles aient leur siège réel dans un autre État-membre. L'État du siège est obligé à reconnaître et à permettre que l'entreprise jouisse de droits sur son territoire si l'État où elle a été constituée la lui reconnaît.

Les nouvelles législations de droit international privé des pays de l'Europe tendent à adopter le critère de l'incorporation. Ainsi, par exemple, la loi suisse de 1987⁷ et la loi italienne de 1995⁸.

Stevens & Sons Limited, 1967, règle n 70.

4 Jean Derruppé, *Droit International Privé*, 5.ed. Paris: Dalloz, 1978, p. 40.

5 Sur le thème, Henri Battifol et Paul Lagarde, *Droit International Privé*, t. 1, 6.ed. Paris: Librairie générale et de jurisprudence, 1974, p. 254: «Les Anglo-saxons vont d'ailleurs plus loin en CE sens par le système de <l'incorporation>: société est régie par la loi du lieu où les formalités de constitution ont été accomplies, même si le siège social réel est dans un autre pays. Le système donne aux associés la latitude de conserver le bénéfice de la loi anglaise et de la protection diplomatique anglaise quel que soit le lieu de leur activité, tout en évitant les discussions éventuelles sur la localisation du siège réel. Mais la liberté qu'assure ce formalisme est jugée dangereuse pour l'autorité de la loi par les partisans du siège social dans les pays continentaux où les sociétés pourraient s'incorporer à Londres pour éluder les dispositions de la loi locale».

6 Traité instituant la Communauté Européenne signé à Rome le 25 mars 1957, article 58: «Les sociétés constituées en conformité de la législation d'un État membre et ayant leur siège statutaire, leur administration centrale ou leur principal établissement à l'intérieur de la Communauté sont assimilées, pour l'application des dispositions du présent chapitre, aux personnes physiques ressortissantes des États membres.

Par sociétés, on entend les sociétés de droit civil ou commercial, y compris les sociétés coopératives, et les autres personnes morales relevant du droit public ou privé, à l'exception des sociétés qui ne poursuivent pas de but lucratif».

7 Loi fédérale n 291, du 18 décembre 1987, art. 154 : « 1. Les sociétés sont régies par le droit de l'Etat en vertu duquel elles sont organisées si elles répondent aux conditions de publicité ou d'enregistrement prescrites par ce droit ou, dans le cas où ces prescriptions n'existent pas, si elles se sont organisées selon le droit de cet Etat.

2. La société qui ne remplit pas ces conditions est régie par le droit de l'Etat dans lequel elle est administrée en fait ».

8 Legge 31 maggio 1995, n 218, art. 25: «Le società, le associazioni, le fondazioni ed ogni altro ente, pubblico o privato, anche se privo di natura associativa, sono disciplinati dalla legge dello Stato nel cui territorio è stato perfezionato il procedimento di costituzione. Si applica, tuttavia, la legge italiana se la sede dell'amministrazione è situata in Italia, ovvero se in Italia si trova

D'autre, le critère du siège social détermine que la personne morale aura la nationalité du pays où se trouve son siège. Ceux qui soutiennent l'adoption de ce critère affirment que la personnalité et la capacité d'une entreprise se lient à ses activités; c'est la loi du pays de son siège social la plus adéquate pour déterminer les conditions que la personne morale devra remplir pour être reconnue dans tout le monde⁹. Ce critère établit un lien effectif et objectif entre la personne morale et la loi applicable. En plus, il protège les intérêts des tiers ayant des relations avec la société et qui ne doivent pas être surpris par l'application d'une loi étrangère. C'est le critère adopté en droit commun français.

Ainsi, pour la détermination de la nationalité française des sociétés, on conjugue les critères du siège social avec celui du siège réel. L'article 1837, première partie, du Code Civil français établit: «Toute société dont le siège est situé sur le territoire français est soumise aux dispositions de la loi française». La partie finale de l'article, toutefois, détermine que «Les tiers peuvent se prévaloir du siège statutaire, mais celui-ci ne leur est pas opposable par la société si le siège réel est situé en un autre lieu»¹⁰. Cette règle a été bilatéralisée par la jurisprudence.

Dans plusieurs cas où une entreprise se constituait à l'étranger pour échapper à l'application de la loi française, la jurisprudence française a toujours été très dure, en précisant que c'est le siège réel et non le siège statutaire qui détermine la loi applicable aux sociétés (la doctrine cite, par exemple, un arrêt du 21 novembre 1889, de la chambre Criminelle de la Cour de Cassation). Cette manœuvre a toujours été l'un des plus courants exemples que la doctrine française utilise pour

l'oggetto principale di tali enti».

9 Jacob Dolinger et Carmen Tiburcio, *Direito Internacional Privado: parte geral e processo internacional*. Rio de Janeiro: Forense, 2016, p. 246. V. aussi Henri Battifol et Paul Lagarde, *Droit International Privé*, t. 1, 6.ed. Paris: Librairie générale et de jurisprudence, 1974, p. 252 et 253 ; et Yvon Loussouarn et Jean-Denis Bredin, *Droit du Commerce International*. Paris : Sirey, 1969, p. 266 et 267.

10 Auparavant, l'article 3 de la loi du 24 juillet 1966 suivait la même orientation. Sur le thème, v. Henri Battifol et Paul Lagarde, *Droit International Privé*, t. 1, 6.ed. Paris: Librairie générale et de jurisprudence, 1974, p. 253 ; cf. aussi Yvon Loussouarn et Jean-Denis Bredin, *Droit du Commerce International*. Paris : Sirey, 1969, p. 254, note (2): «Les articles 31 et 60 de la loi du 24 juillet 1966, le premier relatif aux sociétés en commandite simple, et le second aux sociétés à responsabilité limitée, disposent que <Les associés ne peuvent, si ce n'est à l'unanimité changer la nationalité de la société>. Quant à l'article 154 de la loi du 24 juillet 1966, il prévoit, reprenant en substance la disposition de l'ordonnance du 7 janvier 1959 que l'assemblée générale des actionnaires peut changer la nationalité de la société à condition que le pays d'accueil ait conclu avec la France une convention spéciale, permettant d'acquérir sa nationalité et de transférer le siège social et conservant à la société sa personnalité juridique».

expliquer le phénomène de la fraude à la loi^{11, 12}.

Au-delà de la France, le siège social est aussi le critère traditionnellement adopté par tous les pays de l'Europe continentale occidentale, à l'exception des Pays-Bas¹³. Comme on verra ensuite, c'est le critère partiellement adopté au Brésil pour déterminer la nationalité brésilienne des sociétés anonymes. Le troisième critère, cette du contrôle, détermine que la personne morale aura la même nationalité que celle des personnes qui la contrôlent – autrement dit, des personnes qui détiennent la majorité de son capital. C'est l'idée de «perce de la voie sociale»¹⁴. Ce critère a été largement adopté pendant les Grandes Guerres pour identifier les sociétés contrôlées par les ennemis¹⁵.

Il présente, toutefois, plusieurs difficultés, du fait que les titres des sociétés peuvent changer de mains très facilement (ce qui pourrait conduire à un constant changement de nationalité de la personne morale) et aussi du fait que les sociétés peuvent, elles-mêmes, être contrôlées par d'autres sociétés, ce qui augmente la difficulté¹⁶.

De plus, il n'y a pas nécessairement un lien important entre la nationalité des actionnaires et les règles relatives au fonctionnement de la société. Aujourd'hui, ce critère n'est guère adopté, sauf pour restreindre quelques droits à des sociétés qui, bien qu'établies dans un certain pays, sont contrôlées par des étrangers. Le but est d'empêcher

11 Cf. Henri Battifol et Paul Lagarde, *Droit International Privé*, t. 1, 6.ed. Paris: Librairie générale et de jurisprudence, 1974, p. 255. V. Crim. 21 nov.1889, S. 97.1.84, J. 89.850; Req. 22 déc. 1896, D.P. 97.1.159, S. 97.1.84 ; Crim. 4 août 1906, J. 1907.151 ; Paris, 27 mars 1907, J. 1907.768, G.P. 1907.1.496 ; Trib. Lille, 21 mai 1908 ; Aix, 6 juil. 1908, G.P. 1908.2.462 ; Paris, 23 mars 1909, D.P. 1910.2.108, S. 1909.2.183, R. 1909.877. 11 et 25 avril 1913, G.P. 1913.2.185 ; Angers, 23 juin 1913, G.P. 1913.2.113 ; Rennes, 1er mars 1914, Rec. Nantes, 1914.1.250 ; Paris, 17 déc.1919, G.P. 1920.1.34 ; Paris, 10 nov. 1922, S. 1922.2.128, J. 1923.320 ; Rennes, 26 juil. 1926, G.P. 1927.1.59 ; Paris, 4 févr. 1935, R. 1935.816 ; Seine, 25 oct. 1943, G.P. 1944.1.8 ; Paris 31 oct. 1957, R. 1958.345, note Y.L. Sur l'effectivité du siège social en matière fiscale dans l'Union française Com., 25 avril 1950, R. 1951.291, note Y.L. Sur la faillite des sociétés Cass., 15 juil. 1954, G.P., 1954.2.234 ; 19 mars 1956, D. 1956.351 ; 15 juin 1957, D.1957.596.

12 Pour comprendre le choix de la jurisprudence française pour le critère du siège social, v. Jean Schapira, *Le Droit International des Affaires*. Paris: Presses Universitaires de France, 1972, p. 57.

13 V. Yvon Loussouarn et Jean-Denis Bredin, *Droit du Commerce International*. Paris: Sirey, 1969, p. 496, 497 et 498. Cf. aussi Jacob Dolinger et Carmen Tiburcio, *Direito Internacional Privado: parte geral e processo internacional*. Rio de Janeiro: Forense, 2016, p. 246 et 247.

14 Jacob Dolinger et Carmen Tiburcio, *Direito Internacional Privado: parte geral e processo internacional*. Rio de Janeiro: Forense, 2016, p. 249 V. Henri Battifol et Paul Lagarde, *Droit International Privé*, t. 1, 6.ed. Paris: Librairie générale et de jurisprudence, 1974, p. 258 ; et Yvon Loussouarn et Jean-Denis Bredin, *Droit du Commerce International*. Paris: Sirey, 1969, p. 265 et 266.

15 Sur le thème, Jacob Dolinger et Carmen Tiburcio, *Direito Internacional Privado: parte geral e processo internacional*. Rio de Janeiro: Forense, 2016, p. 249 et 250.

16 Jacob Dolinger et Carmen Tiburcio, *Direito Internacional Privado: parte geral e processo internacional*. Rio de Janeiro: Forense, 2016, p. 250.

l'influence étrangère dans des affaires stratégiques¹⁷.

Ainsi, par exemple, au Brésil, l'article 171 de la Constitution Fédérale de 1988, déjà abrogé¹⁸, faisait une distinction entre les entreprises brésiliennes de capital national et les entreprises brésiliennes de capital étranger¹⁹.

Le Code Bustamante²⁰, diplôme conventionnel élaboré en 1928 et adopté par plusieurs pays en Amérique, détermine, dans ses articles 16 et 17, que les corporations, fondations et associations auront la nationalité du pays où elles ont été créées (critère de l'incorporation)²¹.

En ce qui concerne les sociétés civiles, commerciales et industrielles, l'article 18 du Code détermine qu'elles auront la nationalité qui est stipulée dans leur statut social (c'est le critère de l'autonomie de la volonté) ou, en son absence, celle du lieu où se situe habituellement son organe de direction principal (critère du siège social)²².

Quant aux sociétés anonymes, l'article 19 du Code Bustamante établit que leur nationalité sera déterminée par son contrat social (critère de l'autonomie de la volonté) et, éventuellement, par la loi du lieu où normalement se réunit l'assemblée générale des actionnaires, ou encore,

17 Jacob Dolinger et Carmen Tiburcio, *Direito Internacional Privado: parte geral e processo internacional*. Rio de Janeiro: Forense, 2016, p. 250: «Modernamente, o critério do controle quase não é mais utilizado para aferir a nacionalidade, mas a ele se tem recorrido para negar certos direitos a sociedades estabelecidas no país que, por estarem sob controle de estrangeiros, não devem ter reconhecida a condição de sociedade nacional para determinadas atividades e para certos privilégios».

18 Amendement à la Constitution n 6/1995.

19 La Constitution brésilienne disposait, dans son article 171, déjà abrogé: «São consideradas: I - empresa brasileira a constituída sob as leis brasileiras e que tenha sua sede e administração no País; II - empresa brasileira de capital nacional aquela cujo controle efetivo esteja em caráter permanente sob a titularidade direta ou indireta de pessoas físicas domiciliadas e residentes no País ou de entidades de direito público interno, entendendo-se por controle efetivo da empresa a titularidade da maioria de seu capital votante e o exercício, de fato e de direito, do poder decisório para gerir suas atividades. § 1 - A lei poderá, em relação à empresa brasileira de capital nacional: I - conceder proteção e benefícios especiais temporários para desenvolver atividades consideradas estratégicas para a defesa nacional ou imprescindíveis ao desenvolvimento do País; II - estabelecer, sempre que considerar um setor imprescindível ao desenvolvimento tecnológico nacional, entre outras condições e requisitos: a) a exigência de que o controle referido no inciso II do caput se estenda às atividades tecnológicas da empresa, assim entendido o exercício, de fato e de direito, do poder decisório para desenvolver ou absorver tecnologia; b) percentuais de participação, no capital, de pessoas físicas domiciliadas e residentes no País ou entidades de direito público interno. § 2 - Na aquisição de bens e serviços, o Poder Público dará tratamento preferencial, nos termos da lei, à empresa brasileira de capital nacional».

20 Pour une analyse plus détaillée du Code Bustamante, v. Antonio S. de Bustamante y Sirven, *Derecho Internacional Privado*, v. I, p. 247, 248, 300 et 301.

21 Jacob Dolinger et Carmen Tiburcio, *Direito Internacional Privado: parte geral e processo internacional*. Rio de Janeiro: Forense, 2016, p. 252.

22 Dans le même sens, v. Jacob Dolinger et Carmen Tiburcio, *Direito Internacional Privado: parte geral e processo internacional*. Rio de Janeiro: Forense, 2016, p. 252.

en son absence, par la loi du lieu où fonctionne son principal Conseil d'Administration ou son principal organe directif (critère du siège social)²³. Malgré sa valeur historique et bien qu'il ait été ratifié par plusieurs pays américains, le Code Bustamante n'est guère utilisé en jurisprudence.

Il y a deux Conventions qui ont été élaborées au sein des Conférences Spécialisées Interaméricaines en Droit International Privé de l'Organisation des États Américains: la Convention sur le Conflit de Lois relatives aux Sociétés Commerciales, élaborée en 1979 à Montevideo (à l'Uruguay); et la Convention sur la Personnalité et Capacité des Personnes Morales en Droit International Privé, élaborée en 1984 à La Paz (en Bolivie)²⁴.

Toutes les deux ne mentionnent pas la nationalité des personnes morales mais seulement la loi qui leur est appliquée, dans le domaine du conflit des lois. La Convention de la Haye de 1956 Concernant la Reconnaissance de la Personnalité Juridique des Sociétés, Associations et Fondations Étrangères utilise le même critère.

Qu'en est-il du droit commun brésilien? L'article 11 de la Loi d'Introduction aux Normes du Droit Brésilien, de 1942, conjugué avec les articles 19 et 21 de l'ancienne Introduction au Code Civil, de 1916, consacre le critère de l'incorporation²⁵.

23 Cf. Jacob Dolinger et Carmen Tiburcio, *Direito Internacional Privado: parte geral e processo internacional*. Rio de Janeiro: Forense, 2016, p. 252.

24 La Convention sur le Conflit de Lois relatives aux Sociétés Commerciales, élaborée en 1979 à Montevideo a été internalisée au Brésil par le Décret n. 2400, du 21 novembre 1997; et la Convention sur la Personnalité et Capacité des Personnes Morales en Droit International Privé, élaborée en 1984 à La Paz a été internalisée au Brésil par le Décret n. 2427, du 17 décembre 1997. Sur les deux Conventions, v. Jacob Dolinger et Carmen Tiburcio, *Direito Internacional Privado: parte geral e processo internacional*. Rio de Janeiro: Forense, 2016, p. 252 et 253.

25 Sur la conjugaison de l'article 11 de la Loi d'Introduction aux Normes du Droit Brésilien, de 1942, avec les articles 19 et 21 de l'Introduction au Code Civil de 1916, v. Jacob Dolinger et Carmen Tiburcio, *Direito Internacional Privado: parte geral e processo internacional*. Rio de Janeiro: Forense, 2016, p. 258 et 259: «Para compreender o sistema brasileiro das pessoas jurídicas no plano internacional, há de se examinar sua evolução, coordenando o disposto nos sucessivos dois diplomas de DIP: de 1916 e de 1942».

A Introdução do Código Civil de 1916 dispunha que <são reconhecidas as pessoas jurídicas estrangeiras> (artigo 19) e que <a lei nacional das pessoas jurídicas determina-lhes a capacidade> (artigo 21). Reconhecida a pessoa jurídica, passa ela a ter capacidade, tudo na conformidade de sua lei nacional.

Não tinha, contudo, o legislador do Código Civil determinado o critério para aferição da nacionalidade da pessoa jurídica, o que só veio a ser estabelecido pela Lei de Introdução de 1942, que em seu artigo 11, dispõe que <as organizações destinadas a fins de interesse coletivo, como as sociedades e as fundações, obedecem à lei do Estado em que se constituírem>.

Melhor teria andado o legislador se tivesse referido simplesmente às pessoas jurídicas como o fizera a Introdução de 1916. De qualquer forma, o dispositivo da atual Lei deve ser entendido como uma complementação interpretativa do texto de 1916, que deixara de definir o critério a ser aplicado para determinação da lei nacional da pessoa jurídica.

On analysera ces articles par la suite, lorsqu'on traite de la personne morale et les conflits de lois. La loi des sociétés anonymes prévoit une règle spéciale. C'est l'article 60 du Décret-loi n 2.627 de 1940, qui dispose que «sont nationales les sociétés organisées en conformité avec la loi brésilienne et qui ont leur siège d'administration au pays». Cet article a été expressément maintenu par l'article 300 de la Loi des Sociétés Anonymes de 1976²⁶.

Pour qu'une société anonyme ait la nationalité brésilienne, elle devra avoir son siège au Brésil et y être constituée²⁷. Cette règle a été étendue pour déterminer la nationalité brésilienne des entreprises en général, pas seulement pour des sociétés anonymes²⁸. Maintenant la question est traitée par l'article 1126 du Code Civil de 2002²⁹.

Pour les sociétés anonymes étrangères, ou pour toutes les autres personnes morales étrangères, c'est l'article 11 de la Loi d'Introduction aux Normes du Droit Brésilien – qui consacre le critère de l'incorporation – qui s'applique³⁰.

Conclui-se da justaposição das duas leis introdutórias que o reconhecimento da personalidade e a determinação da capacidade das pessoas jurídicas no Direito Internacional Privado brasileiro decorre da lei de sua nacionalidade e que esta é determinada pelo país de sua constituição, sistema idêntico ao britânico».

26 L'article 60 du Décret-loi n 2.627 de 1940 a causé des perplexités dans la doctrine, qui posait des questions à propos d'une possible antinomie entre cet article et l'article 11 de la Loi d'Introduction aux Normes du Droit Brésilien, de 1942. Mais l'antinomie a été écartée, cf. Miguel Maria de Serpa Lopes, *Comentário Teórico e Prático da Lei de Introdução ao Código Civil*, v. III. Rio de Janeiro: Livraria Jacintho, 1946, p. 171. V. aussi Jacob Dolinger et Carmen Tiburcio, *Direito Internacional Privado: parte geral e processo internacional*. Rio de Janeiro: Forense, 2016, p. 259 et 260.

27 Jacob Dolinger et Carmen Tiburcio, *Direito Internacional Privado: parte geral e processo internacional*. Rio de Janeiro: Forense, 2016, p.260; Jacob Dolinger, "A Sociedade Anônima Brasileira – Critério Determinador de sua Nacionalidade", *Revista de Direito Mercantil, Industrial, Econômico e Financeiro*, vol. 23, p. 65 et suivantes. Cf. aussi Luiz Mélega, «Nacionalidade das Sociedades por Ações», *Revista de Direito Mercantil, Industrial, Econômico e Financeiro*, vol. 33, p. 127 et suivantes.

28 Jacob Dolinger et Carmen Tiburcio, *Direito Internacional Privado: parte geral e processo internacional*. Rio de Janeiro: Forense, 2016, p. 260.

29 Code Civil, 2002, Art. 1.126: «É nacional a sociedade organizada de conformidade com a lei brasileira e que tenha no País a sede de sua administração».

30 Miguel Maria de Serpa Lopes, *Comentário Teórico e Prático da Lei de Introdução ao Código Civil*, v. III. Rio de Janeiro : Livraria Jacintho, 1946, p. 171. Cf. aussi Jacob Dolinger et Carmen Tiburcio, *Direito Internacional Privado: parte geral e processo internacional*. Rio de Janeiro: Forense, 2016, p. 261 514: «Assim, uma sociedade constituída na Espanha, que estabeleça sua sede social em Portugal, será considerada por nosso DIP. sociedade espanhola. Mas a sociedade constituída no Brasil que não estabelecer aqui sua sede social não será considerada brasileira, o que nos leva, em um passo mais adiante, a compreender que nossas autoridades não registrarão uma sociedade no Brasil que não fixe sua sede social em território brasileiro».

3. LE STATUT DES ENTREPRISES ÉTRANGÈRES

Bien que les entreprises étrangères soient reconnues d'après la loi de leur nationalité, pour exercer certaines activités au Brésil, comme on l'a déjà mentionné, il faudra respecter aussi la loi brésilienne. Ce n'est pas, toutefois, une condition pour reconnaître la personnalité juridique de l'entreprise étrangère, mais pour lui permettre la jouissance de certains droits au Brésil.

La règle, dans un État de Droit, c'est que toute personne est libre pour exercer tout type d'activité privée licite. C'est le principe de la libre initiative, consacrée au niveau constitutionnel³¹. Cependant, il y a quelques restrictions imposées aux entreprises étrangères au Brésil.

Ces restrictions parfois se rapportent aux entreprises étrangères elles-mêmes, parfois à la participation des personnes étrangères dans des sociétés brésiennes. Citons-en quelques-unes³².

- La Constitution interdit les personnes étrangères d'être propriétaires de moyens de communication (article 222)³³ et d'obtenir des concessions pour explorer des ressources minérales et hydriques

31 Le principe de la libre initiative est consacré aux articles 1er et 170 de la Constitution brésilienne. Le 1er article de la Constitution a la rédaction suivante: «A República Federativa do Brasil, formada pela união indissolúvel dos Estados e Municípios e do Distrito Federal, constitui-se em Estado Democrático de Direito e tem como fundamentos: I - a soberania; II - a cidadania; III - a dignidade da pessoa humana; IV- os valores sociais do trabalho e da livre iniciativa; V - o pluralismo político. Parágrafo único. Todo o poder emana do povo, que o exerce por meio de representantes eleitos ou diretamente, nos termos desta Constituição». L'article 170 dispose: «A ordem econômica, fundada na valorização do trabalho humano e na livre iniciativa, tem por fim assegurar a todos existência digna, conforme os ditames da justiça social, observados os seguintes princípios: I - soberania nacional; II - propriedade privada; III - função social da propriedade; IV - livre concorrência; V - defesa do consumidor; VI - defesa do meio ambiente, inclusive mediante tratamento diferenciado conforme o impacto ambiental dos produtos e serviços e de seus processos de elaboração e prestação; VII - redução das desigualdades regionais e sociais; VIII - busca do pleno emprego; IX - tratamento favorecido para as empresas de pequeno porte constituídas sob as leis brasileiras e que tenham sua sede e administração no País. Parágrafo único. É assegurado a todos o livre exercício de qualquer atividade econômica, independentemente de autorização de órgãos públicos, salvo nos casos previstos em lei».

32 Pour un panorama du status des entreprises étrangères au Brésil, v. Carmen Tiburcio, A condição jurídica do estrangeiro na Constituição brasileira de 1988. In: Daniel Sarmento, Daniela Ikawa e Flávia Piovesan (orgs.), Igualdade, diferença e direitos humanos, 2008, p.747. V. aussi: Carmen Tiburcio et Luís Roberto Barroso, Direito Constitucional Internacional, Rio de Janeiro: Renovar, 2013, p. 297-318.

33 Jacob Dolinger et Carmen Tiburcio, Direito Internacional Privado: parte geral e processo internacional. Rio de Janeiro: Forense, 2016, p. 266,267 et 268. V. aussi José Afonso da Silva, Comentário Contextual à Constituição. São Paulo: Malheiros, 2010, p. 848 et 849.

(article 176, § 1)³⁴.

- La Loi 5.709 de 1971 impose des restrictions aux personnes morales étrangères pour l'acquisition des immeubles ruraux³⁵.

- La Loi 6.634 de 1979 interdit aux personnes morales étrangères d'être actionnaires dans des entreprises brésiliennes qui soient titulaires de droit réel sur des immeubles situés dans la zone de frontière³⁶.

Enfin, toutes ces restrictions se justifient par face à la préoccupation de protection des intérêts nationaux. Elles se rapportent à des activités que le législateur considère essentielles et stratégiques, de manière que, si leur exercice était librement attribué à une entreprise contrôlée par des étrangers, les intérêts du pays pourraient être menacés³⁷.

34 Jacob Dolinger et Carmen Tiburcio, *Direito Internacional Privado: parte geral e processo internacional*. Rio de Janeiro: Forense, 2016, p. 269. Cf. José Afonso da Silva, *Comentário Contextual à Constituição*. São Paulo: Malheiros, 2010, p. 741 et 742.

35 Par exemple, l'article 7ème de la Loi 5.709, de 1971, détermine: «A aquisição de imóvel situado em área considerada indispensável à segurança nacional por pessoa estrangeira, física ou jurídica, depende do assentimento prévio da Secretaria-Geral do Conselho de Segurança Nacional».

36 L'article 2 de la Loi 6.634, de 1979, prévoit: «Salvo com o assentimento prévio do Conselho de Segurança Nacional, será vedada, na Faixa de Fronteira, a prática dos atos referentes a: (...) V - transações com imóvel rural, que impliquem a obtenção, por estrangeiro, do domínio, da posse ou de qualquer direito real sobre o imóvel; VI - participação, a qualquer título, de estrangeiro, pessoa natural ou jurídica, em pessoa jurídica que seja titular de direito real sobre imóvel rural; (...)». En 2015, cette Loi a été altérée et une exception a été incluse «§ 4o. Excetua-se do disposto no inciso V, a hipótese de constituição de direito real de garantia em favor de instituição financeira, bem como a de recebimento de imóvel em liquidação de empréstimo de que trata o inciso II do art. 35 da Lei nº 4.595, de 31 de dezembro de 1964».

37 Toutefois, la doctrine reconnaît que les personnes morales étrangères dont la personnalité juridique est reconnue, dans le silence des textes sur leur statut en France, ont les mêmes droits des personnes morales françaises. Cf. Henri Battifol et Paul Lagarde, *Droit International Privé*, t. 1, 6.ed. Paris: Librairie générale et de jurisprudence, 1974, p. 269: «C'est dire qu'elles seront assimilées aux sociétés françaises, sauf texte contraire, puisque tel est aujourd'hui le principe pour l'étranger personne physique». Selon Yvon Loussouarn et Jean-Denis Bredin: «On s'accorde à admettre que les sociétés étrangères reconnues ont l'aptitude à jouir, en France, des mêmes droits que les sociétés françaises. En l'absence d'un texte exprès prévoyant cette assimilation, la jurisprudence a étendu aux personnes morales le principe d'assimilation admis pour les personnes physiques, et résultant de l'interprétation libérale de l'article 11 du Code civil» (Yvon Loussouarn et Jean-Denis Bredin, *Droit du Commerce International*. Paris: Sirey, 1969, p. 328).

4. LES PERSONNES MORALES ET LES CONFLITS DE LOIS

Pour être universellement reconnue, la personne morale devra remplir les conditions que le pays de sa nationalité lui impose pour acquérir la personnalité juridique. En règle, c'est la loi du pays de la nationalité de la personne morale qui régira son statut juridique, c'est-à-dire sa capacité juridique pour contracter des obligations et pour acquérir des droits dans tout le monde (c'est la *lex societatis*). Il faut distinguer, toutefois, la reconnaissance de l'entreprise étrangère et son aptitude pour s'installer au Brésil. Ces deux aspects seront soumis à des lois différentes.

En ce qui concerna la question de la reconnaissance de la personne morale étrangère, l'ancienne Introduction au Code Civil de 1916 déterminait, dans son article 19, que «sont reconnues les personnes morales étrangères».

De plus, l'article 21 disposait que «la loi national des personnes morales détermine leur capacité». C'était la consécration de l'application de la *lex societatis*, mais le législateur n'indiquait pas le critère adopté pour indiquer quelle était la nationalité des personnes morales.

En 1942, la Loi d'Introduction au Code Civil est entrée en vigueur. Celle-ci régit le droit international privé brésilien jusqu'aujourd'hui, sous la dénomination de Loi d'Introduction aux Normes du Droit Brésilien. Son article 11 établit que «les organisations destinées à des buts collectifs, ainsi que les sociétés et les fondations, obéissent à la loi d'État où elles se sont constituées». C'est la consécration du critère de l'incorporation, en suivant le modèle du droit anglais et nord-américain.

La doctrine recommande que l'article 11 de la Loi d'Introduction doit être compris comme un complément aux articles 19 et 21 de l'ancienne Introduction, de manière que le droit brésilien reconnaît les personnes morales étrangères, à condition qu'elles soient reconnues selon la loi du pays où elles ont été constituées.

Il faut dire que la Loi d'Introduction aux Normes du Droit Brésilien de 1942 a une règle, à l'article 16³⁸, interdisant expressément le renvoi. Cela signifie que, dans le cas où une entreprise dont le siège social se situe au Brésil – mais qui a été constituée en France –, la règle de conflit brésilienne déterminera l'application de la loi française (critère de l'incorporation) et on ne fera pas jouer le renvoi de la loi française à la loi brésilienne (critère du siège social³⁹).

38 Loi d'Introduction aux Normes du Droit Brésilien, 1942, art. 16: «Quando, nos termos dos artigos precedentes, se houver de aplicar a lei estrangeira, ter-se-á em vista a disposição desta, sem considerar-se qualquer remissão por ela feita a outra lei».

39 Jean Derruppé, *Droit International Privé*, 5.ed. Paris: Dalloz, 1978, p. 39: «Pour déterminer la loi applicable à la constitution et fonctionnement de la société, la doctrine française accepte unanimement de se référer au siège social. C'est cette solution que l'article 3 de la loi du

Somme toute, une entreprise étrangère dont la personnalité juridique est reconnue par le pays de son incorporation pourra célébrer un contrat au Brésil, être en justice devant le Pouvoir Judiciaire brésilien et également être actionnaire d'une société anonyme brésilienne (conformément à la partie finale de l'article 1.134 du Code Civil⁴⁰).

Nonobstant, pour s'établir au pays, le respect à la *lex societatis* ne suffira pas. Il convient d'analyser aussi la loi appliquée pour qu'une entreprise étrangère puisse exercer des activités au Brésil en caractère permanent.

Comme on a mentionné auparavant, il faut distinguer la reconnaissance de la personne morale étrangère de son aptitude pour fonctionner au Brésil. Tandis que sa reconnaissance dépend exclusivement de la *lex societatis*, son aptitude pour fonctionner au Brésil dépendra aussi des conditions imposées par la loi brésilienne.

D'où la règle du paragraphe unique de l'article 11, qui détermine que les personnes morales «ne pourront pas, toutefois, avoir, au Brésil, filiale, agence ou établissement avant que ses actes constitutifs soient approuvés par le Gouvernement brésilien, étant soumises à la loi brésilienne».

Aussi pour les sociétés anonymes nous avons une règle spécifique semblable. L'article 68 du Décret-loi 2.627, de 1940, détermine que «les sociétés anonymes étrangères autorisées à fonctionner seront soumises aux lois et aux tribunaux brésiliens en ce qui concerne les actes et opérations qu'elles pratiquent au Brésil». C'est l'application du principe selon lequel l'État d'accueil peut toujours réglementer l'exercice des activités dans son pays. Le Code Civil de 2002 reprend cette règle⁴¹.

Il faut remarquer que les personnes morales étrangères peuvent exercer leurs activités au Brésil de deux manières: i) constitution d'une filiale au Brésil et dans ce cas-là elle subira les restrictions imposées pour les personnes morales étrangères; et ii) constitution d'une entreprise indépendante au Brésil avec personnalité juridique propre, c'est-à-dire une personne morale brésilienne qui sera traité comme telle, indépendamment du fait qu'elle soit contrôlée par une entreprise étrangère⁴².

24 juillet 1966 a consacré». (Loi n° 66-537 du 24 juillet 1966, art. 3 : «Les sociétés dont le siège social est situé en territoire français sont soumises à la loi française. Les tiers peuvent se prévaloir du siège statutaire, mais celui-ci ne leur est pas opposable par la société si son siège réel est situé en un autre lieu»).

40 Code Civil, 2002, art. 1.134: «A sociedade estrangeira, qualquer que seja o seu objeto, não pode, sem autorização do Poder Executivo, funcionar no País, ainda que por estabelecimentos subordinados, podendo, todavia, ressaltados os casos expressos em lei, ser acionista de sociedade anônima brasileira».

41 Code Civil, 2002, Art. 1.137: «A sociedade estrangeira autorizada a funcionar ficará sujeita às leis e aos tribunais brasileiros, quanto aos atos ou operações praticados no Brasil».

42 L'article 64 du Décret-loi 2627 de 1940 dit «As sociedades anônimas ou companhias estrangeiras, qualquer que seja o seu objeto, não podem, sem autorização do Governo Federal, funcionar no país, por si mesmas, ou por filiais, sucursais, agências, ou estabelecimentos que as representem, podendo, todavia, ressaltados os casos expressos em lei, ser acionistas de

Il convient d'analyser la question de la loi appliquée aux obligations des personnes morales et chez nous c'est controversée la possibilité pour les entreprises de choisir la loi appliquée aux contrats.

L'article 13 de l'ancienne Introduction au Code Civil de 1916 disposait : «Sauf stipulation contraire, la substance et les effets des obligations seront réglés par la du lieu où elles ont été contractées». Ce dispositif, lorsqu'il disait «sauf stipulation contraire», consacrait l'application du principe de l'autonomie de la volonté aux relations contractuelles, c'est-à-dire, la même règle de conflit qui est adoptée dans les systèmes de droit international privé les plus modernes.

À propos, c'est le critère adopté en France dès l'arrêt *American Trading*, de 1910, selon lequel «loi applicable aux contrats, soit en ce qui concerne leur formation, soit quant à leurs effets et conditions, est celle que les parties ont adoptée»⁴³.

L'article 9 de la Loi d'Introduction aux Normes du Droit Brésilien, de 1942, toutefois, n'a pas reproduit expressément cette règle. Il détermine que «pour qualifier et régir les obligations, la loi du pays où elles se sont constituées sera appliquée». Ainsi, la littéralité de l'article semble avoir consacré le critère de l'application de la *lex celebrationis*, sans espace pour l'application du critère de l'autonomie de la volonté.

Selon le texte de l'article, les parties contractantes ne peuvent pas choisir la loi qui y sera appliquée. Dans cette matière, la doctrine se divise. L'entendement d'une partie de la doctrine va dans le même sens de la lettre de l'article 9. Comme la loi de 1942 n'a pas reproduit l'expression «sauf stipulation contraire», contenue dans l'ancien article 13 de l'Introduction de 1916, on comprend que l'intention du législateur a été d'abolir l'application du critère de l'autonomie de la volonté⁴⁴.

Toutefois, l'autre partie de la doctrine affirme que la choix de la loi applicable au contrat n'a pas été interdit par la loi de 1942⁴⁵. Une

sociedade anônima brasileira». Cette exception a été motif de sévère critique du juriste Haroldo Valladão, qui se demande comment on peut autoriser que la société étrangère s'infilte dans l'économie du pays par acquisition du capital d'une société anonyme brésilienne si la société étrangère seulement peut fonctionner au Brésil avec l'autorisation du gouvernement, qui est antécédé d'un rigoureux examen des documents. (cf. Haroldo Valladão, *Direito Internacional Privado*. Rio de Janeiro: Freitas Bastos. 1980. p. 461).

43 Jean Derruppé, *Droit International Privé*, 5.ed. Paris: Dalloz, 1978, p. 54 : «Les contrats sont soumis à la loi choisie par les parties (Loi d'autonomie)».

44 Dans ce sens, Nadia de Araújo, qui s'est manifestée contre l'autonomie de la volonté, a écrit: «No Brasil, a regra de conexão utilizada para os contratos internacionais é a *lex loci contractus*, na forma estabelecida pelo art. 9º da Lei de Introdução ao Código Civil, de cuja exegese não se extrai a permissão à teoria da autonomia da vontade, antes consagrada na Introdução ao Código Civil de 1916» (Nadia de Araújo, «Contratos Internacionais e a Jurisprudência Brasileira: Lei Aplicável, Ordem Pública e Cláusula de eleição de foro», In João Grandino Rodas, *Contratos internacionais*, 3.ed. São Paulo: Editora Revista dos Tribunais, 2002, p. 200).

45 Jacob Dolinger, *Direito Internacional Privado (Parte Especial): Direito Civil Internacional*,

explication historique pour ça a été posée par le Professeur Haroldo Valladão, l'un des plus importants juristes de droit international privé brésilien du XXe siècle. Il explique qu'en 1942 le Brésil était soumis à une dictature («le Nouvel État»). Ainsi, toute référence à l'autonomie de la volonté était vue avec des mauvais yeux et ne pouvait pas apparaître de manière expresse dans les lois⁴⁶.

Selon Valladão, toutefois, le législateur de 1942 a consacré le critère de l'autonomie de manière cachée, lorsqu'il prévoit, dans le paragraphe second de l'article 9 de la Loi de 1942, que «l'obligation résultant du contrat est réputée constituée dans le lieu où réside le proposant»⁴⁷. Or, selon Valladão, l'utilisation du verbe «réputer» établit une présomption. Si les parties en disposent autrement, cette présomption sera écartée⁴⁸.

Philadelpho de Azevedo, un ancien ministre de la Cour Suprême de la première moitié du XXe siècle, justifie l'admission du critère de l'autonomie de la volonté d'après le principe de la liberté contractuelle. Si les parties sont libres pour établir le contenu des clauses de son contrat, elles peuvent reproduire les dispositions d'une loi quelconque; ainsi, il n'y a rien qui les empêche, au lieu de reproduire toutes les dispositions de cette loi, d'y faire référence de manière générale. La liberté pour les parties de choisir la loi appliquée au contrat, d'après Azevedo, est comprise dans le principe de la liberté contractuelle⁴⁹.

Le Professeur Lauro Gama a fait une relecture constitutionnelle de cet argument: toute restriction à la liberté des individus doit se

v. II. Rio de Janeiro: Renovar, 2002, p. 458: «Outrossim, o direito brasileiro sempre admitiu a interpretação teleológica da lei, e segundo esta, é indubitável que, considerada a realidade das relações jurídicas internacionais da atualidade, considerado o panorama do direito internacional privado contemporâneo, considerados os interesses da economia brasileira, em crescente internacionalização, que o artigo 9º da LICC não impõe qualquer óbice à escolha de outra lei que a *lex contractus*». Cf. aussi: Jacob Dolinger et Carmen Tiburcio, *Direito Internacional Privado: parte geral e processo internacional*. Rio de Janeiro: Forense, 2016, p. 360: «Quanto à faculdade de as partes escolherem a lei aplicável a contrato internacional, apesar do silêncio do legislador, a melhor doutrina entende que essa escolha é aceita em nosso sistema jurídico».

46 Haroldo Valladão, *Direito Internacional Privado: introdução e parte geral*. Rio de Janeiro: Livraria Freitas Bastos, 1968, p. 371.

47 Cf. Haroldo Valladão, «O Contrato Internacional», *Revista Forense*, v. 269, jan./mar. 1980, p. 3.

48 V. Haroldo Valladão, «O Contrato Internacional», *Revista Forense*, v. 269, jan./mar. 1980, p. 3.

49 Voir Haroldo Valladão, «O Contrato Internacional», *Revista Forense*, v. 269, jan./mar. 1980, p. 4: «Igualmente a não-referência do art. 9, caput, da Lei de Introdução, à autonomia da vontade, à eleição de lei, à lei do contrato, secular no Brasil (v. H. VALLADÃO, 'Estudos de DIPr', 1947, 292-3, e 'DIPr', 3.ª Ed., 1972, 352-4 e 370-1), não significou a sua eliminação, a supressão do domicílio especial para escolha da lei competente em determinado negócio. Segundo decidiu o Supremo Tribunal Federal, em acórdão do saudoso Min. PHILADELPHO DE AZEVEDO, princípios básicos de nosso direito não podem desaparecer por sua simples omissão num Código ou numa Lei (Ac. em Diário da Justiça, apenso 135, em 12.VI.1945, ps. 2.550-1)».

justifier selon un souci constitutionnel raisonnable. Il n'y a aucun souci, toutefois, qui justifie l'interdiction aux parties de choisir la loi applicable pour régir les relations de droit privé⁵⁰.

Le Professeur Jacob Dolinger, qui a donné un cours à L'Académie de la Haye⁵¹ et a publié un livre à ce sujet, admet expressément l'autonomie dans le droit brésilien.⁵²

Un autre argument en faveur de l'autonomie de la volonté découle d'une interprétation systématique de l'ordre juridique brésilien. La loi de l'arbitrage⁵³ permet aux parties, lorsqu'elles choisissent l'arbitrage pour régler leurs différends, de choisir la loi qui sera appliquée au litige⁵⁴.

Si on permet l'application du critère de l'autonomie de la volonté devant l'arbitre, pourquoi ne pas la permettre devant le juge étatique ? Est-ce que le mode de résolution des controverses doit interférer dans la loi applicable au contrat ? Est-ce que cela n'heurterait pas le principe de l'indépendance entre la compétence juridictionnelle et la compétence législative ?

On aperçoit, donc, que la question est très controversée. C'est probablement la question la plus discutée du droit international privé brésilien au niveau doctrinaire. À mon avis, le critère de l'autonomie de la volonté doit être admis⁵⁵. La jurisprudence des tribunaux supérieurs, toutefois, ne s'est pas encore manifestée.

Comme le règlement de l'arbitrage expressément prévoit la possibilité pour les parties de choisir la loi appliquée au contrat, cela est une des raisons qui stimule les entreprises étrangères qui exercent des activités au Brésil à choisir l'arbitrage comme moyen de résolution des controverses et à éviter le recours à la juridiction étatique. En choisissant

50 Sur le thème, Lauro da Gama e Souza Jr., «Autonomia da vontade nos contratos internacionais do Direito Internacional Privado brasileiro: uma leitura constitucional do art. 9 da LICC em favor da liberdade de escolha do direito aplicável». In Carmen Tiburcio et Luís Roberto Barroso (org.), *O Direito Internacional Contemporâneo: Estudos em homenagem ao Professor Jacob Dolinger*. Rio de Janeiro: Renovar, 2006, p. 599-626.

51 Jacob Dolinger, «Evolution of principles for resolving conflicts in the field of contracts and torts». *Recueil des cours*, Volume 283, 2000.

52 Jacob Dolinger, *Direito Internacional Privado (Parte Especial): Contratos e obrigações no Direito Internacional Privado*, Rio de Janeiro: Renovar, 2007, pp. 421-481.

53 Loi 9.307/96.

54 Loi n 9.307, 1996, art. 2: «A arbitragem poderá ser de direito ou de equidade, a critério das partes. § 1 Poderão as partes escolher, livremente, as regras de direito que serão aplicadas na arbitragem, desde que não haja violação aos bons costumes e à ordem pública. § 2 Poderão, também, as partes convencionar que a arbitragem se realize com base nos princípios gerais de direito, nos usos e costumes e nas regras internacionais de comércio».

55 Cf. pour la discussion dans la doctrine brésilienne, Carmen Tiburcio, «A lei aplicável às arbitragens internacionais». In: Pedro A. Batista Martins et José Maria Rossani Garcez (coord.), *Reflexões sobre a arbitragem*. São Paulo: Ltr, 2002.

l'arbitrage, elles peuvent tranquillement choisir l'application, au contrat, d'une loi différente de la *lex celebrationis*.

En ce qui concerne les contrats de travail, l'énoncé numéro 207 du Tribunal Supérieur du Travail – déjà abrogé – déterminait l'application de la loi du pays où les services ont été exercés⁵⁶. Elle écartait, donc, pour les relations de travail, la règle de l'article 9 de la Loi d'Introduction aux Normes du Droit Brésilien, qui établit le critère de l'application de la *lex celebrationis*. Maintenant, la jurisprudence utilise le critère de la règle la plus favorable pour le travailleur⁵⁷.

5. LES PERSONNES MORALES ET LE CONFLIT DE JURIDICTION

Dans ce domaine, il convient de voir les cas où une entreprise pourra être soumise à la juridiction brésilienne. Les règles de compétence internationale sont fixées aux articles 21, 22 et 23 du Nouveau Code de

56 Tribunal Superior do Trabalho, Enunciado n 207: « A relação jurídica trabalhista é regida pelas leis vigentes no país da prestação de serviço e não por aquelas do local da contratação ».

57 La jurisprudence a décidé en faveur de l'application de la loi la plus favorable au travailleur en se basant sur l'article 3, II de la Loi 7.064/1982, laquelle détermine que, dans le cas de travailleurs contractés ou transférés pour prêter des services à l'étranger: « A empresa responsável pelo contrato de trabalho do empregado transferido assegurar-lhe-á, independentemente da observância da legislação do local da execução dos serviços: (...) a aplicação da legislação brasileira de proteção ao trabalho, naquilo que não for incompatível com o disposto nesta Lei, quando mais favorável do que a legislação territorial, no conjunto de normas e em relação a cada matéria ». Cf. TST, DEJT 21 set. 2012, AIRR 103840-50.2007.5.03.0138, Rel Min. Waldir Oliveira da Costa: « Não obstante o cancelamento da Súmula nº 207 do TST pela Resolução nº 181/2012, este Tribunal Superior já vinha adotando iterativo e notório posicionamento no sentido de que o princípio da territorialidade admite exceção, na hipótese de empregado contratado no Brasil e posteriormente transferido para prestar serviços no exterior; caso no qual se aplica, ao invés daquele postulado, o princípio da norma mais favorável, nos termos do artigo 3º, II, da Lei nº 7.064, de 06/12/82, o qual não se restringe a engenheiros ou a empregados de empresas de engenharia, em face da Lei nº 11.962, de 03/07/2009, que alterou o art. 1º da Lei nº 7.064/82, justamente para abranger a situação de todos os trabalhadores contratados no Brasil ou transferidos por seus empregadores para prestar serviços no exterior ». Dans le même sens: TST, DEJT 27 abr. 2012, AIRR 641-86.2010.5.03.0047, Rapporteur. Juge convoqué: Flavio Portinho Sirangel; et TST, DEJT 22 jun. 2012, AIRR 295-74.2010.5.03.0035, Relª. Minª. Maria de Assis Calsing.

Il faut observer que la jurisprudence applique la règle mentionnée même pour des cas pendants avant la publication de la Loi nº 11.962/2009, laquelle a altéré l'article 1º de la Loi nº 7.064/82, pour étendre l'application de la dite loi pour tous les travailleurs transférés à l'étranger et pas seulement pour ceux qui sont du secteur de l'ingénierie: TST, DEJT 19 set. 2014, RR 103440-91.2007.5.01.0461, Rel Min. Renato de Lacerda Paiva.

Procédure Civile de 2015. Les articles 21⁵⁸ et 22⁵⁹ établissent les cas de compétence internationale concurrente et l'article 23⁶⁰, les cas de compétence internationale exclusive.

Si l'hypothèse est prévue à l'article 23, seul l'autorité brésilienne pourra la connaître et dans aucune hypothèse une sentence étrangère ne sera homologuée au Brésil; si l'hypothèse est prévue aux articles 21 ou 22, de l'autre côté, en principe, une sentence étrangère pourra être exécutée au Brésil.

L'article 23 détermine que l'autorité judiciaire brésilienne sera compétente, à l'exclusion de toute autre, pour connaître des actions relatives aux immeubles situés au Brésil (la même règle que celle de l'article 44 du Nouveau Code de Procédure Civile Français) et pour les successions des biens situées au Brésil bien que pour la confirmation du testamant particulier, même si la personne décédée est étrangère et a résidé hors du Brésil. De plus, l'article prévoit aussi la compétence exclusive du Pouvoir Judiciaire brésilien dans les cas de divorce ou séparation lorsqu'il y a des biens du couple situés au Brésil

Voyons, maintenant, les cas de compétence internationale concurrente (article 21 et 22 du CPC). Dans ces cas, l'action pourra aussi être soumise à un juge étranger et la sentence étrangère pourra être homologuée au Brésil, même si la même action est en cours au Brésil (art. 24, seul paragraphe, CPC)⁶¹.

58 Code de Procédure Civile, Loi n 13.105, 2015, art. 21: «Compete à autoridade judiciária brasileira processar e julgar as ações em que: I - o réu, qualquer que seja a sua nacionalidade, estiver domiciliado no Brasil; II - no Brasil tiver de ser cumprida a obrigação; III - o fundamento seja fato ocorrido ou ato praticado no Brasil. Parágrafo único. Para o fim do disposto no inciso I, considera-se domiciliada no Brasil a pessoa jurídica estrangeira que nele tiver agência, filial ou sucursal».

59 Code de Procédure Civile, Loi n 13.105, 2015, art. 22: «Compete, ainda, à autoridade judiciária brasileira processar e julgar as ações: I - de alimentos, quando: a) o credor tiver domicílio ou residência no Brasil; b) o réu mantiver vínculos no Brasil, tais como posse ou propriedade de bens, recebimento de renda ou obtenção de benefícios econômicos; II - decorrentes de relações de consumo, quando o consumidor tiver domicílio ou residência no Brasil; III - em que as partes, expressa ou tacitamente, se submeterem à jurisdição nacional».

60 Code de Procédure Civile, Loi n 13.105, 2015, art. 23: «Compete à autoridade judiciária brasileira, com exclusão de qualquer outra: I - conhecer de ações relativas a imóveis situados no Brasil; II - em matéria de sucessão hereditária, proceder à confirmação de testamento particular e ao inventário e à partilha de bens situados no Brasil, ainda que o autor da herança seja de nacionalidade estrangeira ou tenha domicílio fora do território nacional; III - em divórcio, separação judicial ou dissolução de união estável, proceder à partilha de bens situados no Brasil, ainda que o titular seja de nacionalidade estrangeira ou tenha domicílio fora do território nacional».

61 Code de Procédure Civile, Loi n 13.105, 2015, art. 24, seul paragraphe: «A pendência de causa perante a jurisdição brasileira não impede a homologação de sentença judicial estrangeira quando exigida para produzir efeitos no Brasil».

Ainsi, l'autorité brésilienne sera compétente, de manière non exclusive, si le défendeur est domicilié au Brésil. C'est la règle ordinaire de compétence internationale, la même que celle adoptée dans droit français, résultant de l'application de l'article 42 du Nouveau Code de Procédure Civile (règle de compétence interne qui doit être étendue au niveau international en raison de ce que dispose l'arrêt Scheffel, du 30 octobre 1962, selon lequel «la compétence internationale se détermine par l'extension des règles de compétence territoriale interne»⁶².

Le paragraphe unique de l'article 21 consacre une règle similaire à la jurisprudence française des «gares principales»⁶³. Dit le paragraphe que seront considérées domiciliées au Brésil les personnes morales étrangères qui y ont une agence, une filiale ou une succursale⁶⁴. Les entreprises étrangères, donc, pourront être assignées devant les cours brésiennes si elles ont un établissement secondaire au Brésil, pour des litiges liés à cet établissement.

L'article 21, alinéa II prévoit que l'autorité brésilienne aura compétence si l'action se rapporte à une obligation qui doit être accomplie au Brésil. C'est la même hypothèse que celle de l'article 46 du Nouveau Code de Procédure Civile français, selon lequel le demandeur pourra saisir, «en matière contractuelle, la juridiction du lieu de la livraison effective de la chose ou du lieu de l'exécution de la prestation de service», et, «en matière délictuelle, la juridiction du lieu du fait dommageable ou celle dans le ressort de laquelle le dommage a été subi».

Enfin, l'article 21, alinéa III détermine la compétence de l'autorité brésilienne si l'action s'origine d'un fait ou d'un acte qui ont eu lieu au Brésil. Le nouveau Code a aussi inclut la compétence concurrente du judiciaire brésilien dans le cas de pension alimentaire lorsque le créancier a son domicile ou sa résidence au Brésil ou lorsque le défendeur a des biens quelconques au Brésil (art. 22, I du CPC 2015). En plus, le judiciaire brésilien sera aussi compétent dans les cas de consommation quand le consommateur a son domicile ou sa résidence situé au Brésil (art. 22, II du CPC 2015).

Même si une action identique avait été antérieurement introduite en France, cela n'empêcherait pas l'exercice de la juridiction brésilienne,

62 Cass., Civ., 30 oct 1962, Scheffel: «Mais attendu que l'extranéité des parties n'est pas une cause d'incompétence des juridictions françaises, dont, d'autre part, la compétence internationale se détermine par extension des règles de compétence territoriale interne».

63 Yvon Loussouarn et Jean-Denis Bredin, *Droit du Commerce International*. Paris: Sirey, 1969, p.333: «En matière de conflits de juridictions, par extension sur le plan international de la jurisprudence des gares principales, la société étrangère, qui a une succursale en France, peut être assignée au siège de cette dernière, lorsqu'il s'agit d'une opération traitée dans le ressort de la succursale».

64 Jacob Dolinger et Carmen Tiburcio, *Direito Internacional Privado: parte geral e processo internacional*. Rio de Janeiro: Forense, 2016, p. 563.

car le droit brésilien, au contraire du droit français, ne reconnaît pas les effets de la litispendance internationale⁶⁵ (art. 24 du CPC⁶⁶).

En plus, est-ce que les parties peuvent choisir les tribunaux d'un autre pays pour régler leurs litiges? Après plusieurs décisions en jurisprudence qui ont considérés que les clauses attributives de juridiction ne pouvaient pas écarter la compétence internationale concurrente de l'autorité brésilienne⁶⁷, le nouveau Code a expressément admis les effets positifs et négatifs de ce type de clause⁶⁸.

Les effets négatifs des clauses d'élection de for étranger durant de nombreuses années ont été une des questions les plus controversées en ce qui concerne le conflit de juridiction en droit international privé brésilien⁶⁹.

La Cour Suprême avait rendu des arrêts favorables aux clauses d'élection de for étranger pendant les années 50⁷⁰, mais la plupart des décisions postérieures, surtout des tribunaux inférieurs, refusent leurs effets négatifs, tout en empêchant qu'une clause qui attribue juridiction à un tribunal étranger puisse écarter la compétence internationale

65 Pontes de Miranda, *Comentários ao Código de Processo Civil*, Tomo II, Forense 1974, p. 228: «Ineficácia da litispendência de ações propostas no estrangeiro – se alguma ação, que, conforme os artigos 88 e 89, tenha de ser intentada no Brasil, e o foi perante autoridade judiciária estrangeira (juiz ou tribunal), a litispendência, que existe no estrangeiro, é sem qualquer eficácia para o Brasil. Mesmo se está no fim o curso do processo, ou se já houve sentença, ou se já transitou em julgado, pode ser proposta no Brasil a ação se se trata da mesma causa, isto é, do mesmo mérito, do mesmo direito, pretensão ou ação, ou se apenas há entre as duas causas conexão».

66 Code de Procédure Civile, Loi n 13.105, 2015, art. 24: «A ação proposta perante tribunal estrangeiro não induz litispendência e não obsta a que a autoridade judiciária brasileira conheça da mesma causa e das que lhe são conexas, ressalvadas as disposições em contrário de tratados internacionais e acordos bilaterais em vigor no Brasil».

67 Cf. STJ, DJ 02.out.1989, AR 133/RS, Rel. Min. Cláudio Santos; STJ, DJ 08.ago.2000, REsp 251438/RJ, Rel. Min. Barros Monteiro; et STJ, DJ 19.ago.2008, REsp 804306/SP, Rel. Min. Nancy Adrighi.

68 Effets positifs: «Art. 22. Compete, ainda, à autoridade judiciária brasileira processar e julgar as ações: (...)III - em que as partes, expressa ou tacitamente, se submeterem à jurisdição nacional.»; Effets négatifs: «Art. 25. Não compete à autoridade judiciária brasileira o processamento e o julgamento da ação quando houver cláusula de eleição de foro exclusivo estrangeiro em contrato internacional, arguida pelo réu na contestação ».

69 Avant le Code de Procédure Civil de 2015, sur les effets négatifs de la clause d'élection de for, voir Ricardo Ramalho Almeida, «Breves reflexões sobre eleição de foro estrangeiro e a competência concorrente do Judiciário brasileiro». In João Grandino Rodas, *Contratos internacionais*, 3.ed. São Paulo: Editora Revista dos Tribunais, 2002, pp. 296-316; Carmen Tiburcio, *A eleição de foro estrangeiro e o judiciário brasileiro*. Revista de Arbitragem e Mediação, v. 21, 2009, p. 84-113.

70 STF, j. 24.jan.1957, RE n. 30636, Min. Rel. Cândido Motta: «Com efeito, a norma consubstanciada no citado art. 12 não é do interesse do Estado Brasileiro, motivo porque pode ser derogada por convenção das partes, pela eleição de um foro estranho à jurisdição brasileira, salvante a hipótese de versar a ação controvérsia sobre imóveis situados em território nacional».

concurrente des juges nationaux⁷¹.

Dans le Nouveau Code de Procédure Civile, qui vient d'entrer en vigueur, il y a une règle qui changera ce cadre, comme déjà observé.

En France, les effets négatifs des clauses attributives de juridiction sont reconnus dès les années 30. En 1985, la règle de principe fut reproduite à l'arrêt *Compagnie de Signaux et d'Entreprises Électriques*, selon laquelle: «les clauses prorogeant la compétence internationale sont en principe licites, lorsqu'il s'agit d'un litige international, comme c'était en l'espèce, et lorsque la clause ne fait pas échec à la compétence territoriale d'une juridiction française»⁷².

Jusqu'à l'entrée en vigueur du Code de Procédure Civile de 2015, le traitement des clauses compromissaires établissant l'arbitrage, était beaucoup plus favorable que celui des clauses attributives de juridiction.

La Loi de l'Arbitrage de 1996 a inauguré un régime qui a permis l'ample développement de l'arbitrage au Brésil, surtout après l'année 2001, lorsque la Cour Suprême a déclaré la constitutionnalité de cette Loi⁷³ par rapport au principe constitutionnel selon lequel rien ne peut empêcher l'accès d'une personne au Pouvoir Judiciaire⁷⁴⁻⁷⁵. La Loi garantit le caractère obligatoire des clauses compromissaires, dont l'exécution peut être menée par le Pouvoir Judiciaire, qui a le pouvoir de déterminer l'installation de l'arbitrage, même si l'un des plaideurs ne le veut pas. Peu importe, pour cela, que l'arbitrage ait lieu au Brésil ou à l'étranger.

Ainsi, si un contrat célébré au Brésil prévoit que les litiges seront réglés par un arbitrage établi en France, le juge brésilien ne pourra pas les juger. Si une des parties se refuse à se soumettre à l'arbitrage, l'autre partie pourra recourir au juge étatique pour l'y obliger. Le Pouvoir Judiciaire brésilien en général est très favorable au développement de l'arbitrage et très rarement, dans des conditions très exceptionnelles, intervient contrairement à l'arbitrage. Cela a fait du Brésil l'un des pays les plus favorables à l'arbitrage dans le monde.

Il y a une lacune législative au Brésil en ce qui concerne les aspects du droit international privé des faillites. La Loi 11.101 de 2005 (Loi de Faillite) semble avoir établie, dans le même temps, un système

71 Cf. Ricardo Ramalho Almeida, «Breves reflexões sobre eleição de foro estrangeiro e a competência concorrente do Judiciário brasileiro». In João Grandino Rodas, *Contratos internacionais*, 3.ed. São Paulo: Editora Revista dos Tribunais, 2002, pp. 296-316.

72 Cf. B. Ancel et Y. Lequette, *Grands arrêts de la jurisprudence française de droit international privé*, Paris: Dalloz, p. 645 et suivantes.

73 STF, DJ 30.abr.2004, *Agravo Regimental em Sentença Estrangeira* n° 5206-7, Rel. Min. Sepúlveda Pertence.

74 Constitution Fédérale Brésilienne, art. 5ème, XXXV: «a lei não excluirá da apreciação do Poder Judiciário lesão ou ameaça a direito».

75 Sur la question, v. Jacob Dolinger et Carmen Tiburcio, *Direito Internacional Privado: Arbitragem Comercial Internacional*. Rio de Janeiro: Renovar, 2003, p. 49-69.

universel au niveau interne et territorial au niveau international.

Ainsi, son article 3 détermine que sera compétent pour déclarer la faillite et pour approuver le plan de récupération de l'entreprise en crise financière le for de son principal établissement⁷⁶. C'est une règle de compétence interne et, au niveau interne, elle signifie que toute question patrimoniale concernant l'entreprise en crise devra être soumise au juge de la faillite.

Si on admet que cette règle puisse être étendue au niveau international, toutefois, il y aura quelques difficultés. Premièrement, on constatera que le critère adopté par la Loi de Faillite (le principal établissement) est différent de celui adopté pour déterminer la nationalité brésilienne des personnes morales (l'incorporation).⁷⁷ Deuxièmement, ce qui est le grand problème, c'est la question de l'extension de la déclaration de faillite: si elle est limitée au territoire national ou si elle peut s'étendre aux établissements que cette entreprise a à l'étranger⁷⁸.

En même temps, une autre question très polémique est celle de savoir les effets qu'une déclaration de faillite à l'étranger peut produire en relation aux établissements secondaires que l'entreprise a au Brésil.

Toutes ces questions sont très discutées. Il semble que la loi a consacrée, pour le plan international – au contraire de ce que le même article 3 établit pour le niveau interne –, un régime purement territorialiste, ce qui signifie que les effets de la déclaration de faillite sont limités au territoire du pays du juge qui l'a déclarée.

Ainsi, la compétence internationale du juge brésilien serait limitée aux établissements situés au Brésil, peu importe s'il s'agit du principal établissement ou d'un établissement secondaire. La jurisprudence admet, toutefois, l'homologation de sentences étrangères qui déclarent la faillite d'une entreprise étrangère pour que cette déclaration puisse produire des effets en relation à l'agence, à la filiale ou à la succursale

76 Sur le thème, v. Fábio Ulhôa Coelho, *Comentários à nova Lei de Falências e Recuperação de Empresas*, 6.ed. São Paulo: Saraiva, 2009, p. 26, 27 et 28. Cf. aussi Manoel Justino Bezerra Filho, *Lei de Recuperação de Empresas e Falências Comentada*, 4.ed. São Paulo: Editora Revista dos Tribunais, 2007, p. 55, 56 et 57.

77 V. Fábio Ulhôa Coelho, *Comentários à nova Lei de Falências e Recuperação de Empresas*, 6.ed. São Paulo: Saraiva, 2009, p. 27.

78 Il est intéressant de remarquer que le Tribunal de Rio de Janeiro (TJRJ) a rendu une décision dans le cas OGX admettant l'inclusion des entreprises indépendantes constituées à l'étranger et contrôlées par l'entreprise mère dans la récupération judiciaire de l'entreprise au Brésil (TJRJ, DJ 16.04.2014, Embargos de Declaração no AI 0064658-77.2013.8.19.0000, Rel. Des Gilberto Campista Guarino). À l'inverse, il faut noter la décision rendue à propos de la récupération judiciaire de l'entreprise Sete Brasil, dans laquelle le juge a décidé qu'il n'était pas possible d'inclure les entreprises situées à l'étranger, indépendantes de la maison mère. (3^a Vara Empresarial do Rio de Janeiro, Proc. n° 0142307-13.2016.8.19.0001, Juge: Luiz Alberto Carvalho Alves).

située au Brésil⁷⁹. Il faut, donc, une altération législative qui puisse clarifier le régime de la faillite internationale au Brésil.

Finalement, il convient de dire quelques mots au sujet des relations internationales de consommation. Un arrêt très important a été rendu en 2000. Un individu avait acheté, aux États-Unis, une caméra de la marque Panasonic. En arrivant au Brésil, l'appareil a montré de problèmes. L'individu a donc cherché l'assistance technique de la Panasonic au Brésil, qui lui a refusé de faire jouer la garantie sous le fondement que l'entreprise brésilienne (Panasonic du Brésil) était différente de celle qui avait vendu l'appareil (Panasonic International), et que le produit n'était même pas offert sur le marché brésilien.

La Cour Supérieure de Justice, toutefois, a considéré que le consommateur pouvait se prévaloir du lien économique entre les deux marques et que le représentant de Panasonic au Brésil devrait être responsable pour les vices du produit commercialisé par la marque Panasonic International, à laquelle le consommateur avait déposé sa confiance lorsqu'il a acheté le produit. Cet arrêt Panasonic permet aux consommateurs qui achètent des produits à l'étranger de proposer au Brésil des actions en justice contre l'entreprise représentant la marque étrangère, même si le produit n'a pas été mis dans le marché brésilien⁸⁰.

6. CONSIDÉRATIONS FINALES

Je viens de vous présenter un bref panorama du droit international privé brésilien concernant les personnes morales et leurs activités. En ce qui concerne la nationalité étrangère des entreprises, le Brésil adopte le critère de l'incorporation. Toutefois, pour qu'une entreprise soit brésilienne, elle doit être incorporée au Brésil et avoir son siège administratif au pays. Il y a quelques activités total ou partiellement interdits pour les personnes morales étrangères: par exemple, la

79 Cf. STJ, DJ 24.mar.1997, REsp 15708/RS, Rel. Min. Costa Leite: «Contrato de exportação. Ação de cobrança. Exceção de incompetência. Hipótese em que, respeitada a base fática do acórdão, no que diz com a definição do lugar do cumprimento de obrigação, cumpria reconhecer a competência da Justiça brasileira. Sentença estrangeira declaratória de falência só tem eficácia no Brasil depois de homologada pelo STF. Recurso não conhecido». Dans le même sens, v. STJ, DJ 22.ago.1994, REsp 19263/RS, Rel. Min. Antônio Torreão Braz. Toutefois, il y a une observation à faire sur le thème: la Constitution Brésilienne de 1988 a été modifiée par l'Amendement Constitutionnel n. 45 de 2004. La Cour Supérieure de Justice (STJ), selon l'article 105, I, alinéa «i», est le Tribunal compétent pour homologuer les sentences étrangères. Auparavant, le Tribunal compétent pour homologuer les sentences étrangères était la Cour Constitutionnelle brésilienne (STF). Ce sujet est controversé au Brésil: il y a des décisions par lesquelles le STJ a refusé la reconnaissance (STJ, DJ 16.fev.2011, SEC 1734/PT, Rel Min. Felix Fischer et STJ, DJ 03.jun.2011, SEC 1735/PT, Rel. Min. Arnaldo Esteves Lima.

80 STJ, DJ 20.nov.2000, REsp 63981/SP, Rel. Min. Aldir Passarinho Júnior, Rel. p/ acórdão Min. Sálvio de Figueiredo Teixeira.

Constitution interdit les personnes étrangères d'être propriétaires de moyens de communication et d'obtenir des concessions pour explorer des ressources minérales et hydriques et il y a quelques restrictions aux personnes morales étrangères pour l'acquisition des immeubles ruraux.

Les personnes morales étrangères obéissent à la loi de leur nationalité en ce qui concerne leur capacité et à la loi brésilienne en concernant leur activités au pays. En plus, la règle générale à propos des contrats est l'application de la loi du lieu où le contrat a été conclu, sauf pour des contrats de travail, quand on applique la loi où les services ont été exercés. La possibilité de choisir la loi applicable aux contrats est beaucoup controversée soit dans la doctrine soit dans la jurisprudence.

Finalement, en ce qui concerne la juridiction, l'autorité brésilienne sera compétente, de manière non exclusive, si le défendeur est domicilié au Brésil. La législation détermine que seront considérées domiciliées au Brésil les personnes morales étrangères qui y ont une agence, une filiale ou une succursale. Cela veut dire que les entreprises étrangères pourront être assignées devant les cours brésiliennes si elles ont un établissement secondaire au Brésil, pour des litiges liés à cet établissement. En plus, le juge brésilien sera compétent si l'action se rapporte à une obligation qui doit être accomplie au Brésil ou si l'action s'origine d'un fait ou d'un acte qui ont eu lieu au Brésil. En matière de consommation, le juge brésilien est compétent quand le consommateur a son domicile ou sa résidence au Brésil. De plus, en ce qui concerne les immeubles situés au Brésil, le Pouvoir Judiciaire brésilien est exclusivement compétent. Bien que les clauses attributives de juridiction ont toujours été controversées chez nous, heureusement, dorénavant le Code de Procédure Civil de 2015 les a expressément admises.

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LE PRINCIPE DE LA TOLÉRANCE COMME CONTOUR DE L'ORDRE PUBLIC: LA CIRCULATION DES MODÈLES FAMILIAUX AU BRÉSIL

THE PRINCIPLE OF TOLERANCE AS MANIFESTATION OF PUBLIC ORDER: THE FLEXIBILIZATION OF FAMILY MODELS IN BRAZIL

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Résumé: L'applicabilité d'une loi étrangère dans les relations familiales - dans laquelle les différences entre les normes de deux systèmes juridiques sont en preuve en raison des aspects culturels et sociologiques - génère place pour la discussion sur les limites et les valeurs de l'ordre public comme une exception. Dans ce contexte, la tolérance apparaît comme un outil pertinent pour une compréhension plus profonde du principe de l'ordre public.

Mots-Clés: Relations familiales - Principe de la tolérance - Ordre public

Abstract: The applicability of a foreign law in family relations - in which the differences between the norms of two legal systems are in evidence due to cultural and sociological aspects - generates room for discussion about limits and values of public policy as an exception. In this context, tolerance emerges as a relevant tool for a deeper understanding of the principle of public policy. Dans le cadre des rapports familiaux actuels, une pléiade interminable de modèles a été socialement reconnue; il incombe donc au Droit la mission de les cadrer pour assurer que ces faits sociaux deviennent des faits juridiques.

Keywords: Family relationships - Tolerance principle - Public policy

1. INTRODUCTION

Apparemment nouveaux, ces modèles sont maintes fois la simple expression de quelque chose qui a toujours existé au coeur des membres des générations précédentes, sans que le fait de passer outre les limites de ce que l'on définit comme "l'intimité du foyer" n'ait été - à l'égard des moeurs de l'époque - socialement acceptée.

Cependant, d'autres modèles se sont inscrits dans la durée et, malgré le fait de remonter à des périodes éloignées de l'histoire dite occidentale (car ils ont existé de fait et de droit dans le passé occidental), non seulement ont perduré mais ont également été intégrés par d'autres cultures.

En effet, il n'y a que peu de structures familiales effectivement nouvelles et contemporaines à l'évolution technologique, à l'instar des "familles éminemment génétiques". Celles-ci se construisent à partir de rencontres d'individus forgées à l'aide des "réseaux sociaux" - lesquels me semblent, d'ailleurs, plutôt antisociaux puisqu'au lieu d'approcher, ils finissent par promouvoir l'éloignement physique.

Ainsi, ces rencontres ne se concrétisent qu'à partir d'un numéro attribué au donateur du matériel génétique par les cliniques de fertilisation in vitro. Ce numéro est fourni aux dénommés "bébés éprouvette" provenant d'une fécondation hétérologue, laquelle ne dépend, d'après la loi de certains États, que de la présentation d'une requête simple. Un autre exemple récent, qui porte sur la détection des maladies mithocontrales, vient du Royaume-Uni: là-bas, une autorisation a été accordée à la manipulation génétique pouvant générer (du moins génétiquement) un être humain constitué de matériel génétique provenant de trois personnes.

Dans ce contexte, on sera désormais devant une pluralité de modèles familiaux, parmi lesquels: (i) des modèles familiaux juridiquement dépassés en occident, mais reconnus par d'autres cultures, (ii) des modèles familiaux socialement anciens mais juridiquement nouveaux, (iii) des modèles familiaux dits traditionnels et (iv) des modèles familiaux découlant de l'évolution technologique.

Dans ce contexte certes sensible aux effets de la mondialisation, il est inévitable que dans l'exercice de leur souveraineté les États évoluent, chacun à son rythme, vers une destination encore inconnue.

Et en dépit de cette marche plutôt solitaire, il est tout de même possible d'en identifier une autre, qui ne méprise pas le besoin de coopération internationale: on se réfère à la l'évolution des instruments internationaux reconnaissant la mobilité des groupements familiaux (dont le déplacement se fait souvent, d'ailleurs, par étapes, les uns

attendant les autres dans le pays d'immigration). Des instruments internationaux qui assurent non seulement cette mobilité, mais aussi, dans une certaine mesure, la circulation des personnes.

La vitesse de cette évolution a tendance à coïncider avec celle des membres des groupement familiaux arrivant les derniers. En ce sens, cette marche vers l'extérieur, avec l'autre et envers l'autre, s'avère encore insuffisante vis-à-vis de la potentialité de la plupart des gens; voici donc une porte grand-ouverte, en vertu de laquelle on fait recours au principe d'ordre public.

2. LOIS DE POLICE

Applicable¹ durant le déroulement de la méthode conflictuelle, le principe d'ordre public peut néanmoins avoir son incidence bridée par les lois de police² (ou lois d'application directe et immédiate) du for.

Cependant, les lois de police et le principe d'ordre public ne joueraient-ils pas le même rôle, celui de vérifier la conformité de la règle matérielle étrangère aux valeurs de l'ordre juridique du for ?

En tout cas, même si ces deux mécanismes (lois de police et principe d'ordre public) ne poursuivent pas le même but, et si le moment de l'application de chacun des deux est méthodologiquement divers (moments pré-conflictuel et conflictuel), la question demeure. Savigny concluait déjà, en effet, que « toutes les normes de cette espèce correspondent à des situations exceptionnelles (...), de sorte que, en ce qui concerne leur application, chaque État doit être considéré comme absolument isolé »³.

Il estimait ainsi que, dans des hypothèses spécifiques et

1 Voir: MONACO, Gustavo Ferraz de Campos. *Controle de Constitucionalidade da Lei Estrangeira*. São Paulo: Quartier Latin, 2014.

2 Phocion Francescakis, auteur d'origine grecque qui à forgé la doctrine moderne des lois de police, a modifié leur nomenclature au fil du temps. Ainsi, en 1958 il les nomme « règles d'application immédiate (*La théorie du renvoi et les conflits de systems en droit international privé*. Paris: Sirey). En 1966, il souligne que le terme était « improvisé et uniquement descriptif » (Quelques précisions sur les “lois d'application immédiate” et leurs rapports avec les règles de conflits de lois. *Revue Critique de Droit International Privé*. Paris, n. 1, p. 1-18, jan/mar. 1966, p. 2 e 9). En 1968, En 1968, il se met à employer l'expression *lois de police* dans le but manifeste de fondre en un seul concept le contenu des expressions *lois de police* et de *sûreté* e *lois d'ordre public* (*Répertoire de droit international*. Définition de “Conflits de lois (principes généraux)”. Paris: Dalloz, 1968, p. 470 et suivantes). Enfin, en 1974 (Lois d'application immédiate et droit du travail: l'affaire du comité d'entreprise de la Compagnie des wagons-lits. *Revue Critique de Droit International Privé*. Paris, t. 63, n. 2, p. 273-296, avr/juin, 1974), il décide de reprendre les expressions da expressions *lois d'application immédiate* et *lois d'application nécessaire*.

3 SAVIGNY, Friedrich Carl von. *Sistema do Direito Romano atual* [System des Heutigen Römischen Rechts]. Trad. Ciro Mioranza. v. 8. Ijuí: Unijuí, 2004, p. 54-55.

exceptionnelles, c'était tout-à-fait acceptable que, pour défendre ses propres intérêts, l'État obstruait l'application de la méthode classique de droit international privé: il serait donc défendu au juge du for de chercher la meilleure localisation de la situation qui lui était soumise, celle-ci devant être liée à un élément de connexion spécial⁴; le résultat serait ainsi la résolution de la question à partir de la simple application immédiate et nécessaire de la loi matérielle du for⁵.

S'il est vrai que la tâche de connaître ces hypothèses « spécifiques et exceptionnelles » ne s'annonce pas plus facile aujourd'hui qu'elle n'était auparavant, lorsque l'auteur est arrivée à cette conclusion, il ne semble pourtant pas utile de s'attarder sur l'identification d'hypothèses plausibles⁶: il vaut mieux s'occuper de l'analyse abstraite des paramètres en question.

Dans le contexte actuel, les effets des lois d'application immédiate sur le système de droit international privé de chaque ordre étatique varient selon le but poursuivi. Mais d'une manière générale il est toujours possible de constater que le mécanisme se prête spécialement à associer, d'une façon matérielle ou substantielle, une question donnée

4 Cette notion, tel que l'on verra plus tard, découle surtout du positionnement de la doctrine portugaise. Apparemment, cette construction cherche à sauvegarder la mission du droit international privé et de ses fonctions, qui s'affaiblissent avec la reconnaissance des lois d'application immédiate. Dans un premier temps de la recherche, j'ai réfuté cette construction pour soutenir que les lois d'application immédiate représentaient des entraves absolues à la méthode conflictuelle. Néanmoins, une meilleure réflexion m'a permis de voir que la complexité de la connexion spéciale était non seulement utile pour sauvegarder la discipline en question, mais aussi pour tenter de démontrer que le contrôle intrinsèque de constitutionnalité garde son autonomie procédurale, même s'il est possible d'identifier des enchevêtrements importants en quelques situations. J'adopte ainsi la distinction faite par la doctrine minoritaire dans le sens de ne pas inclure les règles de protection des personnes vulnérables parmi les lois d'application immédiate, justement car, tandis que les celles-là se valent dans une certaine mesure de la méthode classique du droit international privé, celles-ci empêchent son incidence. Je considère que les règles projectives sont des règles matérielles de droit international privé, lesquelles, en prévoyant des connexions alternatives, cumulatives, successives ou basées sur l'idée de la « loi la plus favorable », s'éloignent d'une logique classique, fondée sur la justice conflictuelle, pour protéger des intérêts spécifiques et s'approcher d'une justice matérielle favorisant la partie la plus faible concernée par une situation plurilocalisée.

5 Voir: GAUDEMET-TALLON, Hélène. Le pluralisme en droit international privé: richesses et faiblesses (le funambule et l'arc-en-ciel). *Recueil des Cours*. Martinus Nijhoff Publishers. Dordrecht/Boston/London, n. 312, p. 9-488, 2005, p. 232 et suivantes; VASSILAKAKIS, Evangelos. Recent private international law codifications. *Revue Hellénique de Droit International*. Atenas, v. 63, n. 1, p. 103-12. 2010, p. 107-108.

6 LOUSSOUARN, Yvon; BOUREL, Pierre. *Droit international privé*. 6. ed. Paris: Dalloz, 1999, p. 134, estiment être possible d'établir une catégorie homogène de lois d'application immédiate et que l'interprète n'a d'autre choix que le recours à l'étude au cas par cas.

à un ordre juridique donné, notamment celui du for⁷⁻⁸. Et ce procédé se justifie, normalement, par des raisons de sauvegarde des valeurs en vigueur dans le territoire concerné.

En admettant l'existence de lois d'application immédiate, le droit international privé assume la mission de protéger «une certaine organisation sociale», de manière à assurer la «solidité de l'organisation étatique dont les lois internes qui ne peuvent être écartées sont des piliers fondamentaux»⁹. Il empêche ainsi la manifestation de l'internationalité présente dans l'hypothèse - souvent admise notamment par les auteurs portugais¹⁰ - qui tend à reconnaître dans ce cas-là une connexion spéciale et exclusive qui rattache la situation juridique à la *lex fori*.

L'objectif ici c'est que cette «internationalité» ne s'avère pas, dans la pratique, intolérable vis-à-vis du système. Car il est nécessaire d'assurer la protection de valeurs qui, étant très chères au système en question, de doivent même pas risquer d'être régies, *in concreto*, par un droit étranger.

Et cela arrive indépendamment du contenu de la loi étrangère, laquelle pourrait s'appliquer si la méthode du droit international privé était mise en place, et si le critère de rattachement indiqué par la règle de conflit était rempli, en l'espèce, par un élément d'extranéité.

Puisqu'il existe des (rares) hypothèses où l'État ne prend pas le risque de s'exposer à un ordre juridique étranger, le droit international privé prévoit le mécanisme des lois d'application immédiate. D'après Gaudemet-Tallon, les lois de police traduisent une action particulière de l'État sur des situations de droit privé d'extrême importance. Le phénomène est légitime: les buts poursuivis sont parfaitement justifiables¹¹.

Pour Moura Ramos, «la *publica utilitas* du for prévaut ainsi, par l'emploi de cette catégorie de norme, sur le devoir de coopération internationale et sur le principe de parité de traitement qui caractérisent le DIP classique. Le DIP contemporain a pour but de sauvegarder les exigences de la collectivité (interne), d'assurer la sécurité et la stabilité

7 Cela a amené FOYER, Jacques. L'égalité en droit international privé. *Archives de Philosophie du Droit*. Paris, v. 51, p. 179-93. 2008, p. 187, à affirmer que les lois d'application immédiate et les lois de police sont «franchement inégalitaires et donnent par principe compétence à la loi» du for. Toujours sur l'égalité, mais sous une perspective plus générale: FRANK, Alexis. Les critères objectifs et rationnels dans le contrôle constitutionnel de l'égalité. *Revue du Droit Public et de la Science Politique en France et à L'Etranger*. Paris, n. 1, p. 77-98, jan./fév. 2009.

8 Je ne m'attarderai pas ici sur les lois d'application immédiate étrangères, qu'elles appartiennent au système de la *lex causae* ou qu'elles proviennent d'États tiers. Voir: MAYER, Pierre. Les lois de police étrangères. In: *Choix d'articles*. Paris: L.G.D.J., 2015, p. 99-161

9 MOURA RAMOS, Rui Manuel Gens de. *Direito Internacional Privado e Constituição: introdução a uma análise das suas relações*. Coimbra: Coimbra, 1994, p. 122.

10 MOURA RAMOS. *Direito Internacional Privado e Constituição*, cit., p. 121, mentionne le «manquement manifeste à son obligation - jusqu'ici élevée à la condition fin ultime - de promouvoir la coopération internationale».

11 GAUDEMET-TALLON. Le pluralisme en droit international privé..., *Recueil*, cit., p. 263.

sociales dans les formes prévues par le législateur interne et de conserver les valeurs qui, d'après ce dernier, doivent présider au développement de la vie¹² en société. Et l'auteur le fait justement en raison de cette connexion spéciale de caractère unilatéral.

Les normes incarnent (toujours) et traduisent (aux sujets de droit) une certaine politique législative mais aussi son importance, qui vient d'être établie par un processus d'interprétation téléologique¹³. Ce processus joue un rôle essentiel pour la construction de la nature de la loi d'application immédiate.

Cela veut dire qu'une loi qui s'avère importante à l'ordre juridique d'un État peut être prise en considération d'une manière différente lorsque la relation juridique en question présente un élément d'extranéité. Mais celle-là ne pourra certes pas être une *faveur* concédée à n'importe quelle loi. Puisque l'on risquerait de voir monter l'influence d'idées nationalistes si cette pratique devenait ordinaire au point d'atteindre un grand nombre de lois internes, toutes reflétant une politique législative malgré le fait d'être incapables¹⁴ de sauvegarder les *exigences de la collectivité* et à assurer la *sécurité et la stabilité sociales* auxquelles Moura Ramos s'est référé.

Il est question de reconnaître que l'ordre juridique du for ne peut supporter la non application d'une éventuelle loi étrangère à la relation juridique en cours d'instance, mais aussi que la possibilité même que la relation en question puisse être appréciée sous optique n'un ordre juridique autre que celui du for. Et pour attaquer cette insupportabilité, la règle matérielle délimite son champ d'application pour, en se valant de la connexion unilatérale est spécifique dont parle la doctrine portugaise, le circonscrire à celui du for.

En effet, si l'application du droit étranger était intolérable, en rabino de l'incompatibilité de ses dispositions concernant les valeurs du for, la situation pourrait se résoudre à l'aide d'un recours, méthodologiquement orienté, au principe d'ordre public. Ainsi, on écarterait la loi étrangère en principe applicable mais que, en raison de son contenu, est intolérable du fait de s'éloigner manifestement des valeurs locales. Le but de cette démarche n'est autre que celui de préserver l'axiologie du système.

En l'espèce, pourtant, la question est toute autre. La méthode classique n'a pas été amorcée. Une fois constatée la présence de

12 MOURA RAMOS. *Direito Internacional Privado e Constituição*, cit., p. 121.

13 AUDIT, Bernard. Le droit international privé en quête d'universalité. *Recueil des Cours*. Martinus Nijhoff Publishers: Dordrecht/Boston/London, n. 305, p. 9-488, 2003, p. 248.

14 Sur l'importance pour le droit international privé d'une approche sociologique le l'ordre public, en raison de la pluralité de méthodes, voir: DÉPREZ, Jean. *Droit international privé et conflits de civilisations*. *Recueil des Cours*. Martinus Nijhoff Publishers. Dordrecht/Boston/London. v. 211, p. 217-309, 1988, p. 252-260.

l'élément d'extranéité, il n'est pas question de connaître la loi applicable. On sait que la question ne pourra être dénouée avec un recours à la *lex fori*, dont l'incidence se justifie puisqu'elle doit, par son essence, être appliquée immédiatement, sans que l'on s'interroge sur la loi en principe applicable d'après les règles de conflit avant de, dans un second moment, la mettre en balance avec des valeurs locales. Il n'est donc pas question de faire jouer la méthode traditionnelle: il n'y a de la place que pour la loi locale, d'application obligatoire, impérative, immédiate, circonscrite au *for*¹⁵. Et cette limitation imposée par le juge du *for* se manifeste par la construction d'une règle de conflit unilatérale dotée d'une connexion spécifique. « Cette règle de conflit est, tout comme la prévision dont découle sa détermination, une particularité de la loi d'application immédiate. (...) Pour la loi application immédiate, la règle de conflit est un rouage accessoire au service de chaque règle matérielle. Elle va donc varier selon ses desseins »¹⁶.

Considérant l'existence d'instruments internationaux, la question est de savoir s'il y a de la place pour la mise en oeuvre des lois de police, lesquelles sont, d'ailleurs, souvent antérieures à ces accords internationaux.

3. PRINCIPE D'ORDRE PUBLIC

En ce qui concerne le principe d'ordre public, une définition précise s'avère difficile¹⁷ soit en raison des différentes interprétations de son contenu au fil des temps, soit en vertu du décalage existant entre les valeurs protégées par chaque État. Le Professeur Luiz Olavo Baptista estime l'une des caractéristiques marquantes de l'ordre public est sa "dynamique historico-géographique"¹⁸.

Les valeurs auxquelles je viens de me référer découlent d'une certaine philosophie politico-juridique inhérente aux droits nationaux (là, je reprends l'histoire de ne pas voir plus loin, de la marche vers

15 Sur les lois d'application nécessaire, en général: MIAJADE LAMUELA, Adolfo. Las normas materiales de Derecho internacional Privado. *Revista Española de Derecho Internacional*. Madrid, v. 16, p. 425-457, 1963.

16 PISSARRA, Nuno Andrade. Normas de aplicação imediata e direito comunitário. In: PISSARRA, Nuno Andrade; CHABERT, Susana. *Normas de aplicação imediata, ordem pública internacional e direito comunitário*. Coimbra: Almedina, 2004, p. 29.

17 « Le problème ne se résolve pas avec une définition, car l'ordre public est indéfinissable conceptuellement, tout comme est également indéfinissable le *style* ou l'*âme* d'un ordre juridique » (BAPTISTA MACHADO, João. *Lições de direito internacional privado*. 3. ed. Coimbra: Almedina, 2006, p. 259).

18 BAPTISTA, Luiz Olavo. O direito estrangeiro nos Tribunais brasileiros. *Revista Forense*. Rio de Janeiro, v. 355, n. 97, p. 89-99, maio. /jun. 2001, p. 95.

l'isolément)¹⁹. Cette philosophie reflète les besoins de chaque Etat à une époque donnée, et représente un plancher en-dessous duquel il n'y a pas de place à des concessions à la loi étrangère²⁰. Cette loi d'autrui, celle "qui choque, qui est incompatible et qui effraye même, c'est une loi distante, qui s'éloigne complètement d'une idée de proximité, et qui ne peut pour autant être appliquée"²¹. Ferrer Correia souligne, cependant, que parfois "l'ordre public international est évoqué en tant que bouclier d'une politique législative qui ne vise pas à la tutelle des valeurs mentionnées, mais qui est adoptée pour des raisons d'opportunité. Le refus d'application de la loi étrangère se justifie par la crainte que l'application d'une norme contraire à cette politique puisse être subversive"²². Ceci semble être, d'ailleurs, le cas des certains Etats sous des régimes politiques d'exception ou dont l'ordre juridique interne méprise les règles contraignantes de Droit international tout court.

Tel qu'il se passe avec les lois de police, l'ordre public international²³ risque également d'être évoqué indument et utilisé de façon arbitraire. C'est la raison pour laquelle les conventions de droit international privé les plus récentes, et notamment celles qui découlent de la Convention de la Haye de droit international privé, précisent que la non prise en considération d'un droit étranger dont l'application est

19 Il convient de rappeler que les nécessités qui découlent de la volonté de la majorité et s'inscrivent dans des règles matérielles peuvent présenter une certaine proximité de principe au sein de divers États nationaux. Parfois, cette proximité peut être également perçue dans la législation de chaque État. Cela se doit au fait que les sociétés (notamment les occidentales) présentent une certaine identité culturelle, idéologique, politique et économique, de même que, malgré tout cela, l'existence de quelques différences radicales (TENÓRIO, Oscar. *Direito Internacional Privado*. 11. ed., t. 1. Rio de Janeiro: Freitas Bastos, 1976, p. 321) empêchent l'uniformisation et l'harmonisation des lois.

20 DOLINGER, Jacob. *A evolução da ordem pública no direito internacional privado*. Thèse présentée au sein de l'Université de l'État de Rio de Janeiro (UERJ) lors du concours de Droit International Privé, 1979, p. 4-5. BAPTISTA. O direito estrangeiro..., cit., p. 96 affirme que c'est, « à l'évidence, un mécanisme de défense et que celle-ci est sa finalité ».

21 DOLINGER, Jacob. *Contratos e obrigações no direito internacional privado*. Rio de Janeiro: Renovar, 2007, p. 544.

22 FERRER CORREIA. *Lições de direito internacional privado I*. Coimbra: Almedina, 2000, p. 409.

23 L'expression, employée plus souvent par les auteurs lusophones, se réfère au deuxième et au troisième niveaux d'incidence de l'ordre public. Au-delà de l'ouvrage de Dolinger citée auparavant (note 19), voir aussi: DOLINGER, Jacob. A ordem pública internacional em seus diversos patamares. *Revista dos Tribunais*, São Paulo, v. 93, n. 828, p. 33-42, out. 2004, especialmente às páginas 33-37. Il ne faut cependant pas confondre cette notion avec celle d'ordre public mondial, puisque la première est (avec ces trois niveaux) d'ordre interne, alors que la seconde est d'origine vraiment internationale, puisque commune à la communauté juridique internationale, de sorte à pouvoir, en effet, être « caractérisée comme étant l'intérêt commun de l'humanité ». Voir: DOLINGER, Jacob. Ordem pública mundial: ordem pública verdadeiramente internacional no direito internacional privado. *Revista de Informação Legislativa*, Brasília, v. 23, n. 90, p. 205-232, 1986, p. 210.

fixée par les règles de conflit internes n'est justifiée qu'en présence d'une incompatibilité manifeste entre la loi étrangère et les valeurs ou la politique législative du for²⁴.

On rappelle que, du moins, ce mécanisme impose que l'écartement de la loi étrangère par l'application du principe de l'ordre public soit bien justifié, et ce au cas par cas²⁵.

Lors de l'application du principe d'ordre public, force est, en outre, de le prendre en considération en son état d'évolution actuel. En d'autres termes, et pour reprendre les propos du Professeur Gaudemet-Tallon, "la disposition de la loi étrangère sur laquelle la question de pose doit être confrontée à l'état actuel de l'ordre public international du for"²⁶.

Mais alors, en quoi le principe d'ordre public diffère des lois de police auxquelles on s'est référé avant²⁷? Pour avoir des bases solides, la réponse à cette question doit prendre en considération des aspects procéduraux comme substantiels.

En ce qui concerne la procédure, la doctrine signale de façon unanime l'application *a posteriori* du principe d'ordre public, bien que par le passé quelques auteurs aient soutenu existence de lois d'ordre public applicables *a priori*.²⁸

Cette interprétation du principe d'ordre public n'a cependant pas été accueillie par la doctrine majoritaire, dont Jacob Dolinger est un représentant. «Puisque une loi n'est jamais, à proprement parler, d'ordre public», il considère qu'«il n'est pas possible d'identifier des lois d'ordre public interne et des lois d'ordre public étrangère. Ce qui existe c'est le principe d'ordre public, une notion abstraite, qui s'applique aux lois lorsque le juge estime qu'une certaine règle de droit doit être protégée et renforcée par ce principe»²⁹. Si elle était appliquée a

24 « L'ordre public international jouerait ainsi le rôle de limite transversale à l'importance juridique du droit étranger, même si l'on met en cause l'application de ces lois, dont la densité en termes de valeurs ne pourrait pas mettre en péril les valeurs du for » (CHABERT, Susana. *Ordem pública internacional e direito comunitário*. In: PISSARRA, Nuno Andrade; CHABERT, Susana. *Normas de aplicação imediata, ordem pública internacional e direito comunitário*. Coimbra: Almedina, 2004, p. 163).

25 Dans ce même sens, et en citant Von Overbeck e Vitta, voir: PINHEIRO. *Direito internacional...*, cit., v. 1, p. 587.

26 GAUDEMET-TALLON. Le pluralisme en droit international privé..., *Recueil*, cit., p. 273. Dans le même sens: CHABERT. *Ordem pública...*, cit., p. 162.

27 ARAUJO, Nadia de. *Direito internacional privado: teoria e prática brasileira*. 4. ed. Rio de Janeiro/São Paulo: Renovar, 2008, p. 104 et suivantes, en dépit de reconnaître qu'ils sont des institutions distinctes, s'y réfère dans le même contexte et semble les approcher d'une manière excessive.

28 Parmi ceux qui admettent toujours cette possibilité, voir: BENTOLILA, Juan José. Los límites del derecho internacional privado clásico en un caso multicultural. *Investigación y Docencia*. Rosário, n. 39, p. 41-46, ene./dic. 2006, p. 41.

29 DOLINGER. *A evolução...*, cit., p. 40-41.

priori, l'ordre public constituerait, d'après Luis de Lima Pinheiro³⁰, une catégorie autonome de connexion, et s'approcherait ainsi aux lois de police. Vu sa mise en pratique *a posteriori* (c'est-à-dire après le constat que la solution matérielle indiquée pour l'espèce s'avère intolérable en face des principes et des lois de l'ordre juridique du for), le principe d'ordre public s'éloigne de la catégorie des lois de police pour assumer un tout autre rôle, soit celui d'étape de la méthode conflictuelle classique. D'ailleurs, Phocion Franceskakis est catégorique pour affirmer que l'ordre public international est tout-à-fait indissociable de la méthode conflictuelle³¹.

La mise en oeuvre de l'ordre public après l'identification de la loi applicable permet que la défense des valeurs chères au for se manifeste de manière plus équilibrée en comparaison à ce qui se passe avec les lois de police, lesquelles ont vocation à écarter dès le départ l'analyse du contenu de la loi étrangère. Et cela s'explique car l'application de l'ordre public permet de vérifier s'il y a ou non un affrontement aux valeurs du for. Néanmoins, les lois de police ne laissent même pas la place à cette analyse, puisqu'elles ne s'appliquent que lors que l'affrontement en question est un fait évident (ce qui, à la vérité, pourrait ne pas avoir lieu dans la pratique).

Quant au fond, le principe d'ordre public garde des liens intimes avec une notion de justice matérielle³² ou, pour dire autrement, avec (i) le résultat qui se produira dans le pays du for en raison de l'application de la loi étrangère et (ii) les risques que cette application puissent secouer "les fondements même de l'ordre juridique interne (en mettant en cause les intérêts de la plus grande transcendance et de la dignité)"³³.

A ce stade, on s'attardera sur deux textes, l'un de Paul Ricoeur³⁴, l'autre de Norberto Bobbio³⁵, dans le but d'établir un dialogue entr'eux. Ces deux textes jouent, à mon avis, un rôle important pour la compréhension du principe d'ordre public, de sa construction, de ses limites et de ses fonctions. Ayant comme thème central la tolérance religieuse, le texte

30 PINHEIRO. *Direito internacional...*, cit., v. 1, p. 589.

31 FRANCESKAKIS. Quelques précisions..., cit., p. 2.

32 MARQUES, Cláudia Lima. O direito internacional privado solucionando conflitos de cultura: os divórcios no Japão e seu reconhecimento no Brasil. *Revista de Informação Legislativa*, Brasília, v. 41, n. 162, p. 91-113, 2004, p. 107, fait une conclusion qui va dans le même sens de celle du texte, en reconnaissant que « les divorces religieux sont soumis à un contrôle plus strict en ce qui concerne les droits fondamentaux des femmes et l'affrontement de notre ordre public ».

33 BAPTISTA MACHADO. *Lições...*, cit., p. 263. Plus tard dans le même ouvrage l'auteur se réfère à « choquer la conscience et provoquer une exclamation ».

34 In: RICŒUR, Paul. *Leituras 1: em torno ao político* [Lectures 1: autour du politique]. Trad. Marcelo Perine. São Paulo: Loyola. 1995.

35 In: BOBBIO, Norberto. *A era dos direitos* [L'età dei Diritti]. Trad. Carlos Nelson Coutinho. Rio de Janeiro: Campus, 1992.

de Ricœur apporte des réflexions importantes sur les institutions et les traditions culturelles, et forge une conception de tolérance en tant qu'abstention (laquelle est son application négative) de la perception qui, en présence que quelque chose qui pourrait affronter l'interlocuteur et provoquer en lui le désir d'interdire cette façon d'agir qui affronte, serait, en revanche, tolérée. Pour cela, il serait nécessaire de s'abstenir d'une réaction véhémente, dont l'éventuelle manifestation ne pourrait cependant pas faire, du moins en principe, l'objet de censure. Dans ce contexte, l'intolérance se présente, à son tour, comme une "disposition hostile à la tolérance ecclésiastique ou civile"³⁶.

L'auteur explique que ce contenu (ou définition) de l'(in)tolérance est institutionnel. Dans la sphère individuelle, à son tour, la tolérance se manifeste non par le biais de l'abstention, mais par celui de l'admission. Il est ainsi que l'on aurait tendance à admettre chez l'autre une manière d'agir, de penser, de gérer une situation qu'est substantiellement diverse de celle qui serait sa propre façon d'agir dans ces mêmes circonstances. Et l'intolérance, pour l'individu, se manifeste par le reproche d'une opinion ou d'une conduite "insupportable" de l'autre³⁷.

Bobbio, lui, estime que, au plan individuel, la tolérance présente une raison morale matérialisée dans le respect d'autrui: "je crois fermement en ma vérité, mais je crois avoir un devoir d'obéissance envers un principe moral absolu: le respect d'autrui"³⁸.

Institutionnellement, l'Etat s'exprime d'une manière tolérante et justifie positivement la liberté qu'il accorde à ses nationaux moyennant une idée de justice, qui admet ainsi "la reconnaissance du droit à l'existence des différences du droit aux conditions matérielles pour l'exercice de la liberté d'expression"³⁹.

Toutefois, puisque les "sphères de liberté sont compétitives et que l'expression de chacune d'elles a tendance à se superposer à celles des autres", cette attitude ouvre une porte à la tolérance institutionnelle, et entraîne une confusion entre les champs de la justice (matérielle, si l'on veut) et de la vérité (ou bien, toujours selon Ricoeur, de la *prétention* de vérité, ou encore d'une « vérité » basée exclusivement sur les opinions de quelqu'un). Il ne reste ainsi à l'Etat que d'être un relais de protection des libertés construites à partir de ce que J. Rawls, cité par l'auteur, appelle les "règles d'ordre", dont la mission est tout simplement la protection de l'ordre public du for: c'est-à-dire que ce qui est intolérable - et donc

36 RICŒUR. *Leituras...*, cit., p. 175.

37 BODEN, Didier. Le pluralisme juridique en droit international privé. *Archives de Philosophie du Droit*. Paris, v. 49, p. 275-316, 2005, p. 303, affirme que prévaut dans la littérature sur la morale et l'éthique l'approche institutionnelle, au détriment de l'individuelle.

38 BOBBIO. *A era...*, cit., p. 208.

39 RICŒUR. *Leituras...*, cit., p. 180.

redoutable - doit céder aux règles d'ordre public⁴⁰.

A ce stade de sa réflexion, Ricœur envisage la construction d'un lien entre les sphères institutionnelle et individuelle de la tolérance ou de intolérance, et cherche à répondre à l'interrogation suivante: "pourquoi l'Etat absolument neutre n'existe pas?"⁴¹. Cette question se justifie dans la mesure où l'on comprend que la justice est une valeur essentielle à la compréhension du *modus operandi* de l'Etat; elle vise à « empêcher que l'expression de la liberté de l'un se superpose à l'expression de la liberté de l'autre »⁴². Bobbio, à son tour, affirme que la « tolérance absolue est une pure abstraction » et que la « tolérance historique, réelle, concrète, est toujours relative »⁴³. Et dans une société non égalitaire par sa nature, dans laquelle les groupes les plus forts ont tendance à imposer leur conception de liberté, l'action positive de l'Etat est souvent indispensable pour que cet objectif soit atteint. Non sans raison, Bobbio estime que la tolérance, en tant qu'exigence, « naît au moment de la prise de conscience de l'irréductibilité des opinions et de la nécessité de trouver un *modus vivendi* (c'est-à-dire une règle purement formelle, une règle du jeu) qui permette que l'expression de toutes les opinions s'expriment »⁴⁴. Cependant, l'Etat n'étant pas un entité tout-à-fait neutre, une action idéale reste difficile. Celle-ci est la raison pour laquelle Ricœur pose ces questions concernant les causes qui, empêchant une neutralité absolue de la part de l'Etat, permettent que l'on côtoie le « redoutable » intolérable au sein de ce dernier.

La réponse de l'auteur français est simple: la neutralité absolue n'existe pas « parce que l'Etat ne se construit pas sur le vide, mais s'attache à une culture qu'il exprime et protège à la fois »⁴⁵. Didier Boden explique que la « tolérance n'est ni inconditionnelle, ni illimité, et la décision d'être ou non tolérant dépend des circonstances »⁴⁶. Bobbio, quant à lui, est plus tranchant et affirme que « la tolérance est évidemment, consciemment, et "utilitaristiquement" le résultat d'un calcul et n'a, en effet, rien à voir avec le problème de la vérité »⁴⁷. Avec ce constat, Ricœur se tourne vers la sphère individuelle de manifestation de la tolérance. Il reconnaît dans

40 "Le rôle primaire de la clause d'ordre public consiste en la sauvegarde des valeurs essentielles de justice, qui sont à la base de l'ordre juridique. Ces valeurs sont consacrées dans des principes sur lesquels repose la loi interne de l'Etat du for". BUCHER, Andreas. *L'ordre public et le but des lois en droit international privé. Recueil des Cours*. Martinus Nijhoff Publishers. Dordrecht/Boston/London, n. 239, 1993

41 RICŒUR. *Leituras...*, cit., p. 181.

42 RICŒUR. *Leituras...*, cit., p. 179.

43 BOBBIO. *A era...*, cit., p. 211.

44 BOBBIO. *A era...*, cit., p. 213.

45 RICŒUR. *Leituras...*, cit., p. 181.

46 BODEN. *Le pluralisme juridique...*, cit., p. 307.

47 BOBBIO. *A era...*, cit., p. 207.

cette sphère l'existence d'un espace plus adapté à la conformation du consensus conflictuel, dont l'une des caractéristiques est l'équilibre entre les tolérances individuelles. Cet équilibre permet que « chacun renonce à faire interdire ce qu'il ne peut empêcher », de sorte à faire émerger, « non sans peine, une tolérance positivement conflictuelle, laquelle se traduit par le droit d'exister de l'adversaire et, à la limite, par une volonté expresse de partage culturel »⁴⁸.

Ricouer ne méprise pas le fait que l'émergence de la tolérance est un phénomène tardif dans l'histoire de l'humanité comme des Etats nationaux. Il admet ce retard aux traits d'intolérance dont s'habillent les convictions: or, de la même façon qu'une conviction intolérante va dans un sens déterminé, il y aura l'expression d'une autre conviction, elle aussi intolérante, qui va dans le sens inverse. Et souvent cette intolérance laisse transparaître une simple caprice intellectuelle: si par mes convictions je détient *la vérité*, l'autre, celui qui n'est pas d'accord avec moi, ne la détient point, et ses convictions sont donc tout simplement fausses. Il a fallu que l'on se rende compte, moyennant une présomption difficile d'admettre, « que l'adhésion de l'autre à ses croyances est, elle même, libre » pour que les convictions s'assouplissent et que la tolérance émerge: « Seule cette présumée liberté place la croyance sous la catégorie de la personne et non sous celle de la chose et, en même temps, la rend digne de respect »⁴⁹, car l'autre a le droit à l'erreur.

En effet, la violence se trouvant dans la conviction se dissipe, et la tolérance devient plus accessible. Elle se transforme en indifférence, dans la mesure où tout s'équivaut. Pour reprendre Bobbio, « l'on met en jeu le principe de la réciprocité, sur lequel se fondent toutes les transactions, tous les engagements, tous les accords se trouvant à la base de toute forme de coexistence pacifique (toute coexistence se base soit sur l'accord, soit sur l'imposition): la tolérance, en l'espèce, est l'effet d'un échange, d'un *modus vivendi*, du *ut des*, sous l'égide du "si vous me tolérez, je vous tolère"⁵⁰. Cette forme violente de conviction, qui ressurgit, toutefois, avec de nouvelles moules lorsque la différence s'approfondit, ne semble plus digne de ce respect qui constitue, pourtant, la vertu de la tolérance au plan de la culture et des valeurs.

On connaît donc l'émergence d'une nouvelle forme de l'intolérable, celle que le philosophe français appelle l'abjecte, et qui ne se confond pas avec l'objet de notre propre et individuelle intolérance, de la violence de notre conviction personnelle. « Cet intolérable c'est ce qui ne pourrait pas être inclus dans le pacte du consensus conflictuel sur lequel repose l'équilibre du vivre ensemble ». L'abject doit être « clairement identifié par le consensus de ceux que nous respectons, précisément parce qu'ils

48 RICŒUR. *Leituras...*, cit., p. 183.

49 RICŒUR. *Leituras...*, cit., p. 183.

50 BOBBIO. *A era...*, cit., p. 207.

sont à nos yeux les gardiens du respect mutuel »⁵¹. Et il reconnaît qu'il y a, pour chaque individu, pour chaque communauté, pour chaque collectivité nationale, de la place pour cet intolérable.

L'abject dont nous parle Ricœur doit être l'exception dans la mesure où il ferme la porte à la réciprocité dont parle Bobbio et qui est à la base de l'acceptation, par le juge du for, des différences entre « sa » loi et la loi étrangère. Pour cela, il suffit que cette différence ne soit pas abjecte, puisque tout le reste peut être toléré.

4. CONFORMATION MATÉRIELLE DU PRINCIPE

Une fois cette toile de fond présentée, il est temps de tenter de délimiter le contenu du principe d'ordre public. S'agissant d'un principe qui, d'après la construction de Jacob Dolinger, porte sur tout l'ordre juridique, en trois différents niveaux (sur la vie juridiquement relevante, sans distinction; sur les relations privées internationales, spécifiquement; et sur la réception des décisions étrangères, à la rigueur) et a le pouvoir de limiter ou obstruer trois situations juridiquement relevantes (la volonté de réglementer qui peut être limitée ou même supprimée, l'expectative légitime de droit reflétée dans la perspective de voir la situation dite « plurilocalisée » réglementée par une loi étrangère et l'exercice de droits acquis d'une façon légitimé à l'étranger, sous l'application d'une loi étrangère), il est indéniable que la constitution de l'État du juge du for mérite d'être considérée comme sa plaque tournante.

À vrai dire, on croit que les normes constitutionnelles doivent constituer le moule de l'ordre public, et notamment ces règles matérielles insérées dans la constitution, telles que celles qui reconnaissent les droits fondamentaux et fixent les conditions ou la manière de son exercice. Mais la conformation matérielle du principe ne doit pas s'y réduire⁵². Tel que Luis Roberto Barroso a remarqué, l'exogénie de l'ordre public relativement aux lois fait que des aspects qui lui sont inhérents soient identifiables « hors du contexte constitutionnel. Ainsi, il serait possible d'évincer la loi étrangère sous prétexte d'incompatibilité avec l'ordre public [d'un pays], même si elle ne se heurte pas, directe ou indirectement, à la constitution »⁵³. Dans ce contexte, le droit pénal pourrait également, pourvu sa fonction de dernier recours dans l'ordre juridique, avoir un impact sur la réglementation des relations sociales: dans la mesure où il cherche à réprimander des conduites humaines

51 RICŒUR. *Leituras...*, cit., p. 185.

52 GAUDEMET-TALLON. *Le pluralisme en droit international privé...*, *Recueil*, cit., p. 394.

53 BARROSO, Luis Roberto. *Interpretação e aplicação da Constituição*. 7. ed., 2. tir., São Paulo: Saraiva, 2010, p. 51; BARROSO, Luis Roberto. *A Constituição e o conflito de normas no espaço. Direito Constitucional Internacional. Revista da Faculdade de Direito da Universidade do Estado do Rio de Janeiro*. Rio de Janeiro, n. 4, p. 201-30, 1996.

non tolérées par la société, ce droit pourrait s'avérer une limite efficace à l'ordre public⁵⁴. De la même manière, quelques règles provenant des droits civil, des affaires et social ne doivent pas être écartés d'emblée car, si elles sont en principe moins relevantes, elles peuvent dans la pratique être des composantes de l'ordre public.

Il a été reconnu, depuis quelque temps, qu'il incombe à la constitution de réglementer les relations juridiques entre les personnes privées, soit par application directe des règles constitutionnels, soit par l'influence actuellement exercée par ces dernières sur l'interprétation des normes ordinaires et sur l'éventuel remplissage des lacunes de l'ordre juridique.

5. L'ARC-EN-CIEL ET LA TOLÉRANCE

La liberté conférée aux magistrats pour la désignation de ce qui doit et de ce qui ne doit pas faire partie du principe d'ordre public a trait à l'idée d'actualité qu'il ne faut pas perdre de vue lors de la fixation de son contenu. Par ailleurs, elle stimule à faire croire que « l'analogie de l'exception d'ordre public en droit international privé est la limite de la tolérance active en tant que vertu interindividuelle, et non en tant qu'attitude de l'État (ou de la société) »⁵⁵. En outre, la soi-disant subjectivité de cette formulation dénoncée par toute la doctrine du droit international privé a entraîné des critiques. À l'instar de celles adressées par Luis Roberto Barroso, qui estime qu'en raison de leur formation, les international privatistes tentent de « minimiser les restrictions à l'application du droit étranger »⁵⁶.

Force est de reconnaître que cette possibilité existe et doit être évitée, même si on ne suit pas l'auteur dans sa critique. Puisqu'il est possible, sans trop de difficulté, de faire que les adorateurs du droit interne se voient devant le même miroir, afin d'admettre l'aversion qu'ils puissent avoir à la application potentielle du droit étranger. Une aversion qui les pousse à avoir souvent recours à une notion très élargie du contenu de l'ordre public, en espérant qu'il soit ainsi capable de faire face à la loi étrangère (intolérablement, il faut dire) dans le but de l'écarter.

D'où la position ici défendue, qui vise à assurer à l'ordre public le rôle qui lui incombe, même si, de fait, il cède la place maintes fois à

54 Celle-ci et, d'ailleurs, la solution trouvée par Teixeira de Freitas dans son *Esboço de Código Civil*, art. 5º: « les lois étrangères ne s'appliquent pas: 1º) lorsque son application s'oppose au droit public et pénal de l'Empire, à la religion de l'État, à la tolérance des cultes, à la morale et aux bons moeurs... ». Voir à ce propos: RODAS, João Grandino. *Direito internacional privado brasileiro*. São Paulo: RT, 1993, p. 73.

55 BODEN. Le pluralisme juridique..., cit., p. 315.

56 BARROSO. *Interpretação e aplicação...*, cit., p. 51; BARROSO. *A Constituição e o conflito...*, cit.

d'autres formes de contrôle. Il convient à ce propos garder à l'esprit la métaphore de l'arc-en-ciel déagée par Hélène Gaudemet-Tallon lors de son cours à l'Académie de la Haye: *Le pluralisme en droit international privé: richesses et faiblesses (le funambule et l'arc-en-ciel)*.

En effet, de la même manière que les limites entre les couches de l'arc-en-ciel sont imperceptibles, les frontières de l'action de chacun des mécanismes en question ne sont plus ni si nettes, ni si étanches. Au lieu de flétrir les « commandements juridiques de la loi désigné », il faudrait faire, « pur et simplement, la prévention des résultats inconstitutionnels qui pourraient découler de son application, à l'instar de ce qui se passe, d'ailleurs, avec les règles de droit interne »⁵⁷.

En outre, s'il y a un « décalage entre la *Weltanschauung* dans laquelle une communauté politique se reconnaît effectivement et celle qui sert de base à sa constitution en sens formel »⁵⁸, les deux pourraient être confrontées, dans cette construction, à la loi étrangère désignée par la règle de conflit; ainsi, il ne resterait à savoir si les normes formellement constitutionnelles méritent de produire des effets dans le champ du droit international privé - on tentera de donner une réponse à cette question dans le chapitre suivant.

Mais en agissant ainsi, le magistrat s'abstiendrait de faire une démarche qui s'avère manifestement contraire aux normes fondamentales établies par sa propre constitution. A ce propos, on rejoint intégralement Moura Ramos lorsqu'il signale que cette façon de se confronter à la question contribue à une solution autonome relativement à la méthode conflictuelle⁵⁹.

C'est la raison pour laquelle on insiste sur le fait que le moment procédural le plus convenable pour cette démarche constitutionnelle est celui de la prise de décision, lorsque l'influence de la méthode du droit international privé s'affaiblit, et que le raisonnement juridique qu'elle devait boucler ne diffère pas, quant à sa structure, de n'importe quelle autre décision (sauf, peut-être, en ce qui concerne le chemin parcouru vers l'application de la loi étrangère et, occasionnellement, aux raisons pour lesquelles elle a été écartée, soit en totalité ou en partie).

La subsumption d'un fait sous la règle applicable, son interprétation, la limite de son application en l'espèce, tout le reste se déroule comme dans n'importe quelle autre situation éminemment

57 *Apud* MOURA RAMOS. *Direito Internacional Privado e Constituição*, cit., p. 228. Aussi, PINHEIRO. *Direito internacional...*, cit., v. 1, p. 610, pour qui « à l'instar de ce qui se passe avec le contrôle de constitutionnalité des normes internationales, la non conformité de la loi étrangère avec la Constitution portugaise ne sert qu'à déterminer l'inefficacité de cette loi relativement à l'ordre juridique interne ».

58 MOURA RAMOS. *Direito Internacional Privado e Constituição*, cit., p. 219, note 82, pour connaître l'analyse de l'auteur concernant la position de Barile.

59 MOURA RAMOS. *Direito Internacional Privado e Constituição*, cit., p. 228.

interne: car si les faits sont « plurilocalisés », la règle signalée est étrangère et donc interprétée conformément au système réceptionné par le droit du for. Pourtant, les effets qu'elle produit se heurtent à des limites logiques, puisque les règles fondamentales fixées par la constitution locale doivent être préservées.

Il semble toutefois prudent de faire la remarque suivante: si les normes d'application immédiate ne doivent pas se multiplier, sous peine de trop élargir le champ d'application de la *lex fori*, et si le contenu du principe d'ordre public ne doit pas être amplifié au point d'accroître excessivement le nombre de situations considérées comme intolérables, le contrôle de constitutionnalité doit également être exercé avec précaution. Ou, pour reprendre les propos de Moura Ramos, qui s'est penché sur ce que l'on a nommé le *contrôle de constitutionnalité intrinsèque*, « par la prise en considération de ces deux vecteurs - les valeurs de certitude et sécurité de la circulation international et les exigences basiques de l'ordre constitutionnel - il faudra donc analyser la solution de chaque cas particulier de manière à assurer, en préservant au maximum le premier, la réalisation intégrale du second »⁶⁰.

6. CONSIDÉRATIONS FINALES

Vivre en famille est toujours difficile, même dans un contexte où celle-ci est culturellement harmonieuse et circonscrite à son territoire. Tous ceux qui en ont une le savent. Mais lorsque les différences vont au-delà de la sphère du foyer et concernent des communautés diverses d'un point de vue culturel, la tolérance assume une importance absolue, surtout dans des contextes où la libre circulation de personnes rend possible l'exercice du droit au regroupement familial. Le refus de ce droit ne semble en effet possible que dès lors que les différences culturelles mettent en évidence cet abject: à nous donc d'exercer la tolérance dans ce monde plein de différences. Une tâche, souligne-t-on, toutefois difficile à mettre en oeuvre.

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60 MOURA RAMOS. *Direito Internacional Privado e Constituição*, cit., p. 235.

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LA DÉMOCRATIE, L'INTOLÉRANCE POLITIQUE ET LES DROITS HUMAINS : LE BRÉSIL ET LA CRISE ACTUELLE

DEMOCRACY, POLITICAL INTOLERANCE AND HUMAN RIGHTS: BRAZIL AND THE CURRENT CRISIS

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Résumé: L'atmosphère d'intolérance dans les démocraties contemporaines est incompatible avec le concept de démocratie, dans un sens plus large ; ce qui présente clairement la corrélation étroite entre la démocratie et les droits humains, et aussi comme la négation des droits humains sont révélés dans les périodes de crise économique et politique. Cet article essaie de traiter de la question de la démocratie dans la vie quotidienne, en abordant des questions de politique actuelle dans la réalité brésilienne contemporaine.

Mots-Clefs: Intolérance politique – Crise Politique – Droits Humains

Abstract: The atmosphere of intolerance in contemporary democracies is incompatible with the concept of democracy in a wider sense, which shows the close correlation between democracy and human rights, and also how human rights deficits are exposed in full force in periods of strong economic and political crisis. This article seeks to address these issues so intersected in contemporary Brazilian reality, addressing the issue of the daily derepression.

Keywords: Political Intolerance - Political Crisis - Human Rights

1. L'INTOLÉRANCE POLITIQUE ET LES DROITS HUMAINS

Le Brésil a une 'image internationale' qui est étroitement associée

à la 'fête', à la 'samba' et à la 'cordialité' du peuple.¹ Cela fonctionne aussi bien quand il s'agit de prendre ces traits de la culture brésilienne comme 'clé' de auto-compréhension, ou de parler de l' 'image de soi' que nous avons intérieurement dans notre pays. Mais, cette idéologie trompe l'analyse, quand on veut regarder les relations de la vie quotidienne dans la réalité concrète. Soit à cause de la sociologie romantique, soit à cause du marketing mondial, soit à cause du métissage ethno-racial historique, nous avons cette vision aveugle comme manifestation d' une idéologie qui nous empêche de confronter nos plus concrets problèmes du quotidien.

Dans le contexte de l'actuelle crise économique et politique, ces problèmes émergent des profondeurs des relations sociales, et se révèlent, en démontrant que le masque de notre 'civilité brésilienne' a disparu sous nos yeux. Ainsi, il est vrai de dire que, dans le Brésil d'aujourd'hui, la vie quotidienne est plus marquée par la distension des relations personnelles, et que nous vivons au 'bord du rasoir' ('fio da navalha'), dans un scénario de polarisation politique, d'extrêmes de l'opinion publique, d'instabilité institutionnelle et de paralysie économique.

Certes, d'un point de vue historique, la crise économique a toujours réveillé les 'fantômes' les plus terribles qui existent, surtout si l'on prend en considération la peur généralisée du peuple et les sentiments manipulés par les médias et le gouvernement, favorisant ainsi une atmosphère d'intolérance politique et sociale.

Mais, la crise économique n'est pas locale et n'est pas non plus un privilège brésilien du moment. La crise est mondiale, et facilite l'extrémisme dans toutes les parties du monde, comme ont montré récemment les actes de terrorisme du 13 Novembre 2015, dans la ville de Paris.

Toute période de crise présente une opportunité pour la manifestation des contradictions jusqu'alors cachées. Ce qui était en suspens, maintenant apparaît comme une fatalité. Chez nous, au Brésil, la contradiction est la consolidation de la démocratie en suspens; en France, la tension devint de la situation non résolue de l'immigration. C'est dans de tels moments que la crise fait 'la civilisation' se soumettre aux épreuves plus difficiles, en faisant réagir la culture et en faisant se manifester 'la barbarie quotidienne' qui est camouflée sous la protection du mot 'civilisation', et plus spécialement du mot 'civilisation moderne'.²

1 "Often described as a difficulty to separate personal and impersonal attitudes in the public space, associated with a spirit of cordiality (Holanda, 1936/1997) or expressed in the difficulty to deny favor to friends (Damatta, 1991, 1999) and in the ability to always find a way to help a friend (the famous Brazilian *jeitinho*), such orientation contrasts with the rules that predominate in the market and in State bureaucracy" (Cardoso de Oliveira, Luís Roberto, Equality, dignity and fairness: Brazilian citizenship in comparative perspective, in *Critique of Anthropology*, 33(2), 131-145, 2013, p. 132).

2 Cf. Adorno, Theodor, Horkheimer, Max, *Dialética do esclarecimento: fragmentos filosóficos*,

Leprocessus de modernisation implique des avances et des reculs, selon les observations de la Dialectique des Lumières (1947), de Theodor Adorno et Max Horkheimer.³ Celui-ci est un important avertissement historique signalé par la Frankfurt Schule, qui analyse les pathologies sociales dans la modernité, pour faire ressortir la critique des éléments opprimant la liberté. Cette analyse nous fait voir que l'histoire de la modernité n'est pas seulement l'histoire de la liberté. Les jeux sociaux impliquant des étapes de l'émancipation ne sont pas libres de tensions, de conflits et de contradictions. Ainsi, la modernité nous fait tout le temps des surprises; comme par exemple, quand la liberté acquise est immédiatement minée par une innovation de la technologie, par des scénarios de crise économique, par un nouvel accord des forces politiques, ou par un scénario d'incertitudes socio-historiques, ou même, par la force de la terreur globale.

Nous traversons une période difficile, de fortes tempêtes politiques, de scandales de corruption, de perte de légitimité du gouvernement, mais toute difficulté ne peut pas nous rendre aveugle à point de ne pas voir clairement que l'intolérance politique du passé a fait trop de victimes dans l'histoire récente, et qu'il est bien temps de se tourner vers les promesses des Lumières.⁴ Par conséquent, la préservation des droits humains ne peut pas subir de revers, soit au nom du 'conservatisme politique', dans le cas du Brésil, soit au nom de la 'sécurité nationale', dans le cas de la France. La menace de retour en arrière dans la culture du respect des droits humains, dans la lutte pour la consolidation de la démocratie et dans la croyance aux institutions de protection de la légalité ne peut pas nous faire revenir en arrière et retourner à un passé récent où la politique cachait le totalitarisme et l'autoritarisme.

Au Brésil, la situation est plus délicate encore, étant donné que la faiblesse de notre démocratie. Les résultats d'évaluation du Democracy Index indiquent que le Brésil est la 51^{ème} démocratie du monde, dans une relation de 167 pays analysés, et qu'il a perdu des positions (il était la 47^{ème} position) à cause de l'actuelle crise politique. En fait, après la dictature civil-militaire de 1964-1985, et déjà passé la période de la restauration démocratique depuis l'adoption de la Constitution Fédérale de 1988, il y a eu deux demandes de impeachment (destitution constitutionnelle) présentées contre des Présidents élus par le vote populaire. Dans le premier cas, la destitution du Président Fernando Collor, après des manifestations populaires des jeunes 'caras pintadas'; dans le second cas, l'impeachment de la Présidente Dilma Rousseff, encore en discussion,

São Paulo, 1985, ps. 12 à 27.

3 Cf. Adorno, Theodor, Horkheimer, Max, *Dialética do esclarecimento: fragmentos filosóficos*, São Paulo, 1985, p. 19.

4 Garapon, Antoine, *O guardador de promessas: justiça e democracia*, Lisboa, 1998, ps. 36-37.

après les manifestations populaires (pour et contre).

Mais, du point de vue historique pour la consolidation de la démocratie brésilienne, le plus tragique est la constatation dans la réalité contemporaine de certains types de marques du quotidien: a.) hate speech (discours de haine) en large propagation virale, dans les sites et partout sur l'internet (Facebook ; Instagram);⁵b.) la violence pandémique;⁶c.) les inégalités socio-économiques; d.) des expressions de l'opinion publique autoritaire demandant le retour de la dictature; e.) les tentatives législatives pour supprimer certains droits humains, en particulier dans le domaine des droits des enfants et des adolescents; f.) le processus pas fini de justice de transition;⁷g.) la dégradation du dialogue politique dans la sphère publique; h.) la forte pression des médias sur le gouvernement.

2. DÉMOCRATIE DANS LA VIE QUOTIDIENNE

La démocratie brésilienne vit les mêmes questions qui affectent une grande partie des démocraties contemporaines autour du monde, parce qu'on vit dans un scénario d'extrêmes. C'est pour ça qu'on a besoin maintenant de stabiliser la démocratie et non de la révoquer; on a besoin de l'approfondir et de la rendre présente où elle ne l'était pas. C'est pour cela que la conception de démocratie dont on a besoin, aujourd'hui, n'est pas celle de la traditionnelle 'démocratie politique'. On a besoin d'une conception de démocratie plus large.

Cela est très présent, parce que la démocratie brésilienne contemporaine a de fortes batailles à vaincre au niveau de la culture et au niveau de l'économie, au niveau de la justice sociale et au niveau de la citoyenneté, au niveau de l'éducation et au niveau de l'opinion publique, aussi importantes que les batailles au niveau politique. Je comprends ça comme d'importantes étapes de préparation pour surmonter le cycle de prémodernité qui empêche le Brésil de vaincre les inégalités économiques, les relations sociales violentes, et l'autoritarisme social.

C'est à cause de ça que peut commencer à sortir dans le débat contemporain autour du terme 'démocratie', le point de vue selon lequel la réalisation et la radicalisation de la démocratie signifient, aujourd'hui, plus que la réforme du 'système politique', entraînant la notion de démocratie de la vie quotidienne, une sorte de démocratie

5 Rothenburg, Walter Claudius; Stroppa, Tatiana, Liberdade de expressão e discurso de ódio: o conflito do discurso nas redes sociais, in Anais do III Congresso Internacional de Direito e contemporaneidade: mídias e direitos da sociedade em rede, <http://www.ufsm.br/congressodireito/anais>, Acesso em 30.12.2015.

6 Cf. Pinheiro, Paulo Sérgio; Almeida, Guilherme A., *Violência urbana*, 2003, p. 5 a 24.

7 Cf. MINISTÉRIO DA JUSTIÇA. Relatório final. Brasília: MJ, Comissão Nacional da Verdade, In: <http://www.cnv.gov.br>.

pour les relations quotidiennes entre citoyens, toujours pratiquées sur la base de la négociation rationnelle, du dialogue et du renforcement des valeurs des droits humains. Cela signifie un profond processus de dérépression du quotidien des relations humaines.

Cela implique la conscience des citoyens de ce qui est commun et de ce qui fait chacun faire partie d'une communauté d'intérêts. La démocratie n'est pas cachée dans une boîte, qu'on appelle 'institutions politiques', le Congrès, le Tribunal, la Mairie;⁸ elle est effectivement présente aux liens sociaux capables de construire spontanément des pratiques démocratiques où des valeurs sociales de convivialité. Ceci un point très important de cet exposé, parce qu'il touche directement la question de la formation d'une culture sociale démocratique. Cela demande une attitude bien radicale devant la vie, soit collective, soit individuelle, et la capacité d'intérioriser le nous dans le moi, et le moi dans le nous, et de faire du dialogue une méthode de vie des valeurs républicaines.

Qui mieux es connaissant l'histoire et les injustices du passé, et sachant que notre passé nous pèse énormément dans le présent (esclavage, génocide des indiens, violences du quotidien, déficits des politiques publiques, république inachevée), on sait que le plus important c'est de chercher, dans l'horizon d'un futur proche, les moyens de la citoyenneté et de la consolidation de la démocratie comme les seules alternatives politiques possibles aux problèmes de notre réalité. La préservation de la démocratie et le progrès de la démocratie ne peuvent pas ignorer ces éléments.

Par conséquent, lors de la formulation de la notion contemporaine de 'démocratie', il faut tenir en compte ces aspects abordés ici plus profondément. Il faut aussi examiner comment la radicalisation de la démocratie pourra se faire sans une culture de démocratie dans la vie sociale. Si l'on n'est pas capable d'actualiser les pratiques en harmonie avec l'évolution des ces nouvelles frontières du concept, la 'démocratie politique' sera toujours passible d' 'interruptions', d' 'indéfinitions' et d'autres 'instabilités'. Ces résultats d'analyse définissent les directions du futur, et indiquent par eux-mêmes, les conclusions. Il faut stabiliser la démocratie dans la vie, au sens d'une pratique quotidienne, exactement où le moi se confond avec le tu, et où les valeurs des droits humains sont les plus gravement maltraitées.

3. CONCLUSIONS

L'atmosphère d'intolérance politique au Brésil contemporain expose la réelle capacité de la démocratie à affirmer, se consolider et de réaliser la culture des droits humains, si nécessaire

⁸ Garapon, O guardador de promessas: justiça e democracia, 1998, ps. 43-44.

comme garantie de respect dans les échanges sociaux.

La crise politique est sûrement la conséquence de la crise économique, mais les institutions de justice suivent en pleine activité, ce qui permet d'affirmer que le contrôle démocratique est déjà une manière de forcer le système juridique à s'imposer sur le système politique, ce qui s'affirme comme démonstration d'autonomie et de puissance qui commence à créer une nouvelle histoire de combat à la corruption et de division entre le privé et le public.

La crise expose le problème de la proximité du gouvernement des entreprises privées, et les scandales montrent la nécessité de réforme politique et de punition aux auteurs des actes criminels. Mais, dans ce temps-là, des démonstrations de participation de la population est très bien reçu comme mouvement pour ou contre la figure de la Présidente, mais surtout, contre chaque acte de corruption ou de attentat contre l'État démocratique. L'activité citoyenne a été très mobilisée, spécialement après les années 2013-2016, ce qui démontre que la poursuite d'une nouvelle culture politique sera bien venue aux prochaines années.

Mais, si les manifestations populaires sont très positives, la violence et l'intolérance sont des choses à regretter. C'est dans ce point-là qu'on va voir les menaces aux relations entre les gens, entre les familiers, entre les amis, ce qui fait sonner l'alarme de la culture des droits humains. Par conséquent, la question de la démocratie au quotidien et des valeurs républicaines pour la coexistence pacifique sont aussi décisives pour l'affirmation active de la culture de la dignité de tous, pour la réalisation des droits humains et pour le respect à la loi. Tout ceci dit assez combien la fragilité de la démocratie va de front avec l'irrespect des valeurs sociales et quotidiennes les plus élémentaires des droits humains.

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LA LUTTE CONTRE LA CORRUPTION DANS LE SYSTEME INTERAMERICAIN DE PROTECTION DES DROITS DE L'HOMME

THE COMBAT OF THE CORRUPTION IN THE INTER- AMERICAN SYSTEM OF HUMAN RIGHTS

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Résumé: Cet article vise à montrer les stratégies conçues par le Système interaméricain de protection des droits de l'homme en matière de prévention, de détection et des poursuites contre la corruption dans la gestion publique. Pour développer notre réflexion, nous allons présenter les principales approches qu'envisagent expliquer ce phénomène, ainsi que montrer l'articulation entre les principaux organismes supranationaux liées à l'Organisation des Etats Américains pour donner des réponses rationnelles et efficaces à cette forme de criminalité.

Mots-clés: Corruption - Abus de pouvoir - Gestion publique - Prévention et répression

Abstract: This article aims to show the strategies designed by the American system of protection of the human rights in the prevention, detection and action against corruption in public administration. To develop our reflection, we will present the main approaches that consider explain this, and show the relationship between the main supranational organizations linked to the Organization of American States to give rational and effective responses to such crime .

Keywords: Corruption - Abuse of power - Public management -

Prevention and punishment

1. INTRODUCTION

La corruption est devenue un problème majeur non seulement dans le cadre de la politique interne des États, mais aussi dans les relations internationales. Aujourd'hui elle dépasse les frontières nationales et bouleverse l'économie mondiale. Elle déplace des sommes pharamineuses qui transitent librement dans des paradis fiscaux en profitant de la libération des échanges, des flux financiers et de la fragilité des systèmes de contrôle fiscal, administratif et judiciaire. La corruption dans les institutions gouvernementales constitue un frein aux droits sociaux, une menace pour la démocratie, un facteur de déstabilisation de l'ordre macroéconomique, une manipulation des marchés publics et un élément de renforcement de la pauvreté. Enfin, elle est à l'origine des financements occultes de partis politiques, du dysfonctionnement des services publics, de l'accroissement du crime organisé, de l'affaiblissement de la confiance que les citoyens doivent porter aux institutions démocratiques de l'État.

Le dernier rapport de l'OCDE sur la corruption transnationale, publié en décembre 2014, présente des statistiques bouleversantes. Il a analysé le résultat de 427 affaires concernant des actions répressives engagées à l'encontre des personnes physiques et morales et qui ont été conclues entre le 15 février 1999 et le 1^{er} juin 2014. Selon le rapport, 53% des affaires ont impliqué des versements de pots-de-vin dans le cadre des marchés publics, dont les principaux secteurs sont l'extraction, la construction, le transport et l'entreposage, l'information et la communication. Ensemble, ils représentent deux-tiers des affaires de corruption. 80% des agents publics corrompus sont des salariés des entreprises publiques, suivis d'autres fonctionnaires comme des Chefs d'État, ministres, agents de défense, élus, agents de douanes, etc. Le montant des commissions en pourcentage est assez variable, entre 21% et 2%, selon le secteur d'activité¹.

Ce phénomène, complexe et répandu, exige des réponses sévères en matière de prévention, de détection et de poursuites. Sur le plan international plusieurs initiatives ont été prises pour lutter efficacement contre la corruption. Les Nations Unies, les systèmes régionaux et des

¹ 21% extraction, 19% commerce de gros et de détail, 17% activités de services administratifs, 16% fabrication, 14% santé humaine, 13% autres activités et services, 8% administration publique et services, 11% électricité et gaz, 8% administration publique et défense, 6% activités scientifiques et techniques. Moins de 5% : information et communication, construction, agriculture, sylviculture et pêche, éducation et distribution d'eau. Cf. Rapport de l'OCDE sur la corruption transnationale : une analyse de l'infraction de corruption. France : Éditions OCDE, 2014.

organismes multilatéraux ont produit plusieurs documents normatifs – conventions, protocoles, recommandations, par exemple – et des outils pour aider les pays dans ce combat, comme l’entraide judiciaire, le gel et la confiscation de biens.

Quels sont les circonstances qui ont favorisé la lutte contre la corruption à l’échelle internationale ? Comment s’articule le droit international pour mener ce combat de façon efficace ?

2. APROCHES SUR LA CORRUPTION

À partir de l’approche économique (A), sociologique (B) et juridique (C), cet article se propose d’exposer ici les principaux résultats, fondements, attentes et mise en œuvre des mesures présentées par les principaux organismes chargés de sanctionner la corruption politique. Pour y parvenir, il faut décrire les aspects les plus importants du système international de lutte contre la corruption, y compris les actions menées par l’Organisation des États Américains. Afin de souligner la dimension préventive, répressive et dissuasive des conventions internationales et du droit interne des États parties, seront présentées quelques hypothèses d’affrontement aux atteintes à la probité publique dans le rapport à la passation des marchés publics et ses échanges illicites.

A. Approche économique

L’occupation des marchés publics² à l’étranger par des sociétés multinationales est à l’origine de la lutte contre la corruption des agents publics. En fait, la corruption active était la règle dans la passation des marchés publics à l’étranger. Dans les années 70, plusieurs pays européens ont adopté des lois qui permettaient la déduction fiscale des sommes versées par des entreprises aux fonctionnaires étrangers. En matière de transactions internationales, les États de l’OCDE toléraient le versement de frais commerciaux exceptionnels à des agents publics en tant que dépenses légales et déductibles officiellement. C’était l’institutionnalisation du pot-de-vin dans les transactions transnationales³.

Un exemple s’impose. En 1976, la France a institué la déductibilité fiscale des frais commerciaux exceptionnels conditionnée

2 Les marchés publics sont des secteurs d’activité économique qui mouvementent d’importants chiffres d’affaires. Par exemple, pétrole, gaz, électricité, défense et armement, banques, aéronautique civile et militaire, industries, pêche, sylviculture, médicaments, santé, télécommunications, mines, immobilier, entreposage, transports, informatique, technologie de l’information, construction civile, biotechnologie, recherches scientifiques, bâtiment et des travaux publics (BTP).

3 Senat National. Projet de loi relatif à la lutte contre la corruption : La lutte contre la corruption, un cadre juridique en mouvement. Paris : Senat.fr . Consulté en 02/12/2014.

à l'autorisation préalable des autorités douanières. Les entreprises étaient obligées de déclarer les sommes versées à des autorités étrangères pour enlever des contrats d'exportation. Par contre, elles avaient le droit d'en déduire le montant de leur bénéfice imposable. La jurisprudence administrative tolérait cette pratique, mais conditionnait le bénéfice fiscal à la preuve comptable du paiement de la commission à une personne physique ou morale – y compris un fonctionnaire public – porteuse du pouvoir de décision en matière d'achat. Malgré quelques restrictions, surtout l'abrogation de 1993, les pots-de-vin ont été tolérés dans le pays. La fin de la déductibilité n'a disparu du droit français que par la loi du 30 juin 2000, comme conséquence de la ratification de la Convention de l'OCDE (1997)⁴.

Le versement des frais commerciaux exceptionnels était une pratique courante dans les entreprises multinationales siégées dans des pays de l'OCDE⁵. C'est le produit des théories fonctionnalistes diffusées dans les années 60, selon lesquelles les pots-de-vin stimulaient la compétitivité et contournaient les exigences bureaucratiques paralysantes qui retardaient la signature des contrats avec l'administration publique. Le paiement de commissions est devenu une nécessité pour ne pas la noyer dans des procédures administratives interminables, complexes et décourageantes, dont le fonctionnaire responsable est doté d'un fort pouvoir discrétionnaire. Chez les avocats des entreprises impliquées dans de grosses affaires, la corruption est « l'huile pour dégripper les rouages, pour contourner les règlements absurdes ou des administrations vétilleuses⁶ ».

Les disputes des marchés publics sont souvent féroces et déloyales. Les appels d'offre attirent vivement l'intérêt des entreprises multinationales décidées à occuper des espaces dans des secteurs économiques des pays étrangers. Si la perte d'une affaire peut affecter lourdement l'avenir d'une entreprise, elle aura aussi des effets négatifs dans la balance commerciale du pays exportateur. Le paiement d'un pourcentage à des autorités responsables des permis, des licences et des réglementations reste donc une stratégie lucrative pour les entrepreneurs qui veulent obtenir ou maintenir des portions de marchés publics⁷. Enfin,

4 Daniel Dommel. Face à la corruption : peut-on l'accepter ? Peut-on la prévenir ? Peut-on la combattre ? Paris : Karthala, 2003, p. 70-71.

5 La Belgique, par exemple, a adopté le principe de la non-déductibilité des commissions occultes pour obtenir des marchés publics à l'étranger en 1996. Mais elle était considérée possible dans des situations dans lesquelles il y avait des pratiques concurrentielles nécessaires dans les pays concernés à un niveau considéré raisonnable par les autorités fiscales. Après la ratification de la Convention de l'OCDE, une telle conduite est devenue punissable.

6 Daniel Dommel. Face à la corruption : peut-on l'accepter ? Peut-on la prévenir ? Peut-on la combattre ? Paris : Karthala, 2003, p. 47.

7 Daniel Dommel. Face à la corruption : peut-on l'accepter ? Peut-on la prévenir ? Peut-on la combattre ? Paris : Karthala, 2003, p. 47.

une imposition du capitalisme, un vecteur du développement économique.

Plusieurs auteurs se sont consacrés à la « Théorie économique de la corruption ». Certains argumentaient que la corruption n'étaient pas incompatible avec le progrès, mais plutôt une réponse du marché aux abus de l'excessive régulation des activités économiques, surtout dans la passation des marchés publics. C'est le cas de Nathaniel Leff (1964), J. Nye (1967) et Samuel P. Huntington (1968), qui sont les principaux représentants d'une branche nommée théorie fonctionnelle de la corruption.

Selon cette conception, l'échange financier entre les entreprises et les fonctionnaires dans des transactions transnationales apportaient des avantages économiques et sociaux comme, par exemple, le développement des pays concernés et l'augmentation des emplois dans le secteur privé. Dans un texte très connu, *Economic Development Through Bureaucratic Corruption*⁸, paru en 1964, Nathaniel Leff constatait que la corruption était un important instrument de protection des entrepreneurs contre l'hostile interférence de la bureaucratie paralysante sur les activités économiques. Le versement de commissions à des agents publics était une réponse du marché aux entraves et à l'abus d'autorité qui troublaient les affaires des sociétés multinationales. Parmi les objectifs envisagés, la théorie fonctionnaliste mentionnait la réduction des incertitudes et du risque des ennuis administratifs dans l'analyse des projets.

En conséquence, le dessous de table n'était qu'une forme de protection des investissements dans des pays étrangers et de réduction du temps d'attente d'une demande. Paradoxalement, la relation était basée sur la confiance mutuelle et ancrée sur un contrat informel entre la société et l'agent public décideur. C'est ce que Leys (1965) appelait « corruption honnête ». Cette formulation théorique ne s'arrête pas aux années 60. L'analyse de la corruption selon cette perspective connaît d'autres approches comme ceux de Francis Lui (1985), Pranab Bardhan (1997) et Daniel Kaufmann (1997).

Il convient de remarquer que l'analyse économique ne se consacre pas à la question de l'éthique, considérée comme objet de recherche de la philosophie morale. L'homo oeconomicus amoral prend ses décisions sur la base de facteurs rationnels. Selon Rudy Aernoudt, « son seul mobile est de déterminer son comportement en fonction de la perspective de satisfaire au mieux ses besoins. Ses décisions, nous dit l'économiste, sont prises de façon à préserver constamment un équilibre entre son effort et l'utilité marginale dégagée⁹ ». C'est la raison pour laquelle les auteurs ne se consacraient qu'aux effets de la corruption sur les intérêts des entreprises.

Jacques Borricand rappelle que les « actes de corruption ont été

⁸ The Americal Behavioural Scientist, 1964, pp. 84-12.

⁹ Rudy Aernoudt. Corruption à Foison – Regards sur un phénomène tentaculaire. Paris : L'Harmattan, 2003, p.21.

trop longtemps considérés comme des faits relevant d'une criminalité sans victime ». Autrement dit, ils n'attiraient pas l'attention du droit pénal. Il y avait tout de même une certaine tolérance de la société vis-à-vis de certaines pratiques corrompues. Il n'est pas inutile de citer la célèbre classification proposée par Arnold Heidenheimer pour expliquer la perception de ce phénomène par la population. Il établit la distinction entre trois espèces de corruption : blanche, grise et noire, selon le degré de tolérance de l'opinion publique et des élites. La première est considérée comme une pratique acceptée, voire inhérente à l'activité politique ; la deuxième n'est condamnée que par une partie de la population, tandis que la troisième désigne les actes condamnés à la fois par la population et par les élites.¹⁰

La relativisation de la corruption a toujours été présente dans le débat politique. Même aujourd'hui, le niveau de tolérance des électeurs par rapport aux élus est préoccupant. Pierre Lascoumes explique ce phénomène en présentant trois facteurs objectifs : « 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 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 de la conception du politique¹¹ ». Ces éléments sont de véritables obstacles à la mise en place d'une politique criminelle anticorruption efficace. On peut affirmer qu'il y a un parallélisme entre le jugement politique et le jugement judiciaire, dans la mesure où la majorité des électeurs ne considèrent pas la corruption comme une composante du crime organisé. La lenteur des poursuites judiciaires favorisent la présence des prévenus dans le paysage politique, jouant parfois le rôle de victimes d'un système juridique arbitraire ou du « gouvernement des juges », voire des manœuvres des adversaires ou d'un piège¹².

B. Approche rationaliste

Sous l'influence de Max Weber et d'autres chercheurs, surtout des économistes, on a vu l'épanouissement d'une autre conception théorique : la rationalisation administrative. Parmi les défenseurs de cette approche, il convient de citer Pontes de Miranda, juriste brésilien d'orientation positiviste. Grosso modo, les auteurs proposaient la professionnalisation de la gestion publique, la formation des fonctionnaires publics, le renforcement des systèmes de contrôle interne

10 Jacques Borricand. La corruption dans l'entreprise. In : *Morale Économique – des fondements religieux à l'éthique en entreprise*. Aix-en-Provence : Librairie de l'Université d'Aix-en-Provence, 1999, p. 217.

11 Pierre Lascoumes. *Une démocratie corrompible – arrangements, favoritisme et conflits d'intérêts*. Paris : Seuil, 2011, p. 17.

12 Idem, 63.

et externe, la réglementation des marchés publics, la quête de critères scientifiques concernant les décisions administratives, etc. Ce modèle confiait aux technocrates la mission de prendre des mesures techniques à l'occasion des appels d'offre et la planification des dépenses publiques. Dans les années 50, la technocratie était une réponse à l'empirisme, au despotisme, au clientélisme, au trafic d'influence et au favoritisme très présents dans l'action politique. Les résultats ont été faibles, insatisfaisants. D'abord à cause de la proximité entre agents publics et entreprises privées ; ensuite, le manque de légitimité démocratique et institutionnelle pour prendre des décisions importantes ; finalement, la méfiance de la classe politique envers les experts a été un facteur générateur de conflits d'intérêts, voire d'arrangements nuisibles à l'Etat. En conséquence, le rationalisme administratif tout court s'est montré incapable d'éliminer la corruption dans les marchés publics.

C. L'approche répressive de lutte contre la corruption à l'échelle mondiale

Les troubles à la concurrence mondiale dans les appels d'offre de grande envergure ont affecté profondément les entreprises nord-américaines. Le manque de loyauté et la corruption endémique dans la gestion publique étaient les principaux problèmes à affronter pour qu'elles reprennent un espace important dans les marchés publics dans plusieurs continents. En 1977, les États-Unis ont adopté le Foreign Corrupt Practices Act, une loi qui sanctionnait sévèrement l'offre de corruption (supply side) par des fonctionnaires étrangers. Cette loi a été élaborée en conséquence de l'affaire Watergate, qui a écarté le président Nixon du pouvoir. Les enquêtes menées par la police judiciaire ont présenté les preuves irréfutables de la participation des entreprises américaines au versement de pots-de-vin à des agents publics étrangers pour obtenir le contrôle des marchés publics. Mais le scandale le plus célèbre a été l'affaire Lockheed Corporation, société accusée de verser U\$ 25 millions à des autorités japonaises, chargées de l'achat des avions Tristar L-1011. Ces événements ont précipité la chute du premier ministre Kankuie Tanaka, plus tard condamné pour corruption.

Ensuite, la diplomatie américaine a déclenché une campagne pour convaincre les Nations Unies et d'autres organismes multilatéraux à lutter contre la corruption transnationale, et aussi contre la légitimation fonctionnaliste de la corruption. C'est dans ce but que les États Unis ont réussi à convaincre l'OCDE à créer le Groupe ad hoc sur les paiements illicites (1989), plus tard nommé Groupe de travail sur la corruption de l'OCDE¹³.

Sur le plan politique, les États-Unis invitaient les principaux

13 Juliette Lelieur et Mark Pieth. Dix ans d'application de la convention OCDE contre la corruption transnationale. In Recueil Dalloz. Paris : 2008, p. 1086.

concurrents – France, Japon, Allemagne, Royaume-Uni – à souscrire des mesures concrètes contre le versement de pots-de-vin à des agents publics étrangers dans le cadre des transactions transnationales, sous la menace d’abroger le Foreign Corrupt Practices Act. Après des négociations assez difficiles, les Etats membres de l’OCDE, ainsi que six Etats partenaires (y compris le Brésil), ont accepté de coopérer. Sur le plan juridique, l’OCDE a proposé un instrument de soft law : la Recommandation initiale du Conseil sur la corruption dans le cadre de transactions commerciales internationales (1994). L’organisme a publié d’autres textes complémentaires jusqu’à la rédaction d’un texte hard law : la Convention sur la lutte contre la corruption d’agents publics étrangers dans les transactions commerciales internationales du 13 décembre 1997¹⁴.

Le parcours pour écarter le principe de déductibilité fiscale des pots-de-vin dans les transactions commerciales a été long. C’est le résultat de graves préoccupations morales et politiques. Martine Millet-Einbinder observe que la déductibilité est économiquement coûteuse, « parce qu’elle entrave le développement des échanges et des investissements internationaux en augmentant les coûts de transaction et en faussant les conditions de concurrence¹⁵ ». Dans son article, elle souligne qu’en 1996 la législation de plusieurs pays admettait la déductibilité des pots-de-vin : Allemagne, Australie, Autriche, Belgique, France, Islande, Luxembourg, Nouvelle Zélande, Pays-Bas, Portugal et Suisse, parmi d’autres. Ainsi, l’auteure met en évidence le rôle du Comité des affaires fiscales (CAF), une importante instance de politique fiscale de l’OCDE, qui a commencé ces activités en juin 1994 dans le but de persuader les pays européens à refuser la déductibilité¹⁶.

Pendant longtemps, la corruption politique s’appuyait sur une certaine tolérance de la société. Les « transactions », assez complexes et secrètes, étaient à l’abri de l’opinion publique, des autorités fiscales et du Ministère Public. Elles n’étaient considérées qu’un « crime blanc », étant donné la faiblesse de la réaction sociale, des sanctions

14 Juliette Lelieur et Mark Pieth. Dix ans d’application de la convention OCDE contre la corruption transnationale. In Reccueil Dalloz. Paris : 2008, p. 1087.

15 Martine Millet-Einbinder. La non-déductibilité des pots-de-vin versés à des agents publics étrangers. In : Affairisme : la fin du système – Comment combattre la corruption. Paris : OCDE, 2000, p. 73.

16 « En pratique, ces pays refusaient souvent la déduction lors des vérifications fiscales, faute de justificatifs suffisants quant à la nécessité de la dépense pour la réalisation du revenu. Plus précisément, la déductibilité des pots-de-vin versés à des agents publics étrangers était généralement subordonnée à la divulgation de l’identité du bénéficiaire aux autorités fiscales lorsque le contribuable est réticent à faire suite à cette demande » Cf. Martine Millet-Einbinder. La non-déductibilité des pots-de-vin versés à des agents publics étrangers. In : Affairisme : la fin du système – Comment combattre la corruption. Paris : OCDE, 2000, p. 79.

et du coût social¹⁷. En plus, il y avait la perception de l'impunité chez les hommes politiques. Cette situation a commencé à changer à partir des grosses affaires judiciaires et financières amplement diffusées dans les médias. Les scandales du monde politique ont provoqué une profonde indignation populaire et ont exposé les fragilités, voire les dysfonctions de l'État et des institutions démocratiques¹⁸. L'exemple le plus emblématique a été l'opération Mains propres, qui a eu lieu en Italie au début des années 90 : une série d'enquêtes dont le but était de démanteler le système de corruption et le financement illicite des partis politiques, incrusté dans l'administration publique et dans le secteur privé, surtout l'influence des mafias dans le « Tangentopoli¹⁹ ».

Force est de conclure que la question éthique n'a pas été la principale raison de la lutte contre la corruption transnationale menée par l'OCDE. Au début, c'est l'occupation des marchés publics qui a rassemblé des pays européens afin d'adopter des mesures de prévention et de répression aux dessous-de-table versés à des fonctionnaires étrangers par les entreprises. Les aspects éthiques de ces échanges n'étaient que transversaux dans le discours officiel, conçu davantage pour convaincre l'opinion publique que pour le bien fondé de la réglementation. La moralité administrative est devenue une valeur majeure à partir des années 80, quand la corruption commence à se mêler à d'autres infractions comme les mafias, le blanchiment d'argent, le financement de partis politiques et de campagnes électorales, dont les scandales et les affaires criminelles ont attiré l'intérêt de la presse et des citoyens.

D. Approche sociologique

Le champ de recherches sociologiques sur les effets de la corruption est très vaste. Plusieurs études analysent le phénomène selon des perspectives théoriques particulières. On rappellera les auteurs classiques tels que Robert Kiltgaard, Kemp Ronald Hope et Arnold Heidenheimer. Mais il y en a d'autres qui ont apporté des approches très importants pour la compréhension de ce phénomène. Sans avoir la prétention d'exposer tous les résultats des recherches sur ce sujet, cette présente Recherche propose juste une réflexion sur la sociologie de la corruption politique, afin de montrer l'ampleur du problème.

Le vocable corruption vient du latin *corruptio*, mot qui évoque l'idée de dégénérescence, de putréfaction, de décomposition, de débauche, de subornation ou de dessous de table. Il est de nos jours

17 Lascoumes, Pierre. *Corruptions*. Paris : Presses de Sciences Po, 1999, p. 11.

18 Brigitte Henri. Le secteur financier : un partenaire important dans la lutte contre la corruption. In *Revue Nouvelles Études Pénales*, n. 25, 2014, p. 98.

19 « Ville des pots-de-vin », affaire sur la responsabilité du Parquet de Milan.

employé pour désigner la conduite d'une autorité qui abuse de sa charge pour obtenir des gains privés ou léser les coffres publics.

La corruption est en quelque sorte une criminalité occulte. Son *modus faciendi* porte l'empreinte de la clandestinité et du secret. Les transactions illicites exigent des protagonistes une discrétion absolue. Personne ne parle, personne ne voit, personne n'entend, telle est la règle. Corrompu et corrupteur se tiennent à l'écart de toute publicité pour éviter les investigations des audits du Fisc, de la Cour des Comptes et du Ministère Public. Un manteau de silence protège les règlements, aussi illégitimes, aussi risqués soient-ils. C'est pourquoi il est si difficile de connaître la réelle dimension des délits pratiqués au niveau national et international.

Les statistiques présentées se fondent sur des données estimatives qui ne correspondent guère à la réalité, des données extraites, par exemple, des services publics ou recueillies auprès des médias. Il existe un abîme profond entre la criminalité apparente (captée par les organes de contrôle social) et la criminalité réelle (actes concrets de corruption). Ce manque d'informations nous empêche d'avoir une idée exacte de l'échelle de corruption pratiquée au niveau national et international. C'est pourquoi plusieurs auteurs utilisent l'expression « chiffre noir » pour désigner cet abîme entre la réalité sociale et les poursuites pénales en matière de corruption.

Comme l'observe Jean-Pierre Bueb, il n'existe, encore, aujourd'hui, aucune statistique qui permette de mesurer l'ampleur des violations de la réglementation concernant les marchés publics. Mais l'absence de données n'autorise guère à affirmer ni que les dérives sont marginales, ni que tous les marchés sont l'objet de détournements. Cet auteur remarque que « cela signifie simplement que l'on ne dispose pas d'indicateurs fiables permettant de quantifier les malversations²⁰ ».

Par contre, la médiatisation des affaires de corruption a exposé les coulisses du pouvoir au grand public. La conséquence la plus évidente est la « crise de la représentation politique ». Ce phénomène s'explique par la perplexité des citoyens devant les scandales liés aux atteintes à la probité publique comme, par exemple, les financements occultes des partis et des campagnes électorales, et aussi le clientélisme, le trafic d'influence, le népotisme et le favoritisme. Les études sur la défense de la probité dans la politique et dans les services publics remontent au début du XXe siècle aux États-Unis. Mais la réaction de la société civile contre la corruption est beaucoup plus récente. Le concept de morale dans la politique prend force et commence à s'incorporer au jugement des électeurs, de plus en plus informés des abus du pouvoir et de la nocivité des pratiques illicites. La presse libre et investigatrice

20 Jean-Pierre Bueb. La lutte contre la fraude et la corruption dans les marchés publics. Forum Mondial de l'OCDE sur la gouvernance – partager les enseignements de la promotion de la bonne gouvernance et de l'intégrité dans le marchés publics. 2006.

démasque les arrangements et permet aux citoyens de sanctionner électoralement les élus, en les écartant du pouvoir. Ce raisonnement s'insère dans la « théorie de l'électeur rationnel », selon laquelle les vertus telles l'intégrité, la moralité, l'honnêteté du candidat et le bon usage de la fonction sont des facteurs déterminants dans le vote. Paradoxalement, les recherches montrent que la sanction électorale est encore faible. Plusieurs personnes accusées d'avoir commis des actes de corruption sont réélues, en dépit de la large diffusion des affaires par la presse. Cette constatation nous invite à réfléchir sur les composantes morales du jugement politique²¹.

Les Constitutions et les traités internationaux renforcent les fonctions du pouvoir judiciaire afin de le doter de tous les instruments nécessaires pour lutter contre la corruption. C'est le cas du Brésil, où la « judiciarisation de la politique » est un phénomène inscrit dans le cadre de la jurisprudence, soit pour garantir les droits sociaux, soit pour punir les agents publics malhonnêtes.

La difficulté, voire l'impossibilité, de mesurer le niveau de corruption dans des pays a inspiré la Transparency International à adopter une méthodologie : l'Indice de perception de la corruption (l'IPC). Il s'agit d'un sondage annuel sur la façon par laquelle les personnes – surtout les experts de ce sujet – perçoivent le niveau de corruption dans différents pays. L'IPC est très prestigieux chez les économistes, sociologues et politologues, qui l'utilisent souvent dans ces travaux de recherches.

Cette organisation non-gouvernementale propose une définition concise : « la corruption est un abus de pouvoir reçu en délégation à des fins privées ». Elle présuppose, d'abord, un acte (action ou omission) considéré comme un abus de pouvoir. Ensuite une pratique en faveur d'intérêts privés, c'est-à-dire, l'agent public, sa famille, ses proches, le parti politique, des campagnes électorales, etc. Finalement, l'utilisation induite du pouvoir reçu en délégation (émané du secteur public ou du secteur privé).

La perception de ce phénomène fait partie d'une méthodologie ayant pour but de présenter le portrait le plus proche possible de la réalité. C'est une tâche assez difficile, car les chercheurs doivent affronter plusieurs difficultés, y compris l'invisibilité des comportements transgressifs et la complicité des acteurs des opérations. Comme il est impossible d'avoir des données exactes, les recherches ne prennent en considération que des points de vue de certaines personnes bien placées pour évaluer le comportement des agents publics quelles

21 Les perceptions et jugements sur les atteintes à la probité publique ont été étudiés par Philippe Bezes et Pierre Lascoumes. Cf. « Percevoir et juger la corruption politique – enjeux et usages des enquêtes sur les représentations des atteintes à la probité publique ». In *Revue française de Science Politique*, vol. 55, n. 5-6, octobre-décembre 2005, p. 757-786.

estiment corrompus.

Puisqu'il est encore difficile d'avoir des données objectives pour évaluer l'ampleur de ce phénomène, la Transparency International a développé une méthodologie ancrée sur la perception des experts à l'égard de la corruption. À partir des informations recueillies, il est possible de mesurer le manquement de probité dans plusieurs pays. En fait, la pluralité et la corrélation de différentes sources – autorités, chefs d'entreprises, banques, centres de recherches, universités, etc. – assurent une grande fiabilité à l'IPC, ce qui justifie son énorme prestige au niveau international²².

E. Approche normative

Le système supranational de combat contre la corruption s'articule en deux niveaux : universel et régional. À l'échelle universelle, il dispose de deux documents législatifs fondamentaux : la Convention des Nations Unies contre la corruption (Résolution 58/4, de l'Assemblée générale du 31 octobre 2003) et la Convention sur la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales, adoptée par la Conférence de négociations de l'OCDE, le 21 novembre 1997. Au niveau régional, il existe le modèle interaméricain, dont le Brésil fait partie. En 1996, les États membres de l'OEA ont souscrit la Convention interaméricaine contre la corruption.

Il s'agit d'une réponse du droit international public à l'accroissement vertigineux de la criminalité économique dans presque tous les pays du monde. Les conventions mentionnées ont pour but de sanctionner les atteintes à l'ordre financier, économique et social, surtout la pratique d'infractions comme la corruption, le blanchiment de capitaux, les fraudes aux subventions publiques, la contrefaçon, le trafic d'influence, l'escroquerie, l'enrichissement illicite et d'autres formes de manque de probité des fonctionnaires publics.

Il s'agit là d'infractions qui présentent une évidente dimension internationale, dont la prévention et la répression exigent l'effective coopération entre les États, la mutualisation de moyens d'enquête et de persécution pénale. Elles s'insèrent dans l'espèce que l'on appelle *borderless crime* (délits sans frontières), parce que les criminels utilisent les grands circuits internationaux pour cacher et nettoyer l'argent sale, produit de la corruption et du crime organisé.

Le concept traditionnel et étroit de corruption active, selon lequel l'autorité corrompue est celle qui accepte ou sollicite une somme d'argent ou tout autre avantage pour favoriser un particulier, personne physique

²² Transparency International. Rapport mondial sur la corruption 2005. Corruption dans le secteur de construction et de la reconstruction d'après-guerre. Paris : Economica, 2005, p. 297.

ou morale ne sera pas retenu. Pas même celui de corruption passive, celle où le particulier offre au fonctionnaire un pot-de-vin pour obtenir des « faveurs », faciliter les choses ou contourner certains obstacles bureaucratiques. Certes, il y aura toujours un marché illicite et punissable entre agent public et particulier. Mais il ne faut pas oublier qu'aujourd'hui la corruption acquiert des formes sophistiquées, diverses et complexes, dont la mise en œuvre est engendrée avec beaucoup de créativité.

En matière de criminalité financière il est très important de distinguer la petite de la grande corruption. La première implique des sommes modestes, de petits fonctionnaires et des intérêts locaux. Elle se manifeste dans des relations quotidiennes entre services publics et usagers sous forme de « cadeaux », « gratifications » ou une autre forme d'avantage indue en échange d'un service public gratuit, y compris la pratique d'extorsion. La Transparency International souligne quelques circonstances favorables à l'épanouissement de cette espèce de corruption, parmi lesquelles on peut citer l'informalisation des services publics, la lenteur des procédures, les files d'attente, la manipulation des normes et des règlements, la déshumanisation et privatisation de l'administration²³.

Les conventions internationales n'ont pas vocation à combattre la petite corruption (administrative), qui se déroule quotidiennement entre fonctionnaires corrompus et usagers, et dont les sommes en jeu sont modestes, malgré sa néfaste nocivité sociale et éthique. Le droit interne dispose de plusieurs mécanismes juridiques pour combattre ce genre de criminalité : le droit pénal, civil et administratif, par exemple.

C'est la grande corruption qui est la principale cible de la législation supranationale. Selon la Banque Mondiale, il s'agit d'infraction « à haut niveau, celui où les décideurs politiques créant et appliquant les lois utilisent leurs positions officielles pour promouvoir leur bien-être, leur statut ou leur pouvoir personnel ». Elle implique des entreprises multinationales responsables pour le versement de sommes faramineuses à des agents gouvernementaux et à des hommes politiques qui sont au sommet de l'État pour obtenir des contrats commerciaux lucratifs dans des marchés publics. Les profits alimentent les classes dirigeantes, avides de se perpétuer au pouvoir politique et économique. Elle devient institutionnelle ou systémique lorsque l'État manque de moyens pour les combattre, par le truchement surtout du contrôle judiciaire et des instances autonomes, du Ministère Public indépendant, de la presse libre et de la société civile vigilante.

La corruption n'est pas une infraction simple à définir. Le concept traditionnel chez les auteurs classiques du droit pénal est insuffisant pour expliquer ce phénomène si complexe de la contemporanéité. On parle d'un crime à facettes auquel s'ajoutent d'autres infractions pénales

23 Transparency international. *Combattre la corruption – Enjeux et perspectives*. Paris : Karthala, 2000, p. 21-24.

jumelles. Jacques Borricand évoque quelques formes de corruption. La corruption individuelle, destinée à des fins personnelles, tel que l'enrichissement illicite. Elle est occasionnelle et a des objectifs privés. Le fonctionnaire profite de son espace de pouvoir discrétionnaire pour demander ou recevoir des pots-de-vin. La corruption en réseaux est beaucoup plus complexe, parce qu'elle exige un niveau élevé d'organisation. Elle met en mouvement des sommes pharaoniques, produit de multiples infractions complémentaires. En général, un secteur est élu pour des actions criminelles : ministères, mairies, entreprises publiques, appels d'offres de biens et de services etc²⁴.

Selon Jacques Borricand, il existe deux espèces de corruption en réseaux : la corruption organisée et la corruption-chantage. La première implique des agents publics et des entreprises qui s'articulent pour obtenir des avantages illicites en utilisant des facilités, des privilèges ou des trucages dans des procédures administratives. Dans ce modèle, il est très difficile distinguer le corrupteur du corrompu, puisqu'ils agissent en absolue complicité. La deuxième espèce a comme facteur déterminant le but d'obtenir des fonds pour soutenir des structures de pouvoir : financement de partis politiques et de campagnes électorales à l'échelle nationale ou régionale. L'engagement partisan, la solidarité, la réciprocité et l'ambition de prendre ou de maintenir le pouvoir politique est à l'origine de cette forme de criminalité. Les sociétés qui détiennent des portions de marchés publics sont obligées vis-à-vis des représentants des partis politiques pour éviter des représailles²⁵. Face à la complexité de la criminalité financière, il est parfois difficile de les distinguer avec précision.

Le mot corruption sera donc employé dans un sens plus large (la grande corruption), qui consiste en un ensemble d'infractions pénales : la criminalité économique, le transfert de fonds d'origine illicite provenant d'infractions contre l'Administration publique, le blanchiment d'argent, le financement illicite des partis politiques et des campagnes électorales, le détournement de fonds et de biens appartenant au patrimoine public, le trafic d'influence, le favoritisme, « les dessous-de-table », l'abus de fonctions, l'extorsion, l'enrichissement illicite des agents publics et des hommes politiques.

Les États ont le devoir de signer et de ratifier les conventions contre la corruption. Elles leurs imposent des prestations positives contre cette forme de criminalité, tout en respectant la souveraineté de chaque pays. Ils doivent également adopter les mesures législatives, administratives et judiciaires qu'ils jugent nécessaires pour honorer

24 Jacques Borricand. Corruption et Politique. In Problèmes Actuels de Science Criminelle, n. IX. Aix-En-Provence : Presses Universitaires d'Aix-Marseille, 1996, p. 67.

25 Jacques Borricand. Corruption et Politique. In Problèmes Actuels de Science Criminelle, n. IX. Aix-En-Provence : Presses Universitaires d'Aix-Marseille, 1996, pp. 72-73.

les principes supranationaux établis, d'une manière compatible avec l'égalité souveraine, l'intégrité territoriale, la non-intervention et l'autodétermination des peuples. Ce devoir d'harmonisation législative et d'application rigoureuse des lois anticorruption sont des démonstrations inéquivoques de l'attachement du pays aux engagements assumés sur le plan international.

Il est vrai que la corruption est devenue un crime de dimension transfrontière, qui demande la coopération internationale. Mais il est également vrai que la pratique de l'infraction se développe à cause de la faiblesse du contrôle interne de la gestion administrative sur les dépenses gouvernementales, favorisant l'enrichissement illicite des agents publics, le financement des partis politiques et les trucages dans l'attribution de marchés publics et le détournement de fonds²⁶. L'intervention de l'ordre juridique supranational est nécessaire pour harmoniser les législations internes et pour donner plus d'efficacité à la poursuite pénale.

3. LE SYSTÈME INTERAMÉRICAIN E LA LUTTE CONTRE LA CORRUPTION

Le Brésil est l'un des 35 pays membres de l'Organisation des États Américains (OEA)²⁷, l'institution régionale la plus ancienne au monde. L'idée de sa création remonte à la fin du XIX siècle, lors de la Conférence internationale américaine, qui s'est déroulée à Washington (1889-1890). Mais elle a commencé à exister en tant qu'organisation supranationale en 1948, quand la Charte de l'OEA a été signée. Au fil des années elle a été perfectionnée par plusieurs amendements. L'ensemble des traités internationaux et des dispositions normatives est nommé « Système interaméricain²⁸ ».

Ayant son siège à Washington, l'OEA accueille la Commission Interaméricaine de Droits de l'Homme, l'Assemblée générale, le Comité juridique interaméricain, ainsi que d'autres entités et organismes spécialisés. En tant qu'institution régionale, elle a pour but d'assurer à tous les Etats membres « un ordre de paix et de justice, de maintenir

26 M. Carlos CASTRESANA FERNANDEZ. Rapport Général. La corruption dans les marchés publics. Allemagne : Edition du Conseil de l'Europe, 1998, p. 29.

27 Du point de vue territorial, l'OEA rassemble des pays de l'Amérique du Sud, de l'Amérique du Nord, de l'Amérique Centrale et des Caraïbes. Les États qui ont signé la Charte de l'OEA: l'Argentine, la Bolivie, le Brésil, le Chili, la Colombie, le Costa Rica, Cuba, la République Dominicaine, l'Equateur, El Salvador, Le Guatemala, Haïti, le Honduras, le Mexique, le Nicaragua, le Panama, le Paraguay, le Pérou, Les États-Unis de l'Amérique, l'Uruguay et le Venezuela. Ultérieurement, d'autres pays l'ont adhéré entre 1967 et 1991 : Barbade, Trinité-et-Tobago, Jamaïque, Grenade, Suriname, Dominique, Sainte Lucie, Antigua et Barbuda, Saint-Vincent-et-Grenadines, Bahamas, Saint-Kitts-et-Nevis, Canada, Belize et Guyana.

28 Sur la creation de l'OEA : www.oas.org.

leur solidarité, de renforcer leur collaboration et de défendre leur souveraineté, leur intégrité territoriale et leur indépendance (article 1)».

Ces caractéristiques font de l'OEA le principal forum multilatéral de protection des droits de l'homme, des valeurs démocratiques, et aussi du combat contre le terrorisme, la pauvreté, les inégalités sociales, la corruption endémique au niveau régional, et pour la diversité culturelle.

D'autres systèmes régionaux ont aussi adopté des conventions contre la corruption. Il suffit de les mentionner, puisque ils ne sont pas l'objet de cette recherche. Le Conseil de l'Union Européenne a adopté la « convention relative à la lutte contre la corruption impliquant les fonctionnaires des Etats membres de l'Union Européenne (1997). Ensuite, la « Convention pénale sur la corruption du Conseil de l'Europe (1999) » et la « Convention civile sur la corruption du Conseil de l'Europe ». En Afrique, l'Organisation de l'unité africaine OUA – composée de 53 Etats - a souscrit à la « Convention de l'Union Africaine sur la prévention et la lutte contre la corruption (2003)». Enfin, simple rappel, la Ligue des États Arabes a adopté au Caire, le 21 décembre 2010, la « Convention arabe contre la corruption », ratifiée par plusieurs pays.

Les systèmes régionaux et la lutte contre la corruption :

Système	Organisme	Convention	Signature	Vigueur
Européen	Conseil de l'Europe	Convention relative à la lutte contre la corruption impliquant les fonctionnaires des Etats membres de l'Union Européenne ;	1997	2005
		Convention pénale sur la corruption ;	1999	2002
		Protocole additionnel à la Convention pénale ;	2003	2005
		Convention civile sur la corruption ;	1999	2005
Interaméricain	Organisation des Etats américains	Convention interaméricaine contre la corruption	1996	1997
Africain	Organisation de l'unité africaine	convention de l'Union Africaine sur la prévention et la lutte contre la corruption	2003	2006
Arabe	Ligue des Etats Arabes	Convention arabe contre la corruption	2010	Après ratification et dépôt de l'instrument de chaque État.

3.1. La Convention Interaméricaine contre la corruption

En 29 mars 1996, l'OEA a adopté la Convention interaméricaine contre la corruption (en vigueur à partir du 6 mars 1997). Ce document est à l'origine d'un système intégré de prévention et de répression de la grande corruption. D'autres conventions ont été édictées sur le plan régional : Convention interaméricaine sur l'entraide judiciaire en matière pénale (1992) et protocole facultatif additionnel (1993) ; Convention interaméricaine sur l'exécution de condamnations pénales à l'étranger (1993) ; Convention interaméricaine sur commissions rogatoires (1975) et son protocole facultatif additionnel (1979).

Le Brésil et le système interaméricain contre la corruption :

Organisme	Convention	Signature	Ratification	Décret
OEA	Convention Interaméricaine contre la corruption	29/03/1996	07/10/2002	4.410
OEA	Convention interaméricaine sur l'entraide judiciaire en matière pénale	23/05/1992	03/01/2008	3.340
OEA	Protocole additionnel à la Convention interaméricaine sur l'entraide judiciaire en matière pénale	23/05/1992	03/01/2008	3.340
OEA	Convention interaméricaine sur l'exécution de condamnations pénales à l'étranger	09/06/1993	12/07/2006	5.519
OEA	Convention interaméricaine sur des commissions rogatoires	30/01/1975	09/05/1996	1898
OEA	Protocole additionnel à la Convention interaméricaine sur commissions rogatoires	08/05/1979	07/10/1996	2.022

La Convention interaméricaine contre la corruption, adoptée par les États membres de l'OEA, est la première réponse régionale à la criminalité financière, très présente dans des pays de l'Amérique du Sud, de l'Amérique Centrale et des Caraïbes. Les États-Unis et le Canada ont aussi connu de grosses affaires de corruption, qui ont beaucoup bouleversé leur stabilité économique et politique.

Les pays membres sont persuadés que la corruption dégrade la légitimité des institutions politiques, porte atteinte au développement des peuples, augmente les inégalités sociales, empêche la mise-en-œuvre des politiques publiques efficaces et de bonne qualité, renforce

les actions des organisations criminelles et menace des régimes démocratiques. Le combat contre la corruption transnationale s'impose comme l'une des stratégies les plus importantes pour assurer l'entraide entre les États, dans le but d'identifier et de réprimer les infractions qui sont à l'origine du problème. En résumé, La Convention encourage les pays à renforcer les mécanismes nécessaires pour prévenir, dépister, sanctionner et éliminer la corruption.

D'abord, la Convention Interaméricaine propose quelques définitions et précisions sur des mots et des expressions employés dans son texte, notamment sur le contenu du crime de corruption national et transnationale. Ensuite elle présente quelques mesures de prévention comme, par exemple :

- l'adoption de normes déontologiques de conduite pour l'exercice de la fonction publique, parmi lesquelles le devoir de rapporter aux autorités les actes de corruption dont quelque fonctionnaire aurait connaissance ;
- le devoir de déclarer les revenus, avoirs et dettes lors de l'exercice d'une fonction dans l'administration publique ;
- la protection des fonctionnaires qui dénoncent des actes de corruption, y compris la protection de leur identité ;
- la participation de la société civile aux efforts pour la combattre.

Sur le plan pédagogique, elle incite les pays à prendre des mesures visant à dissuader la pratique de corruption des fonctionnaires nationaux ou étrangers, à partir de systèmes de contrôle comptables, y compris des registres et détails des transactions financières concernées.

Elle invite les pays membres à sanctionner l'enrichissement illicite des fonctionnaires publics. Le droit interne doit conférer le caractère d'infraction à l'augmentation significative du patrimoine d'un agent public, qui n'a pas les moyens d'expliquer raisonnablement les biens acquis pendant l'exercice de ses fonctions. Au Brésil, par exemple, la Loi 8.429/92 a un caractère civil, mais impose des peines sévères comme la perte de la fonction publique, la suspension des droits politiques, la réparation du préjudice, les dommages moraux et l'interdiction de signer des contrats avec l'État ou avec des entreprises publiques. En vertu de la rigueur de ses sanctions, plusieurs juristes brésiliens la considèrent comme une loi formellement pénale (penaliforme), thèse rejetée par le Tribunal Fédéral Suprême (STF).

La Convention a élu le « principe de la progressivité », autrement dit, les pays membres sont tenus d'adopter dans un délai raisonnable l'harmonisation des législations nationales afin de lutter plus efficacement contre la corruption, à partir de l'adoption de réponses pénales, civiles et administratives. Sans doute, les pays membres de l'OEA ont-ils fait de larges progrès dans ce domaine, malgré les grosses

affaires de corruption diffusées par la presse. Aujourd'hui, le problème n'est pas dans le manque de lois, mais dans leur faible effectivité.

L'extradition des étrangers est un autre aspect qui a mérité l'attention de l'OEA. D'abord, l'organisme stimule les pays à signer des traités internationaux concernant l'extradition, dans lesquels les infractions sont prévues. Mais en l'absence de traité, les parties peuvent utiliser la Convention comme base légale d'extradition (article XIII 3).

L'entraide et la coopération est un autre sujet d'importance. Les pays s'accordent l'assistance mutuelle la plus étendue, et aussi la coopération technique au sujet de procédures et de méthodes considérées les plus efficaces pour la prévention, le dépistage et la sanction des actes de corruption (article XIV). En ce qui concerne la protection de la vie privée, les Etats ne peuvent pas refuser la collaboration sollicitée sous prétexte de protection du secret bancaire.

3.2. La Convention interaméricaine sur l'entraide judiciaire en matière pénale

Cette convention a pour but de renforcer le régime d'entraide entre les Etats parties de l'OEA. On peut remarquer, d'abord, qu'elle incite les pays à adopter le système de double incrimination. Mais l'assistance est accordée même si le pays requis ne considère pas comme infraction l'acte commis à l'étranger. Pourtant, il ne peut pas prendre de mesures coercitives – saisie, séquestre de biens, perquisition et confiscation de biens, par exemple – si le crime n'est pas prévu dans sa législation. Voilà la raison pour laquelle l'harmonisation progressive des régimes juridiques est essentielle à l'efficacité du modèle interaméricain.

L'article 7 de la Convention présente les formes les plus courantes d'entraide entre les Etats. Elles se développent au niveau judiciaire à partir de l'exécution d'actes de procédures, in verbis :

- a. Notification des décisions judiciaires et des jugements ;
- b. Réception de témoignages et de déclarations de personnes ;
- c. Citations de témoins et d'experts aux fins de déposition ;
- d. Exécution de saisies et de séquestre de biens, immobilisation d'actifs et assistance aux procédures relatives à la confiscation ;
- e. Réalisation d'inspections et de saisies ;
- f. Présentation de pièces judiciaires ;
- g. Remise de documents, de rapports, d'informations et des preuves ;
- h. Transfèrement des personnes détenues, aux effets de la présente Convention ;
- i. Tout autre acte de procédure pourvu qu'un accord soit intervenu entre l'Etat requérant et l'Etat requis.

Toutes ces mesures doivent respecter le principe de la réciprocité, qui est l'âme de l'entraide judiciaire internationale. Il est parfaitement légitime de refuser de communiquer des renseignements si l'État requérant méprise tel principe, en empêchant des poursuites dans des circonstances similaires. Evidemment, toutes les Constitutions contemporaines reconnaissent et protègent les libertés fondamentales, parmi lesquelles le droit au procès équitable, l'égalité des armes, le contradictoire et surtout le droit de ne pas témoigner contre soi-même. En général, ce ne sont pas des prérogatives absolues. Parfois, elles sont limitées devant l'importance des affaires de corruption, puisque l'argent détourné va certainement dégrader l'économie nationale et porter atteinte aux politiques publiques dans le domaine de la santé, de l'éducation, du logement, du transport collectif, de l'infrastructure etc. De plus les informations sur des personnes morales n'ont pas la rigidité des garanties attribuées aux personnes physiques.

La Convention interaméricaine sur l'entraide est très spécifique en ce qui concerne les aspects procéduraux. La notification de décisions, d'arrêts, de jugements, ainsi que la comparution de témoins et d'experts, la remise d'informations et d'antécédents occupent une place privilégiée dans le texte. Elle prévoit aussi le transfèrement d'une personne objet d'une procédure pénale, à la condition qu'elle donne son consentement, et que les États respectent d'autres conditions prévues dans les articles 21 et 22. Il existe, dans l'article 9, des hypothèses où les pays peuvent refuser l'entraide judiciaire. Ce sont des cas qui impliquent les délits politiques, la demande d'un tribunal d'exception ou d'un tribunal ad hoc, des demandes envisageant des actions discriminatoires contre des groupes en raison de leur sexe, race, condition sociale, nationalité, religion et appartenance idéologique.

4. POLITIQUE CRIMINELLE INTERNATIONALE ANTI-CORRUPTION

Les secrets du pouvoir. Voilà un sujet qui a inspiré plusieurs ouvrages, qui attire l'intérêt des médias et qui est au cœur des débats académiques. À partir des années 90, les coulisses du monde politique ont été dévoilées, exposant toutes les fractures. Soudain, les citoyens se sont rendus compte que les élus méprisaient les valeurs républicaines. Les affaires publiques sont devenues une source d'enrichissement illicite et de financement de campagnes électorales. Plusieurs scandales financiers ont bouleversé la conception archétypique de la démocratie en tant que régime représentatif du contrat social, dont la volonté générale et le bien commun sont ses principaux fondements. Eva Joly rappelle que « les enquêtes judiciaires en Europe, que ce soit en Italie, en Espagne ou en Allemagne, démontrent des fonctionnements collectifs défaillants et des mécanismes criminels au cœur du pouvoir.

Nous pensions, jusqu'à présent, que le crime vivait dans l'ombre de nos sociétés. Nous le trouvons intimement lié aux grandes entreprises ou aux dirigeants politiques européens les plus honorables²⁹ ». Cette constatation a changé pour toujours la perception populaire de la notion de criminalité. Ainsi la sacralisation du pouvoir a donné lieu à une insurmontable méfiance de l'opinion publique envers les élus et, dans certains cas, au phénomène de la criminalisation de la politique.

S'il est vrai que le système mondial de lutte contre la corruption s'est largement développé depuis 1997, il est aussi vrai que la faible effectivité des cadres normatifs nationaux et internationaux dans certains pays, y compris le Brésil, encourage le versement de pots-de-vin en échange de marchés publics. Malgré la vaste diffusion des scandales par des médias, les pratiques corrompues augmentent d'une façon préoccupante dans la majorité des pays développés et en développement, exigeant des réponses efficaces sur le plan juridique et gouvernemental, sans oublier d'autres partenaires comme des organisations multilatérales, le secteur privé et la société civile.

A partir de la Convention de l'OCDE, la communauté internationale commence à s'articuler autour des documents normatifs et des actions concrètes pour lutter contre la corruption. Parmi les mesures adoptées, il convient de citer l'entraide judiciaire à plusieurs niveaux, la responsabilisation pénale et civile des personnes morales, la répression au blanchiment de capitaux, le renforcement des sanctions contre les agents publics impliqués, la politique de prévention, la pression exercée sur des paradis fiscaux et l'élargissement de la coopération transfrontalière. Les pays signataires des conventions sont obligés d'adapter leurs législations aux nouvelles exigences et de s'engager à les mettre en application.

Plusieurs enquêtes montrent que la corruption dans la passation des marchés publics demeure un problème irrésolu et alarmant. Le versement de pots-de-vin à des fonctionnaires pour l'obtention des marchés publics reste encore une pratique adoptée par des entreprises multinationales, malgré les efforts des organismes multilatéraux, voire de la société civile.

L'opacité des transactions commerciales lors de la passation de marchés publics reste encore la règle. Le devoir de transparence et les dispositions anti-corruption sont toujours contournés par les personnes intéressées, soit des agents publics, soit des entreprises qui cachent leurs véritables intentions avec beaucoup de créativité. Le transfert des sommes versées à des fonctionnaires corrompus est encore possible grâce aux complexes réseaux criminels et à la complicité des paradis fiscaux et judiciaires.

Le cadre normatif supranational est, sans doute, satisfaisant pour

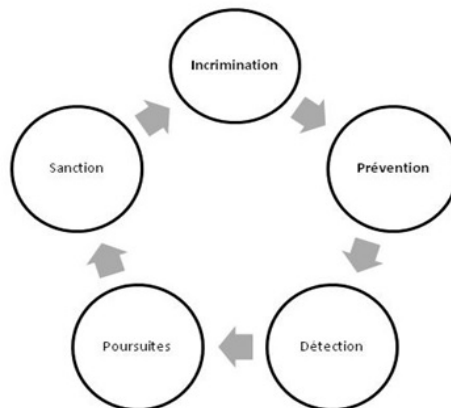
29 Eva Joly. *Notre affaire à tous*. Paris : Les arènes, 2000, p. 19-20.

mener un combat efficace contre la corruption. Mais la composante la plus importante est la véritable détermination des détenteurs du pouvoir à vaincre les obstacles que rencontre ce combat : la bureaucratie paralysante, les procédures complexes et longues, les moyens insuffisants pour faire marcher les enquêtes, le corporatisme, les manipulations politiques, parmi d'autres³⁰. En conséquence, le vrai problème repose sur la faiblesse de l'effectivité des lois. C'est plutôt une question d'application que de construction normative. Le discours juridique rationnel et post-positiviste doit renforcer l'engagement à assurer le respect à la probité et aux valeurs républicaines dans les affaires publiques.

En effet, la lutte contre la corruption exige l'articulation des actions menées par les gouvernements, les entreprises, les établissements financiers, le pouvoir judiciaire et le ministère public de chaque État. Les organismes de contrôle jouent aussi un rôle très important dans la lutte contre la corruption. D'autres acteurs peuvent aider en tant que sentinelles des entreprises comme, par exemple, les avocats, les comptables, les analystes et les auditeurs.

La lutte contre la corruption a été renforcée par des conventions de l'organisation des Nations Unies et de l'OCDE. Ces organismes invitent tous les pays signataires à harmoniser leurs dispositifs aux nouvelles exigences. Le défi de la politique criminelle dans ce domaine consiste à persuader les États à prendre des mesures législatives concrètes et urgentes pour affronter la délinquance financière de la façon la plus efficace possible. Au plan normatif, l'action politique proposée par la communauté internationale porte sur quatre aspects : 1) l'incrimination ; 2) la prévention ; 3) la détection ; les poursuites et 4) les sanctions.

Politique criminelle internationale anti-corruption



30 Jean-Louis Rocca. La corruption. Paris : Syros, 1993, 128.

Parmi d'autres initiatives concernant la coopération internationale, l'entraide judiciaire internationale est plus complexe et problématique. Elle est la condition sine qua non pour donner plus d'efficacité à la lutte contre la corruption. Plusieurs conventions et documents consultatifs préconisent des stratégies, des outils et des orientations envisageant d'aider les juges à promouvoir les mesures nécessaires pour affronter ce défi. Le champ de l'entraide judiciaire est extrêmement vaste : collecte des éléments de preuve, application des mesures coercitives demandées par le juge étranger, échanges entre cellules de renseignements financiers, etc. Le refus ou la lenteur des autorités judiciaires dans la mise-en-œuvre des mesures est un facteur qui explique l'impunité, voire l'accroissement de la délinquance financière et de la corruption.

À partir de l'analyse des sources normatives disponibles, il est pertinent de retenir trois niveaux d'intervention judiciaire à l'étranger : 1) mesures provisoires ; 2) mesures procédurales et 3) mesures définitives.

Mesures Provisoires	Mesures Procédurales	Mesures Définitives
<ul style="list-style-type: none"> -Identification du produit du crime -localisation d'avoirs -gel de capitaux -saisie des biens -arrestation de la personne soupçonnée -rétention du passeport 	<ul style="list-style-type: none"> -témoignages/dépositions -comparution -volontaire -perquisitions -examiner des objets -visiter les lieux -envoi de pièces à conviction -estimations d'experts -envoi des documents -cartes rogatoires -autres mesures. 	<ul style="list-style-type: none"> -confiscation d'avoirs -restitution des biens -transfèrement des personnes détenues -extradition des accusés -exécution de condamnations pénales dans l'étranger.

La célérité est l'un des principes-clés de l'entraide judiciaire. Le juge doit prendre les mesures demandées d'une façon rapide, dans les délais les plus raisonnables. L'autorité judiciaire ne peut pas refuser l'entraide sous le prétexte de respecter le secret bancaire. Même si la « double incrimination » reste la règle générale, cette condition n'est pas absolue, puisqu'elle sera considérée remplie sitôt que l'infraction commise dans le pays requérant tombera sous la définition de corruption dans l'État où la mesure judiciaire aura lieu. Mais la conformité et l'harmonisation des lois nationales aux définitions proposées par des

conventions internationales s'imposent en tant que politique criminelle anticorruption.

5. CONCLUSION

Les formes pour sanctionner la corruption dans les pays signataires des conventions internationales sont très variées. En général, les lois prévoient des peines comme les amendes civiles et pénales, l'emprisonnement avec ou sans sursis, la réparation, la confiscation, l'inéligibilité, l'exclusion, la dissolution des entreprises, le programme de conformité, l'exclusion des offres d'appel et la perte de la fonction publique.

Dans le secteur privé, la mise en œuvre des codes professionnels déontologiques est l'un des moyens les plus efficaces pour augmenter la transparence, la conformité et l'intégrité des entreprises. Il s'agit d'un document interne dont le but est de guider les cadres et les employés vers les bonnes pratiques de gouvernance, surtout celle qui assure la réputation positive de la société en vue des transactions transnationales et internes. Dans ce but, elles doivent refuser les pratiques nuisibles comme la formation de cartels et le trucage dans des appels d'offre publics³¹. Les entreprises sont invitées à respecter la législation anticorruption, ainsi que les principes de la bonne gouvernance et la loyauté dans les transactions commerciales, sous risque de subir de sévères sanctions.

Il faut également mettre en valeur le rôle des médias dans la lutte contre la corruption des agents publics. Il est nécessaire d'assurer la liberté d'expression et la liberté de presse dans le sens le plus large possible. La médiatisation des scandales financiers et politiques contribue fermement à la détection, prévention et répression de cette forme de criminalité. Les blogs indépendants sont également une voie très efficace de diffusion des affaires auprès de l'opinion publique. Tous ces moyens sont essentiels à la prise de conscience des citoyens aux dangers de la corruption à l'échelle nationale et internationale.

L'élimination, voire la diminution substantielle, de la corruption exige aussi un fort activisme politique. La société civile joue un rôle essentiel dans ce combat, surtout les organisations non-gouvernementales chargées de dénoncer les pratiques corrompues et d'exiger des réponses judiciaires aux abus de pouvoir. Il faut persuader les citoyens que le manque de probité dans l'exercice de la fonction publique est à l'origine de la faible effectivité des droits sociaux dans des pays en développement. Plusieurs secteurs sont affectés comme, par exemple, la santé, l'environnement, l'éducation, les transports, l'habitation, le travail et la qualité de vie de la population.

31 Cf. Transparency International. Rapport mondial sur la corruption 2009. La corruption et le secteur privé. Cambridge : Cambridge University Press, 2009.

De nos jours, les scandales politiques ont toujours des liens avec la corruption et le financement occulte des campagnes électorales. Cette pratique, incrustée dans la vie institutionnelle de plusieurs pays, est profondément nuisible à la démocratie. Elle porte préjudice à l'économie, sape la confiance des citoyens envers le gouvernement et entrave le développement. L'action politique devient, elle aussi, la cible des suspicions. Les électeurs estiment que les donateurs auront un traitement privilégié dans des affaires publiques, voire à l'occasion de la réglementation des marchés³². L'un des outils les plus importants pour assurer la transparence est la divulgation d'informations pour contrôler les flux financiers en politique. Gene Ward souligne qu'elle a pour but d'assurer la comptabilité et de rendre compte des contributions et des dépenses. La diffusion des données permet l'accès à l'information et assure l'égalité d'opportunités dans le processus électoral. Cette procédure permet aux électeurs de qualifier les actes des candidats, voire des partis politiques, en tant qu'activité transgressive portant atteinte à des valeurs et au contrat social.

Au Brésil, la corruption est devenue un problème politique de grande ampleur, surtout après les affaires « Mensalão » e « Lava Jato ». Des travaux de recherche montrent que l'alliance entre les BTP et le pouvoir politique a commencée pendant le gouvernement Juscelino Kubitschek (1965-1960), lors de la construction de la ville de Brasília, la nouvelle capitale brésilienne. Certaines entreprises ont renforcé les rapports avec des gouvernements qui se sont succédé. Résultat : elles ont obtenu des contrats faramineux dans les secteurs économiques les plus rentables des marchés publics. Même après la démocratisation du pays, les arrangements ont continué des plus en plus importants. Des entreprises, telles que Mendes Júnior et Odebrecht, parmi d'autres, ont quand même réussi à de gros appels d'offre à l'étranger. Quelques-unes sont devenues des multinationales très puissantes³³.

Le système de financement privé des campagnes électorales, adopté par le Brésil depuis 1945, a renforcé le prestige des grandes entreprises auprès du pouvoir. Pour obtenir les contrats le plus avantageux, elles versent des millions d'euros pour soutenir des partis politiques susceptibles d'occuper le gouvernement. Cette pratique est incrustée dans la vie institutionnelle du pays et alimente un réseau de corruption qui implique des élus, des ministres, des cadres et des fonctionnaires du haut rang³⁴.

32 Gene Ward. Le rôle de la divulgation d'informations dans la lutte contre la corruption dans le financement politique. In : Transparency International. Rapport mondial sur la corruption 2004. La corruption politique : Cambridge University Press, 2004, p.47.

33 Carlos Madeiro. Casamento de empreiteiras com poder começou com JK e teve sua lua de mel na ditadura. www.noticias.uol.com.br. 21/01/2014.

34 Carlos Madeiro. Casamento de empreiteiras com poder começou com JK e teve sua lua de

A partir des années 80, plusieurs affaires se sont succédé. La plupart implique des hommes politiques et des fonctionnaires de haut rang. La plus importante (Opération Lava Jato) concerne aux malversations à la PETROBRAS, l'entreprise pétrolière contrôlée par l'Etat. Grâce à l'opération menée par le Ministère Public et par la Police Fédérale à mi-novembre 2014, plus connue comme « Jugement dernier », plusieurs PDGs des entreprises du bâtiment et de travaux publics (BTP), ainsi que des cadres de l'entreprise publique, ont été incarcérés. L'accusation : formation de cartel et corruption. Les sept entreprises soupçonnées³⁵ jouent un rôle très important dans le financement de campagnes électorales et restent en relation avec plusieurs dirigeants de partis politiques. Pour contrôler les marchés publics, les entreprises versaient des commissions de 1% à 3% destinées aux partis de la coalition gouvernementale, surtout le Partis des travailleurs (PT), le Parti du mouvement démocratique brésilien (PMDB) et Parti progressiste (PP). Selon le reportage publié dans le journal *Le Monde*, les entreprises auraient détourné 3 milliards d'euros en dix ans³⁶. Seulement pour la campagne électorale de 2014, les entreprises ont versé officiellement 151 millions d'euros, sans parler de l'argent occulte³⁷.

Voilà le paradoxe. Du point de vue juridique, le Brésil est engagé dans la lutte contre la corruption. Il a ratifié toutes les conventions des Nations Unies, de l'OEA et de l'OCDE. En plus, il a harmonisé sa législation pour combattre le manque de probité des fonctionnaires et pour assurer l'égalité d'opportunités dans les marchés publics. Pourtant, le changement est encore lent. A partir des années 70, on perçoit une importante augmentation des affaires de corruption dans tous les niveaux. Quand on parle de la grande corruption, le pays a fait front à des scandales de grande envergure. Mais le système procédural brésilien est complexe et peu efficient, ce qui favorise l'impunité et l'oubli.

Pour avoir une idée de la lenteur des procédures des affaires de corruption, voilà une donnée incontestable : en cinq ans, l'État brésilien a saisi 4 milliards d'euros appartenant à des agents publics corrompus grâce à la coopération judiciaire internationale. Mais à peine 10% de cette valeur ont été restitués. Cette constatation est due à plusieurs facteurs : la complexité et la sophistication des opérations financières dans le paradis fiscaux, le blanchiment de capitaux, la possibilité de recourir à plusieurs instances de la justice brésilienne, l'exigence de la chose jugée

mel na ditadura. www.noticias.uol.com.br. 21/01/2014.

35 Les entreprises impliquées dans l'affaire PETROBRAS-BTP: Camargo Corrêa, Odebrecht, Mendes Júnior, Queiroz Galvão, OAS, Engevix, Iesa et Galvão Engenharia.

36 Paulo A Paranguá. Retentissant scandale de corruption au Brésil. *Le Monde* du 3 décembre 2014.

37 Leticia Fernandes Gabriela Allegro. Empreiteiras investigadas doaram a partidos R\$ 484,4 milhões nas eleições. www.oglobo.globo.com. 19/01/2015.

pour exproprier les biens obtenus frauduleusement³⁸. Mais il ne faut pas se tromper. Cette augmentation est due plus au renforcement des systèmes de contrôle qu'à l'accroissement de la corruption, puisqu'elle a toujours existé dans le monde politique dans la plus grande opacité.

Mais le Brésil a adopté des mesures importantes dans le cadre de la lutte contre la corruption. En 2012, le Conseil National de Justice, l'organe de contrôle du pouvoir judiciaire, a établi la « Meta 18 », dont l'objectif était de juger les affaires civiles et pénales (manquements au devoir de probité et crimes contre l'administration publique) en cours depuis 2011. Résultat : à la fin 2013, les magistrats avaient jugé 55%, c'est-à-dire, 63.363 dossiers.

Entre 2003 et 2014, 5.126 fonctionnaires fédéraux ont perdu leurs fonctions publiques à cause de fautes administratives – la majorité en raison de la pratique des actes de corruption (67,17%) –, selon le rapport du Contrôle général de l'Union publié en 2014³⁹. Le nombre de punitions est beaucoup plus important, étant donné qu'il n'existe pas d'estimatif par rapport aux peines infligées dans les États membres de la fédération ainsi que dans les municipalités.

Malgré les réponses législatives à l'échelle nationale et internationale, la lutte contre la corruption présente des sanctions à deux vitesses : la sanction électorale et la sanction judiciaire lato sensu. La sanction électorale, autrement dit, le refus des électeurs, ne présuppose nécessairement pas une sanction judiciaire. Il y a encore une certaine tolérance de la société par rapport à certains hommes politiques impliqués dans des scandales financiers. Même devant des preuves irréfutables de participation à des actes de manquement de probité, de nombreux agents publics restent dans leurs fonctions administratives ou sont réélus. Comme les procédures sont longues, complexes et lentes, ils bénéficient de la présomption d'innocence pour continuer à se présenter aux élections en attendant le jugement définitif du pouvoir judiciaire, dont la durée moyenne est de six ans, quelquefois de quinze ans. Cette situation alimente le sentiment d'impunité, d'impuissance, et est fort nuisible à la démocratie.

Le Rapport de l'OCDE sur la corruption transnationale, paru en 2014, signale la gravité de la situation. D'abord la difficulté de la détecter : « De par sa nature même, la corruption internationale est une infraction complexe et occulte. Les schémas de corruption font généralement intervenir une série de transactions extraterritoriales, une multitude d'intermédiaires et des structures d'entreprises complexes. Les difficultés pour détecter les affaires de corruption transnationales

38 Leandro Prazeres. Em quase 5 anos, governo localiza R\$ 12,4 bi desviados, mas só recupera 10%. UOL Notícias: www.noticias.uol.com.br. Em 26/11/2014.

39 Cf. Relatório de acompanhamento das punições e expulsivas aplicadas a estatutários no âmbito da administração pública federal. 2014. Mimeo.

sont donc l'un des obstacles majeurs à une mise en œuvre efficace de la législation anti-corruption⁴⁰ ». La recherche de l'OCDE montre que 31% des affaires ont portées l'attention des autorités répressives à partir du signalement spontané des entreprises privées (audit interne, diligences dans le cadre de fusions-acquisitions, donneur d'alerte, etc.). Tandis que seulement 13% des affaires ont commencé par l'initiative des autorités chargées de la répression de la criminalité financière. Cette donnée renforce la thèse selon laquelle la faible effectivité des lois, faute de moyens de détection, est la principale raison de la montée de la grande corruption à l'échelle mondiale.

La passation des marchés publics reste encore la principale source de la grande corruption. Selon le rapport de l'OCDE, 57% des affaires qui ont impliqué le paiement de pots-de-vin à des agents publics étrangers ont eu lieu dans le cadre des appels d'offre. Le plus grave c'est que presque la moitié des affaires de corruption concerne des pays ayant un haut ou un très haut niveau de développement humain. De plus, 60% des impliqués sont des grandes entreprises, ce qui exige des mécanismes d'autocontrôle pour prévenir des pratiques dommageables à l'équité concurrentielle, voire y renoncer.

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40 Rapport de l'OCDE sur la corruption transnationale : Une analyse de l'infraction de corruption d'agents publics étrangers. France : Éditions OCDE, 2014.

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DEMOCRACY AND JUSTICIABILITY OF THE RIGHT TO EDUCATION – THE BRAZILIAN EXPERIENCE

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Abstract: Democratic regimes establish themselves to the extent to which they are accepted by the majority of the population living under them. This acceptance is translated into a knowledge of and trust in their respective political and legal institutions. Quality education is relevant to democratic governance and citizenship building, as it provides access to the cognitive tools needed for significant political participation. This paper analyzes the interactions between democracy and quality education in the light of judicial proceedings being applied to the right to education, focusing on Brazilian Supreme Court (STF) activities in the period between 2000 and 2010.

Keywords: Democracy - Right to education - Public Policies - Constitutional law

1. INTRODUCTION

Recent political science studies identified the trust of citizens in democratic institutions as one of the essential components of consolidation and improvement of democracies. Reinforcing these findings, same studies show that lack of trust in democratic institutions, as well as lack of knowledge of how they operate, pose a risk to compliance with the norms, weakens political and legal institutions, and limit their legitimacy. These investigations have concluded, therefore, that trusting democratic institutions is related to the quality of the democracy. In other words: democracy will not be fully established until it is accepted by political leaders and the citizens as the only possible way of exercising state authority. More: in order for the democratic

system and its institutions to function well, their values, principles, and entities must be followed by the majority of citizens, unconditionally, as essential elements of political citizenship.

In Political Science, three fundamental reasons raise from the recent launch of studies on the quality of democracy. First: improving the quality of democracy is a duty, derived from principles of Constitutional Rule of Law, because the protection of fundamental rights strictly depends on the quality of a democracy. Second: continuous improvement of democracy strengthens the necessary requisites for the legitimacy of states, especially after a transition from a non-democratic regime, as is the case of Brazil. Third: even in states where democracy is already established, there will always be room for improvement.

Until recently, it was not obvious in Political Science that the relationship between democracy, citizenship, and trust in democratic institutions is relevant to the theory of democracy. Although competitive elections and political parties, which express diversity and plurality in society, are indispensable to contemporary democracies, they do not ensure a quality democracy, nor do they exhaust the democratic order. Building effective democracies and quality democracies is a serious challenge, which depends on the participation of the people. The more the people lack hope and satisfaction toward their democratic regimes, the greater the difficulty to strengthen the democracy they live in. Additionally, institutional inefficiency towards social needs, fraud perpetration, corruption, and disrespect of citizens' rights negatively affect society compliance with the Rule of Law.

These findings also apply to the Brazilian case. Between the year 1989 – when the first direct presidential elections were held in Brazil pursuant to the 1988 Constitution – and 2010, the appreciation of democracy by the population grew by 21% (from 43.6% to 64.8%); in the same period, the number of people unable to define “democracy” decreased by 13% (from 38.8% to 25.5%). In parallel, there was an increasing negative perception, by the population, of government institutions concerning income levels, schooling and age brackets. This was found in relation to the three branches of power and also concerning political parties, and was mainly a result of corruption charges, embezzlement of public resources, and the poor quality of public services. In June 2013, the protests and marches that swept Brazil confirmed this negative trend. On the other hand, according to a study by MOISÉS (2010) aimed at assessing the satisfaction rate of the population in regard to Brazilian political institutions, it was found that most Brazilians believe in the statement that a democracy can do without congress and political parties.

Although Brazilian democracy is established, and grounded on alternating political power, and political stability, these findings

show that the negative perception of state institutions has a positive influence on the citizens' willingness to take part in electing their representative. Moreover, negative perception has negative effects on political participation, creating alienation and contributing to the lack of interest on the part of the majority of the population. In short: in the twenty five years of our democratic regime (a period as long as the previous military dictatorship), Brazil has become an "electoral democracy", but not an "effective democracy" in which would predominate issues – other than voting – such as rights, rule of law, and a broader understanding of participation possibilities inherent to the exercise of citizenship. Therefore, the lack of trust Brazilian citizens show towards their government institutions, and the lack of satisfaction with the performance of the democratic system in place, paradoxically coexist with their support of democracy.

There are consistent explanations for this situation. Despite the undeniable advances triggered by the 1988 Constitution and the significant improvement in social indicators in comparison to the figures of previous years, social indicators in Brazil are still considered poor. Social reforms have been left incomplete, and there is a lot of room for improvement in terms of efficiency and equality. Social and economic equality have not been achieved so far. Such a situation is the result of severe poverty and low education rates, among other factors. This context explains the demand for citizenship, identified as the axis upon which rests the yearning for inclusion and social emancipation, common to complex, unequal, and *sui generis* societies, such as the Brazilian one. These demands outshine discussions on public policies, politics and democratization, which in some circumstances have reached the courts.

The meager social results do not, in any way, do justice to the intensity of the changes, which, despite the lack of major reforms, have transformed the profile of the Brazilian Social State in several aspects, such as the consolidation of citizenship. The positive changes are primarily due to four conditions created by the Constitution: valuation of social rights and their universalization; decentralization of government authority; formulation of new parameters for resources allocation; and redefinition of public-private relations in order to provide and finance social goods and services. This can be observed in the field of education.

Twenty-five years after the Constitution, progress is considerable regarding educational levels for the population in general and the youth in particular. The country has practically achieved universal primary education¹ (the basic educational system, following the tradition of

¹ In 1988, 84,02% of the children between 7 and 14 years old were enrolled in primary education; in 2012, the percentage of enrollments achieved 98, 52%. Cf. <http://www.ipeadata.gov.br/>

Brazilian federalism, was not in the hands of the federal government but in those of the states). The role of both Executive and Legislative in this period is particularly relevant, considering the one-hundred-year delay in terms of education in Brazil, notably in terms of public education. This is especially relevant if one compares to other Latin American countries, such as Argentina and Uruguay, both of which, at the beginning of the twentieth century, had a universalized elementary education².

In the same period, it was noteworthy the role of the Courts in setting educational policies consistent with the constitutional provisions to guarantee the right to education. This was particularly effective after the enactment of the Education National Act – NEA (Law 9.394, the *Lei de Diretrizes e Bases da Educação Nacional*), a federal Law that applies common guidelines to all educational systems across the country. Influencing the Congress and the Executive, education laws cases, especially related to access to childcare, to increasing mandatory basic education and to set affirmative actions, have to be seen not as the end of the judicial procedures, but instead as solutions for common education problems.

The political role of the courts is a recent phenomenon in Brazil, also derived from the 1988 Constitution. The valuation of social rights and their universalization, mentioned above, are the corner stones of this new role, influenced by ethical values.³ Several questions arise from this circumstance: to what extent the independence of the judiciary may be detrimental to democracy, considering the unpredictable effects of case laws on democratic politics. Should the Judiciary, which is not elected and politically irresponsible, make decisions on social rights that have to be implemented by and at the expense of the Executive? Is this democratically desirable? Moreover, traditionally, wealthy citizens tend to have greater access to the courts. By contrast, in contemporary democratic societies, law is both a tool for achieving social justice and social tensions solution mechanism, in the path of John Rawls' theory of justice as fairness (*A Theory of Justice*, 1971). This current regards the political activity of the judiciary as a tool for deepening democracy. This debate is not new and has already been considered by several authors (Waldron, 2006; Gloppen, 2008; Maccann, 2010, among others).

2 Cf. Fausto, Boris & Fernando Devoto, *Brasil e Argentina - Um Ensaio de Historia Comparada* (1850-2002), São Paulo: Editora 34, 2004, p. 50 ff.. See also Marcilio, Maria Luiza, *História da Educação em São Paulo e no Brasil*, São Paulo: Imprensa Oficial, 2005, among others.

3 The opening of the Law to ethical and social values gave rise to the democratic European Constitutions of the post war, in particular: the Fundamental Law of Bonn (1948), the Constitution of Italian Republic (1948), the Spanish Constitution (1978) and the Constitution Portuguese (1976), in which human rights norms are the expressions of ethical and social values; as such, these norms are under strict supervision by Constitutional Courts. The Brazilian Constitution of 1988 was written under the influence of this theory.

However, it is undeniable that the exercise of democracy presupposes forms of organization to prevent arbitrary decisions and allow the participation of citizens. In the absence of legislative or government activity, or in addition to them, lawsuits in education might be a strategy to guarantee equitable access to quality education.

This paper analyzes the interactions between democracy and quality education in the light of the justiciability of the right to education, with focus on the activity of the Brazilian Supreme Court (STF) and the Brazilian Superior Justice Court (STJ) in the period between 2000 and 2010.⁴ Partial conclusions show that jurisprudence might assure rights by influencing both Executive and Legislative; this would be made possible by the fact that the education legal regime is a regime of state performances, typical of social rights. Consequently, the constitutional definition of objectives, goals and priorities, combined with the accurate discrimination of competences, charges and revenues to Federation entities, and with the commitment of financial resources, should allow rights assurance to be attained in a medium term. To sustain these findings Part I focus on the relations between education and democracy; Part II presents some considerations on the justiciability of the right to education and Part III brings forward some conclusions about the role played by the Brazilian Superior Courts in establishing educational public policies. Throughout the paper, the adopted perspective is the quality of democracy. From this point of view, it analyzes the relationship between democratic principles, institutional processes, political participation, and the results of the work of democratic institutions. Consequently, the study of responsiveness and accountability of democratic governments in the studied period plays an important role in the analysis.

2. EDUCATION AND DEMOCRACY

Since mid-20th century, the literature on education has emphasized the relevance of education to a country's democratic governance and citizenship formation, and, in addition, has identified it as one of the main tools available for the State to reverse processes

⁴ Data sources and evidences in this paper are part of the research project Brazil: 25 years of democracy which aims at conducting research and critically analyzing this twenty-five-year period in Brazil (1988/2013) in the light of three main lines: (i) democratic institutions, (ii) relations between civil society and political culture, and (iii) public policies. Under the latter there is the study of the interaction between democracy, the right to education, and education policies. The project is led by the Research Center for Public Policy (NUPP), at the University of São Paulo, with the participation of teachers, researchers, and students of the University of São Paulo (USP), the University of Campinas (UNICAMP), the Pontifical Catholic University of São Paulo (PUCSP), and the Getúlio Vargas Foundation (FGVSP).

replicating social inequalities⁵. Education, in this sense, means having access to the necessary cognitive tools enabling political participation (Lipset, 1959; Lazarsfeld et al., 1944; Converse, 1972; Dahl, 1967; Almond and Verba, 1968; Key, 1961). This understanding is expressed in article 205 of the 1988 Brazilian Constitution, which assigns to the educational process for the purpose of training citizens, among others. The right to education, as a result, is not ideologically unbiased. Its political core, according to the constitutional system as a whole, is the dissemination and promotion of republican and democratic principles. Education, therefore, is a political issue, an issue concerned with collective decision-making, the legitimacy, and the exercise of the law.

The relations between democracy, the right to education and public education policy revolve around a myriad of issues. The study of these relations involves the mobilization of theoretical skills from different areas of knowledge (Political Science, Social Sciences, Education, and Law etc.) as well as the ability to carry out an investigation from different perspectives at the same time. In the field of law, the research focuses on the analysis of the promotional function of the law⁶ that is, protecting and promoting the right to education. In fact, the legal debate on the implementation of public policies reveals the coercive power of the legal norm.

Despite the importance of the right to education for democracy consolidation in Brazil, the literature on the relationship between Law and Education, and on the role of the law in (the) enforcing public policies in education, is incipient. Since the last decade, legal scholars who have been writing about the right to education in both educational and legal approaches, have focused on more conjectural aspects – namely, access, management, and financing conditions – rather than focusing on a more structural approach, in which subjects such as equity, quality, and efficiency are informed by the political element enshrined in the Constitution. In fact, systematic studies about the Brazilian educational system legal organization are a hardly at all explored field of study in the law. In the legal literature, there are no studies assessing the impact of legislation in implementing educational policies. Besides, laws on education are seen more as a branch of administrative law than an independent field having its own structures and categories (Ranieri, 2000). In the literature on education, studies have, for some time, shown that the law, in the relationship among education, society and the state, was being used more as a formalization technique than as an rationality tool, which could contribute to the goal of accomplishing

⁵ For a revision of this bibliography, see, among others, McMahon (2002) and Psacharopoulos (1988).

⁶ BOBBIO, Norberto. *Da estrutura à função: novos estudos de teoria do Direito*. Barueri: Manole, 2007.

education (Cury, Horta & Favero, 1996). This situation has preserved, in educational policy and practice, the centralizing features of Brazilian federalism in detriment of a more effective participation of society in educational issues.

Results of previous research (Ranieri, 2000) show that in the legal field the right to education is not perceived in its democratic dimension. However, it's materialization through judicial decisions have been showing new fields of affirmation in the democratic rule of law, favoring citizenship rights and popular participation, something especially important in a country with low popular perception of the value of democratic institutions and the normative force of the Constitution. In conclusion, the protection of the right to education through judicial mechanisms can be extremely effective in situations where public policy stems directly from the Constitution.

3. THE JUSTICIABILITY OF THE RIGHT TO EDUCATION

State obligations regarding the right to education have been interpreted under national, regional and international human rights law, establishing the right as justiciable. The right to education has been considered fully justiciable in many jurisdictions⁷, since it creates complex, intertwined obligations and responsibilities for multiple stakeholders. As the international human law states, States have the primary responsibility to realize the right to education for all individuals in their territories and subject to their jurisdiction. They must also establish an educational system respectful of the right to education and refrain from any action, which may prevent or limit access to education. In addition, States must ensure that it is respected and fulfilled both as entitlement in terms of universal access to basic education as well as empowerment in terms of acquisition of knowledge, skills and competencies and their quality and standard.⁸ As the Special Rapporteur for the right to education emphasized, the State obligations must be understood in terms of the right to quality education; these obligations also make State responsibility to provide necessary resources for its realization, including financing of education.⁹ Government policies and provisions of education both public and private are subject to review by judicial bodies; the role of adjudication is to ensure that the right to education is respected, protected and fulfilled. Its most basic

⁷ Fons Coomans, *Justiciability of the Right to Education*, *Erasmus Law Review*, Vol. 2, No. 4, pp. 427-443, 2009.

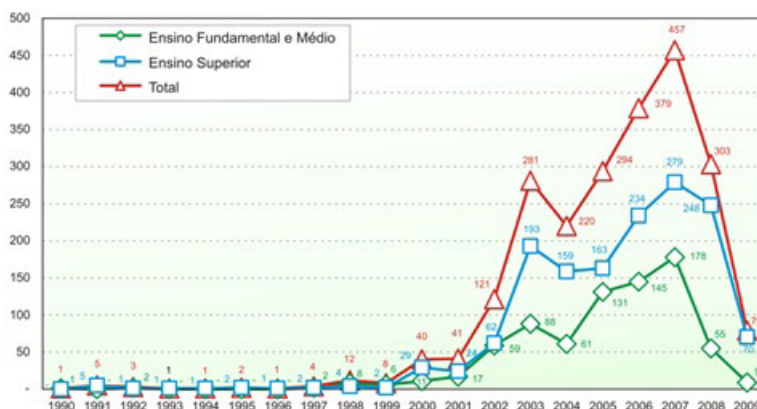
⁸ General Comment 13 on the Right to Education (article 13 of the Covenant), adopted by the Committee on Economic, Social and Cultural Rights at its twenty-first session in 1999. E/C.12/1999/10, 2 December 1999.

⁹ Report of the Special Rapporteur for the right to education - A/HRC/20/21, 2 May 2012.

tenets, free and compulsory primary education for all, the progressive realization of secondary and tertiary education, and the immediate non-discrimination in their application, are universally recognized.

In Brazil, the legal regime of the right to education is defined by the Federal Constitution and may be complemented by rules of Administrative Right; this is a very peculiar situation, since social rights, in general, have its legal regime established by Administrative Law. As such, situations of denial, violation or non-fulfilment of the State obligation related to the right to education could be examined by courts on grounds of constitutional provisions, as well as of international law. Available legal literature has been recognizing that any type of lawsuit (class actions, collective or merely individual) may be used to secure compliance by recourse to law courts.¹⁰

Chart 1. Growth of the number of cases filed at the STF until 2009



The right to education was a relatively marginal issue at the Brazilian Supreme Court before the 1988 Constitution, regardless of the fact that the court also had jurisdiction over issues concerning federal laws. Since then, the situation has changed substantially. Between 1988 and early 2013, the Supreme Court issued almost 4 410 decisions, of which 4 222 had been filed as of the year 2000¹¹. Out of the said 4 222 cases, by 2009, 2 250 cases had been filed, and the remainder (about 2 000 cases) were lodged at the Court in the last three years. Thus, it is possible to note a growing movement towards solving education-related issues through the court system, as shown in Chart 1. In this

¹⁰ See, for all, GRINOVER, Ada Pellegrini. O controle de políticas públicas pelo Poder Judiciário. In: SALLES, Carlos Alberto de (coord.). *As grandes transformações do processo civil brasileiro – in honor of Prof. Kazuo Watanabe*. São Paulo: Quartier Latin, 2009, pages 109-134.

¹¹ Cf. www.stf.jus.br

sense, there has been a noteworthy change in the terms of the content of court decisions in favor of the effectiveness of the right to education, especially with regard to basic education, with repercussions for the structures of a democratic state.

In the early 1990s, for example, lawsuits concerning tuition fees prevailed. These cases aimed to declare unconstitutional Law 8.039/90 (that controls the increase of the annual value of tuition fees), with grounds on the prohibition of State interference on the economic private sector. The Supreme Court declare the law constitutional, since it was issued to safeguard the right to education, protecting it from economic abuse on the part of the private sector, thus making it illegal for schools to penalize students in the event of breach of contract on the part of the latter (i.e. in the event students or their families failed to pay tuition for the year).

The content of the lawsuits present to the Court changed in the beginning of 2000. Several hypotheses may explain the increase in the number of lawsuits aiming at enforcing the right to education, especially in the context of early childhood education. Among them, the role of the Public Ministry under the 1988 Constitution and the consolidation of the civil class action to protect collective interests. Additionally, the creation of the Development Fund for Primary Education (Fundef) in 1996 enabled issues concerning funding, and increased the availability of basic education being solved by states and municipalities, and as a result, attaining universalization in many cases.¹²

The role of the STF is particularly relevant considering that in 1988; part of the court's jurisdiction was assigned to the Brazilian Superior Court of Justice (STJ), created by the Constitution to ensure the adequate interpretation and uniformity of ordinary federal law in the cases adjudicated by the ordinary federal courts and state courts. This means that the STF decisions analyzed in this research, as of 2000, refer to constitutional matters only. This analysis' main goal is to identify significant references regarding the right to education and, in particular, to basic education, in decisions containing consistent interpretation and not merely constitutional law explanatory interpretation. The same is expected in relation to the Superior Court of Justice (STJ). In this case, the choice of the year 2000 as a starting point for reviewing the court's judgments is due to the enactment of the NEA in 1996 (Law 9 394/96).

Our attention is focused on basic education in view of the purposes of this level of education, notwithstanding the analysis of the problem of affirmative actions in higher education, given their peculiarities. The judgments and opinions issued by the Court, in addition to revealing the society degree of knowledge about the rights and guarantees provided in the Constitution, also situate the problem

¹² On the universalization of basic education in Brazil see the 2008 UNESCO Global Monitoring Report available at <http://unesdoc.unesco.org/images/0015/001547/154743e.pdf>.

of education in time and space. Besides, the decisions provide a broad overview on the progress of the realization of the right to education, above all by examining by examining the discretionary authority of legislature and government agents and their adequacy to the public policy expressed in the Constitution.

4. THE ROLE PLAYED BY THE SUPERIOR COURTS IN ESTABLISHING EDUCATIONAL PUBLIC POLICIES

The research reviewed about 1600 cases concerning educational public policies.¹³ Partial results show that at least four evidences raised from the judicial activity in the public education area: (i) the Courts are becoming increasingly more accessible to the population in the protection and enforcement of the right to education; (ii) the Courts play a significant political role in establishing educational public policies; (iii) the Courts influence the National Congress' activities and also the Executive public expenditures agenda (however, the courts resist in recognizing themselves as legitimate and necessary parties in public policy review, including in demands that seek equalitarian distribution of resources and educational assets); (iv) the cases are notable for the continuing development of specific areas of education law that are raising new questions to courts to consider.

There are regional inequalities in terms of access to the courts: the largest number of cases was filed in South and Southeast regions (the most developed regions in Brazil) as well as the Federal District. Students are the main claimants/appellants in cases concerning individual disputes (most appeals filed by students aim at the recognition and accreditation of university degrees obtained abroad, especially degrees in medicine).

The number of cases revealed that state cases concerning access to primary school and pre-school, daycare included, represent the largest area of governance litigation. The remaining cases are aimed at solving individual claims (such as confirmation of degrees, equivalence of studies, transfer of public employees, and mandatory enrollment at the place of residence, penalties etc.). There aren't cases demanding the improvement of quality in education, a constant and prevailing issue in the June 2013 marches that swept the country.

The education law cases related to public daycare were notable for its social and political consequences. In *São Paulo State Prosecutor's Office v. the City of Santo Andre*, Appeal nº 410,715 (2005), a case decided by the Supreme Court that tested the allowance of judicial activism in relation to the separation of powers clause, the constitutional

¹³ The cases review relied on courts databases and websites under the keywords "law and teaching" and "law and education". Duplicate results have not been deleted.

controversy focused on the extent of the duty of the City of Santo Andre – a wealthy municipality at the State of São Paulo - in guarantying universal access to daycare. In its defense, the Municipality claimed that daycare for children between 0 to 6 years old was neither a level of compulsory education nor a constitutional incumbency for local governments. In addition, the governmental budget was insufficient to create daycare new vacancies in respect to all demands. As such, waiting lines for places in daycare are the only equitable solution in a situation of lack of funds. The decision of the STF – determining that the local government create new places immediately, even if at the expenses of public funds designated to other areas - has change the way the Judiciary ruled in terms of public policies. In his vote, Associate Justice Celso de Melo pointed out that “although it is unquestionable the fact that Legislative and Executive Powers have the prerogative to formulate and execute public policies, it is possible for the Judiciary Power to determine their implementation, particularly in cases of public policies defined by the Constitution itself, whenever the competent government affect, with their omission, the efficacy and integrity of social and cultural rights constitutionally granted, through non-compliance with political and legal incumbency that are mandatorily assigned to them.” The decision issue in Appeal no. 410,715 influenced the National Congress, that voted a Constitutional Amendment (no. 59/2009) and a bill (Law 12,796/2013) determining universal access to daycare. It is important to notice that in this case, the court determines to the local education agencies the level of public expenditures to guarantee free daycare for all (the same had never happen in relation to other social rights such as health, a field where is quite common the private litigation, claiming to a certain individual asset - as medications, for example).

The Supreme Court also examines cases related to affirmative actions that raise new questions to consider. Cases concerning the judicial review of racial quotas (ADPF 186/DF) and university quotas for students coming from public schools (RE 597.285/RS) explore complex subjects in the continuing refinement of the rights of students in education. After these precedents, the federal state adopted legislation (Law 12 711/12) which provides for the distribution of student positions in higher education institutions maintained by the federal government.

5. CONCLUSIONS

For many decades, education law in Brazil changed very little. However, during the last 25 years, the situation has altered considerably and the transformation process is not over yet. Basically, these developments involve universal access to the educational system and the guarantee of the rights in education for all. The fact that they

are being enforced by the courts, the provisions on the protection of the right to education became normative provisions rather than being considered programmatic provisions.

The effectiveness of the right to education through court decisions reveals new affirmative aspects of the rule of law in favor of citizenship rights and people participation, something especially important in a country with low perception rates of the importance of democratic institutions, and unaware of the Constitution normative strength. Undoubtedly, this is a signal of the quality of the Brazilian democracy since it reveals the results of the democratic institutions' activity. It is also understood that judicial mechanisms for social rights protection can be extremely effective in situations where public policy arise directly from the Constitution, as seen in *São Paulo State Prosecutor's Office v. the City of Santo Andre*.

These findings suggest as a logical consequence, that the setting up of objectives, targets, and priorities under the constitution, combined with a clear division of roles, duties, and funds among the federative entities, and with a clear allocation of financial resources, enables the right to education being achieved in the medium term. This means that without the efficacy filter of the legislature, the constitutional provisions embody obligations which are thus considered directly accessible to private individuals and have to be immediately enforced by the state. From this perspective, if on the one hand the role of the courts still requires coping with practical issues, such meeting the timing of urgent claims, on the other hand it points to a path where constitutional hermeneutics can be carried out in a highly creative way in order to ensure fundamental rights.

However, the active role of the courts will only lead to concrete public policies and consequently to the true promotion of the right to education if the other Powers comply with court decisions. Besides, by favoring access over quality of education, the courts merely solves isolated disputes and causes the fragmentation of public policies, which should be aimed at more comprehensive development policy, including subjects as school choice and academic reforms. The same conclusion was pointed out by the Inter-American Development Bank Report of the David Rockefeller Center for Latin America Studies at Harvard University: "the formulation of educational policies in Latin America is disproportionately biased in favor of policies emphasizing increased access, rather than quality and efficiency." (IDB / Harvard, 2007, p. 224). Cases involving universal school access tend to decrease. Firstly, due to the precedent established by *São Paulo State Prosecutor's Office v. the City of Santo Andre*. Secondly, due to the issuance of constitutional and federal norms that ensure new rights (among which the right of access to childcare and the increase of mandatory basic education).

The activity in the Courts shows that the right to Education in the Brazilian legal system is not an abstract provision. On the contrary, it consists in a set of objective and consequent determinations that may be applied to contingencies, situations and circumstances that happen in the social development, through the jurisprudential and doctrinal integration. The judicial path, in particular, to give effect to the right to Education, has been revealing new fields of affirmation of the democracy, to the benefit of citizenship rights and popular participation, what is particularly important in a country with low popular perception of the democratic institution value, and little knowledge of the regulatory force of the Constitution. Jurisprudence based on national legislation can also provide insights into the ways in which the justiciability of the right to education and enforcement could be strengthened.

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SOVEREIGNTY AND THE MOTION TO IMPEACH BRAZIL'S PRESIDENT

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Abstract: This article aims to demonstrate that public policies involving the economy follow, in their process of formulation, implementation and especially results, different paths than those for the exercise of political power.

This involves a question of decisions. The decisions of public officials and even of judges are not aseptic, but instead ideological.

Economic crises and political disaffections over these choices cannot serve as justifications for removing that leader, elected by popular vote, especially when the “rules of the political game”, have all been respected.

When democracy is threatened by such incidents, motivated by an economic downturn, notably in supposed exceptions that in reality flaunt the constitutional and legal order, we are faced with a serious injury to sovereignty in the internal plane, perhaps even a coup d'état.

This article will analyze the question of the motion to impeach Brazil's president, demonstrating there is no legal support because she has not committed any act of malfeasance in office. And we conclude that in name of seeking more successful economic results, to serve political demands that are most of the time instigated by ideological passions, a society cannot ride roughshod over fundamental rights assured by the Constitution.

Keywords: Impeachment – Due Process of Law - Democracy

1. THE GUARANTEE OF SOVEREIGNTY IN THE INTERNAL PLANCE BY RESPECT FOR THE RULES OF THE POLITICAL GAME IN A DEMOCRACY

Sovereignty has multiple and controversial meanings. But in its essence, it always involves a question of the justification of political power. For this reason, the gist for understanding sovereignty, to paraphrase the eminent Professor Marcelo Figueiredo, is the idea that “those who hold power always need a political-legal justification to give support to this pretension.”¹

Elected leaders always need *de facto* power in concert with *de jure* power for the exercise of their functions. The preoccupation is in the definitive affirmation of authority, establishing the constancy and sedimentation of power.

While external sovereignty consists of the manifestation of the legitimacy of states in the international scenario, in the sense of mutual respect, acceptance and coexistence among nations, in the internal plane the idea of sovereignty rests in the electoral universe, notably the power of imperium, arising from elections – the popular vote – in the sense that the leader is vested democratically with authority, by elections that respect the rules of the game, to impose political decisions within the territory of a determined country.

2. THE DIFFERENT PUBLIC POLICY AGENDAS AND THE DECISION ELEMENT IN THE GOVERNMENTAL SPHERE. POPULAR DISAFFECTION WITH THE GOVERNMENT AND THE DEMOCRATIC CHALLENGE

Public policies are sets of programs, actions and activities developed by the government, to impose certain political and programmatic objectives, directly or indirectly, with the participation of public or private entities.

Public policies involve, in their process of formulation and implementation, and particularly in the results sought, the ways to exercise political power through directives, guiding principles, rules and procedures for the relations between the public administration and society.

However, it must be noted that the rules regulate those actions, but does not give them meaning. They delimit the freedom of the leader by the paradigms of the deontic modals of the law (prohibited, obligatory, facultative), but the constitutional foundations of the state

1 FIGUEIREDO, Marcelo. *Elementos do Estado*. São Paulo: Editora Atlas, 2014, p. 25

do not substitute the individual will of the leader in the universe of discretion to opt for one hermeneutic vector in detriment to other possibilities, choosing one public policy over another.

This involves the question of the power to decide in the governmental universe. The decisions of elected leaders and even of judges – when called to intervene – will never be aseptic. They are ideological and committed to achieving public policies that are in harmony with the ideological bent of a determined government.

Facing the problem of the economic constitution means facing the scope and the limits of the social state. And the social state is the type of state in which the public authorities are not content only to produce rules, but rather seek to direct their policies so that society reaches the intended goals, to enable materialization of basic conditions for social equality among the various groups, classes and regions of the country.

Since political power implies a social relationship involving many actors, with distinct and even contradictory projects and interests, there is a need for social and institutional mediation so that a minimum of consensus can be forged. This is the only way to legitimize and give efficacy to a determined public policy agenda, because formulating a policy implies establishing who will decide, for what reason, by what means, to achieve what consequences, and for whom.

It is exactly at this moment that governmental political decisions make a difference, because there are distinct ways of viewing public policies, notably when dealing with economic matters, ranging from the liberal, to the social-democratic and the socialist.

Obviously the ideological vectors chosen for governmental initiatives in the areas of economics, health, social security and assistance, questions of infrastructure, labor relations and the type of institutional mediations will reveal the political and economic strategy of a determined government. In the final analysis, public policies are tightly linked to the economic model chosen.

3. THE MOTION TO IMPEACH PRESIDENT DILMA ROUSSEFF AND THE LACK OF ITS LEGAL SUPPORT. THE LEGALITY OF THE SO-CALLED “FISCAL MANEUVERS”

In recent decades Latin America has been the stage for a proliferation of impeachment proceedings. These penal judgments have turned into spectacles in which the desire for democracy has been replaced by the “desire for a trial”, based on stimulation of the dichotomy between the “bad guys and the good guys”.²

2 TIBURI, Márcia. *Olho de Vidro: a televisão e o estado de exceção da imagem*. Rio de Janeiro: Record, 2011, p.18.

But with the excuse of punishing the “bad guys”, the “good guys” also violate the constitutional and legal order.

The democratic winds that swept away the dictatorships that previously abounded in South America brought a predilection for presidential systems. Under presidentialism, impeachable offenses are limited to specific situations, comprehensively defined in the Constitution.

This character of comprehensiveness in *numerus clausus* serves the function of guaranteeing a distinction between acts that really violate administrative probity, classified as crimes of malfeasance in office, from political dissatisfaction over “mismanagement” or the political choices under the discretionary power exercised by the leader, whether or not there is a consensus in society.

The guarantee that someone may only be found guilty of a crime when the conduct in question is clearly typified in law has been repeatedly ignored in the political arena by resorting to expansive interpretations about indeterminate legal concepts.

It is hard to control the legitimate exercise of a political process with imputations that disregard the limits of substantive legality. The legal situations for protection of fundamental rights have not been protected, and instead have been excluded from the universe of discretionary decision power, as put by Luigi Ferrajoli.

Likewise, the protection of the democratic principle and the need to respect the rules of the game are being replaced by the abusive exercise of power by “niches” of those who are discontented with legitimately elected governments, relying on political judgment as a method to overturn the majority will.

Promoting impeachment processes that do not respect due legal process and instead are based on scattershot inferences formed unilaterally, without legal support, is tantamount to a coup d'état, to paraphrase the words of Brazilian Supreme Court Justice Marco Aurélio Mello.

The democratic credo requires us to rise above political passions and economic crises and always defend fundamental rights, the democratic order and the Constitution. At this moment, international bodies like the Economic Commission for Latin America and the Caribbean (ECLAC), an important entity of the United Nations, have demonstrated concern over Brazil, calling on society to respect the result of the election so as not to destabilized democracy.

Popular sovereignty, the source of legitimacy in a democracy, is manifested in a constitutional mandate obtained at the polls by the chief executive of Brazil.

This position does not ignore the efforts of the judiciary to pursue and punish the culture of corruption, something that is not unique to Brazil.

Despite all the support to official investigations and the enactment of more severe laws to fight corruption, the executive branch

in Brazil has become a victim of a relentless and inflammatory media campaign to try to reduce the presidential authority and interrupt the mandate that citizens gave to President Dilma Rousseff at the polls, in a campaign that strictly abided by the rules of the game, again to paraphrase Norberto Bobbio.

The apotheosis of the process of destabilizing democracy that exists today can only be described as an attempt to impose parliamentarianism in Brazil, an option that was rejected by a plebiscite in 1993, established in the Constitution of 1988, so that the rule for presidential system today is an entrenchment clause.

This initiative comes from groups in the Brazilian Congress that, due to absence of sufficient votes or inexistence of leaders with sufficient national support to win elections, are trying to assume power through undemocratic routes that attack the democratic state of law, and can be called as an attempted coup.

3.1. The contractual default of the federal government to public banks and credit transactions

The so-called fiscal maneuvers involve the systematic delay in transferring money from the National Treasury to Banco do Brasil, Caixa Econômica Federal and BNDES (National Economic and Social Development Bank) to pay benefits or to fund low-interest loans under social programs, such as Bolsa-Família (“Family Stipend”), Minha Casa Minha Vida (“My Home My Life”), farm credit and unemployment insurance, among others. Since the financial institutions make these payments timely, the delay in transfer from the Treasury generates the contractual obligation of the government to pay interest. This mechanism gives a certain aura of balance to the public accounts in moments of shortage of revenue, and is not a good financial practice. However, it cannot be construed as the impeachable offense of malfeasance in office, as will now be demonstrated.

Those who claim this budgetary trickery is criminal malfeasance allege that it involves a credit transaction between the federal government and federal banks, which is forbidden by Complementary Law³ 101/2000, better known as the Fiscal Responsibility Law (“LRF” in the Portuguese initials). In reality, the motion for impeachment that was accepted by the president of the Chamber of Deputies is based on the premise espoused by a finding issued by the Federal Audit Tribunal (TCU⁴) that recommended rejection of the executive branch’s accounts

³ A complementary law (lei complementar) is an enabling law of constitutional provisions.

⁴ The TCU is an administrative rather than judicial court, entrusted with oversight of budget matters and accounts of all federal government entities, including government controlled companies with private ownership, such as Petrobras and Banco do Brasil.

for 2014. According to this position, the delay in transferring money from the Treasury to pay social benefits by official banks, so that they had to advance the funds to cover those payouts, caused them to have a credit against the government, something that is forbidden by Article 36 of the LRF, which prohibits lending transactions between government entities and banks controlled by them.

Initially it should be clarified that the rule of Article 36 of the LRF was a response to the abuses of the 1980s and 90s, when state governments bled the banks controlled by them through loan transactions that were never settled and that were above the banks' financial capacities. This wound up causing the liquidation (or fire-sale privatization) of nearly all these institutions. Therefore, to prevent the capital of public sector banks from being drained in this manner, leading to their failure, the Fiscal Responsibility Law prohibits these banks from engaging in credit transactions with the governments that control them. But it is necessary to define what a credit transaction is from a strictly legal standpoint, to prevent other contractual relationships, in the interest of society and official financial institutions, from being barred.

In this respect, Brazil's positive financial law establishes the concept of a credit transaction in cases where the debtor is a public-sector entity, in Article 29, III, of the Fiscal Responsibility Law, in a definition in line with that of Article 3 of Resolution 43/2001 from the Federal Senate, which is empowered by Article 52 of the Constitution to set rules, including limits, on credit transactions contracted by the federal government.⁵

⁵ Article 29, III, of the LRF reads: "Art. 29. For the effects of this Complementary Law, the following definitions are adopted: III - credit transaction: a financial commitment assumed by reason of a loan, opening of a credit facility, issuance and acceptance of bonds, financed acquisition of goods, advance receipt of amounts from installment sale of goods and services, commercial leasing and other similar transactions, including with use of financial derivatives." In turn, Article 3 of Senate Resolution 43/01 states: "Art. 3. A credit transaction, for the effects of this Resolution, is defined as a financial commitment assumed with creditors located in the country or abroad, by reason of a loan, opening of a credit facility, issuance and acceptance of bonds, financed acquisition of goods, advance receipt of amounts from installment sale of goods and services, commercial leasing and other similar transactions, including with use of financial derivatives. § 1. The following are equated with credit transactions: (Renumbered from the sole paragraph of Resolution 19 of 2003) I – advance receipt of amounts from a company in which the public administration detains, directly or indirectly, the majority of the voting capital, except for profits and dividends, as defined in legislation; II – direct assumption of a commitment, debt confession or similar transaction with a supplier of goods, merchandise or services, by issuance, acceptance or guarantee of credit instruments; III – assumption of an obligation, without budget authorization, with suppliers for a posteriori payment for goods and services. § 2. The following are not equated as credit transactions: (Included by Resolution 19 of 2003) I – assumption of an obligation between legal entities of the same state, the Federal District, or the same municipality, under the terms of the definition contained in Art. 2,

One might try to shoehorn the so-called fiscal maneuvers under the general expression other similar transactions. However, that classification is not valid, because the legal text, although containing a general clause, does not allow insertion of anything that does not have the nature of a credit transaction⁶.

Although this practice creates debts of a fiscal nature, the rule of Article 36 of the Fiscal Responsibility Law do not apply, since these debts do not result from a credit transaction, a bilateral contractual relationship calling for the financial institution to lend money or provide a credit facility in favor of the Treasury, to be repaid with interest. Instead, the debts that are created arise from default by the Treasury under a service provision agreement (for transfer of funds).

A credit transaction necessarily involves the transfer of ownership of the resources from the financial institution to the borrower, with recognition by the latter of a liability. When the borrower of a credit transaction is a governmental entity, because this involves an increase in the public debt, some requirements must be satisfied, such as previous budgetary authorization, through a specific law, with control exercised by the Senate in the case of the federal government.

In this conceptual universe, the rule on credit transactions cannot be expanded to fit any accounting liability of the public entity, such as the generation of debts to financial institutions because of default of contractual obligations, consisting of the failure to make timely transfers of funds for public banks to pay subsidies and benefits under social programs.

A credit transaction cannot be confused with the emergence of a credit resulting from a contractual breach, which obviously is not subject to the same legal restrictions. The federal government, like any other contractual party, must be held accountable for defaulting on its obligations assumed to the financial institutions with which it contracts, even when it is the controller of these institutions.

numeral I, of this Resolution; (Included by Resolution 19 of 2003) II – installment payment of existing debts to nonfinancial institutions, provided this does not imply an increase in the net consolidated debt. (Included by Resolution 19 of 2003).

6 As stated by Régis Fernandes de Oliveira in commenting on Article 36 of the LRF: “The law prohibits credit transactions. Nothing more. Hence, there is no impediment to renegotiating debts with the INSS [National Social Security Institute] or debts of the FGTS [Guarantee Fund for Time of Service]. Credit transactions are defined in Art. 29, numeral III, of the Law and do not include any debt settlements or novation that the federative entities seek to obtain. They involve taxes (or contributions) and there is no contractual act. They result from the legal obligations for their payment, so in the case of default, the governments are forbidden to engage in any bargaining to renegotiate the debt. The contrary solution would be absurd, in particular because it would fall foul of the very notion of the freedom of behavior of legal entities. The law is totally clear in vetoing excessive indebtedness, to the point of making the federative entity insolvent.”

Thus, the crucial point of the question is that the mere advance of amounts by public banks to provide cash flow under service provision agreements between the federal government and public banks, without the contracting of any credit transaction, is not subject to the legal rules on credit transactions, in particular the rule contained in Art. 36 of the Fiscal Responsibility Law.

If this were not so, it would be impossible for the federal government to contract public banks to perform any service, because a risk would always be present of default of obligations, generating a credit in favor of the bank, which would be interpreted as legally forbidden. By this reasoning, to avoid the risk of breaking the law, the federal government would only be able to contract private banks to render services, which is absurd and demonstrates the mistaken hermeneutics behind the claim that such a debt to the bank is a credit transaction.

But even if this were not the case, the fiscal maneuvers could not be classified under any of the cases of malfeasance in office of the President of the Republic for violation of the budget law, as defined in Article 85, VI, of the Constitution. The cases of malfeasance in office are typified in the Constitution and cannot be expanded, either by ordinary lawmakers or judges.

The Brazilian Constitution attributes to infra-constitutional lawmakers the task of establishing substantive and procedural laws, except in the areas reserved for the Constitution itself. Therefore, for example, an ordinary law cannot regulate procedures or competencies of the Senate or Chamber of Deputies in any way contrary to the Constitution. Likewise, the scope of impeachable offenses cannot be stretched to include crimes other than those defined in Article 85.⁷

Based on this strict constitutional typology, it must be recognized that since the Constitution only contemplates classifying violation of the budget law as malfeasance in office, then violation of Articles 35 to 37 of the Fiscal Responsibility Law cannot be construed as malfeasance.

It should be mentioned that not even Law 1,079/1950⁸, with

7 This is intuitive, as astutely argued by José Afonso da Silva: "All these crimes will be defined in specific laws, which shall establish the rules on procedure and judgment (Art. 85, sole paragraph, already existing in Law 1,079/50), naturally respecting the typical figures and substantive matters circumscribed in the numerals of Art. 85." It is thus possible to state that the crimes involving malfeasance in office are subject, in the Brazilian legal system, to a regime of strict constitutional typology, so that makers of ordinary law can only specify or detail practices that fall within the scope of the constitutional types." (emphasis added)

8 Art. 10. The following are crimes of malfeasance against the budget law: 6) to order or authorize the opening of a credit line in discordance with the limits established by the Federal Senate, without foundation in the budget law or in an allowed additional credit or without observance of a legal prescription; (Included by Law 10,028 of 2000); 7) to fail to promote or order in the form of the law the cancellation, amortization or constitution of a reserve to

the wording given to it by Law 10,028/00 (to adapt it to the Fiscal Responsibility Law (LRF) by defining budgetary crimes), establishes violation of the LRF as cause for impeachment in its Article 4, VI. These are comprehensively listed in its Article 10.

The advance payment by public banks of obligations of the federal government, even if could be construed as a credit transaction (which, as seen, is not the case), would still not be an impeachable offense. These crimes involve violation of the Annual Budget Law (“LOA”), not the LRF. The LOA contains the rules on handling all the revenues and expenditures of the federal government. Malicious violations of its provisions can, in theory, be cause for impeachment of the President for malfeasance in office. In turn, the LRF contains general rules of financial law to orient the preparation, control and oversight of the LOA, but it contains no rules about revenues and expenses. Its violation is not constitutionally or legally typified as malfeasance in office.

Likewise, it is also not possible to classify the conduct in question under items 6 to 9 of Article 10 of the Impeachment Law (Law 1,079/50), since delayed transfer of resources to pay subsidies and benefits through public banks cannot be classified under any of the conducts defined in that law, as will now be explained:

First of all, item 6 of Article 10 of the Impeachment Law punishes opening of credit lines in discordance with the limits established by the Senate or without authorization in the LOA. As seen, the delayed transfer of funds by the federal government to public banks is contractual default, and the amounts must be paid regardless of being contemplated in the budget or subject to limits set by the Senate. The funds transferred go to pay for social programs, as required by the various laws establishing those programs, besides being included in the LOA. The payment of interest as a result of contractual default results from contracts approved by the Federal Audit Tribunal (TCU) and authorized by law. According to that legal framework, a transaction cannot be carried out without support in law or by the Senate. On the contrary, the transactions result from payments that the federal government is legally required to make, which rules out application of Article 10 of Law 1,079/50.

With respect to item 7, as a consequence of what has already been demonstrated, there is no way to cogitate that measures need to

annul the effects of a credit transaction that oversteps a limit, condition or amount established in law; (Included by Law 10,028 of 2000); 8) to fail to promote or order the full settlement of a credit transaction due to advance of budgetary revenue, including the respective interest and other charges, by the end of the financial year; (Included by Law 10,028 of 2000); 9) to order or authorize, in discordance with the law, the realization of a credit transaction with any of the other entities of the Federation, including their entities of the indirect administration, even in the form of novation, refinancing or postponement of a previously contracted debt; (Included by Law 10,028 of 2000).

be taken to annul the effects of the transactions, since they have legal support, as seen.

Regarding item 8, there was no credit transaction through advance of revenue, as defined in Article 38 of the LRF. Instead, there was only use of accounts to provide supplementary cash.

The mechanism also does not fit under Article 10, item 9, of Law 1,079/50, which defines as malfeasance the opening of credit transactions by one entity of the Federation (one level of government, including a sub-entity of the indirect public administration) with another federative entity (another level of government or sub-entity thereof). This is a situation totally foreign to the transactions described in the finding of the TCU, the denunciation of the jurists in the impeachment motion or the decision of the president of the Chamber of Deputies to accept the motion, because the so-called fiscal maneuvers involve only the federal government and financial institutions controlled by it, not state and municipal governments or their entities of the indirect administration.

Therefore, it must be recognized that none of the conducts described in the finding of the Federal Audit Tribunal (TCU), in the impeachment motion or the decision of the president of the Chamber to accept it, fall under Article 10 of Law 1,079/50.

Furthermore, even if the “fiscal maneuvers” described by those who support impeachment and accepted by the president of the Chamber of Deputies could be construed as violation of the budget law, the fact is those actions occurred in 2014, during the first term of President Dilma Rousseff. Since the president of the Chamber decided to accept only the accusations involving actions in 2015, under the correct interpretation that according to Article 86, § 4, of the Constitution, the President of the Republic can only be impeached for actions during the current term (which started on January 1, 2015), the fiscal maneuvers described in the finding of the TCU recommending rejection of the executive accounts for 2014 cannot serve as the basis for the impeachment motion.

It is true that the petition for impeachment drafted by the jurists and the decision by the president of the Chamber mention in passing that the fiscal shenanigans continued in 2015. But it is obvious that mere references without any specific identification of the acts in that year cannot support any imputation of malfeasance in office, especially because the finding of the TCU, on which the conclusions of the president of the Chamber were based, make no reference to situations in 2015. For these reasons, there is no legal support for the impeachment motion with respect to the fiscal maneuvers.

3.2. The opening of supplementary credits by executive decree

Besides the fiscal maneuvers, another ground for the impeachment

motion that was accepted by the president of the Chamber involves four decrees (not numbered) issued on June 27, 2015 and two others, also not numbered, issued on August 20, 2015, to provide supplementary credits, supposedly without legal authorization.⁹

The purpose of supplementary credits is to increase budget appropriations to cover certain expenses already included in the Annual Budget Law (LOA), because of shortfalls of revenue in relation to that originally contemplated. That procedure is routine in government affairs, since the budget is only a forecast of how much will be spent in light of how much revenue is received during the year. The forecasts almost always need to be revised during budget execution, because of both fluctuations in revenue and extraordinary spending needs. For this reason, Congress, at the time of enacting the LOA, authorizes the opening of supplementary credits by presidential decree, within the limits and conditions imposed on the exercise of this prerogative.

The allegation that the issuance of those decrees was illegal and thus constitutes malfeasance in office is based on Article 4 of Law 12,952/14, the Annual Budget Law for 2014 (LOA/14), which made the opening of supplementary credits conditional on meeting the primary surplus target set in Law 12,919/13, the Budget Guidelines Law for 2014 (LDO/14). In the view of the supporters of impeachment, that primary surplus had not been attained when the decrees were issued.

9 Decree of July 27, 2015: opens in the Federal Fiscal Budget, in favor of various bodies of the Executive Branch, a supplementary credit of R\$ 29,922,832.00, to reinforce appropriations contained in the current Budget Law. Decree of July 27, 2015: opens in the Federal Fiscal Budget, in favor of various bodies of the Executive Branch, Federal Financial Charges and Refinancing of the Federal Bond Debt, a supplementary credit of R\$ 36,759,382,520.00, to reinforce appropriations contained in the current Budget Law. Decree of July 27, 2015: opens in the Federal Fiscal Budget and Federal Social Security Budget, in favor of the Ministries of Education, Social Security, Employment and Labor, and Culture, a supplementary credit of R\$ 1,701,389,028.00, to reinforce appropriations contained in the current Budget Law. Decree of July 27, 2015: opens in the Federal Fiscal Budget and Federal Social Security Budget, in favor of various bodies of the Legislative, Judicial and Executive Branches, the Federal Public Defender's Office, the Federal Prosecution Service and for Transfers to the States, Federal District and Municipalities, a supplementary credit of R\$ 1,629,519,495.00, to reinforce appropriations contained in the current Budget Law. Decree of August 20, 2015: opens in the Federal Fiscal Budget, in favor of the Ministries of Agriculture, Stockbreeding and Supply, Finance and Cities and in Federal Financial Charges, a supplementary credit of R\$ 55,237,582,569.00, to reinforce appropriations contained in the current Budget Law. Decree of August 20, 2015: opens in the Federal Fiscal Budget, in favor of the Ministries dos Transportation, National Integration and Cities and the Secretariats of Civil Aviation and Ports, a supplementary credit of R\$ 1,201,641,285.00, to reinforce appropriations contained in the current Budget Law (cited in SERRANO, Pedro Estevam Alves Pinto. Complementary Legal Opinion, available at <http://blogdotarso.com/2015/12/06/jurista-pedro-serrano-emite-parecer-contra-o-impeachment-de-dilma/>, consulted on December 7, 2015.

The great flaw in that argument is that it is improper to claim that limits in the LOA for 2014 were exceeded by supplementary credits opened in relation to the budget for 2015.

The analysis must focus on whether the opening of supplementary credits in 2015 violated the current budget law. That law (Law 13,115/15, or LOA/15), was only approved in April 2015, and contained text in its Article 4 similar to that in the same article of the LOA/14, conditioning the opening of supplementary credits to meeting the primary surplus target set for 2015, as had been defined in Law 13,080/15 (LDO/15).

In reality, what happened in both 2014 and 2015 was that the primary result targets had to be revised during the year because of revenue shortfalls in relation to what had been forecast, caused by the economic crisis. These revisions were formally authorized by law.

Those alterations in spending needs result from the characteristic of the budget directives law, which is enacted the year before that of budget execution, and generally is based on a different economic scenario than what holds sway at the time of budget execution. In short, lawmakers cannot predict next year's economic scenario with sufficient accuracy, and hence the tax revenue for the following year will often be lower than envisioned. This is the natural fruit of what has been called the risk society¹⁰, and subjects all budget forecasting to the possibility of adjustment to reality, as pointed out by Ricardo Lobo Torres¹¹ regarding the difficulties of meeting primary surplus targets due to the unpredictability that characterizes modern times:

“One of the great challenges of this turn of the century is to achieve financial stability and budgetary balance through long-range policies. Two systems point the way in this respect: that of the United States and that of New Zealand.(...)”

The reception of the New Zealand model by Brazil, through the Fiscal Responsibility Law, was based on the financial policy of Fernando Henrique Cardoso's administration, which sought to eliminate the primary deficit, without impairing payment of interest to artificially support the Real.(...)”

In any event, the objective of achieving monetary stabilization and a primary surplus was attained

10 About unpredictability in modern society, see BECK, Ulrich. Risk Society: Towards a New Modernity. New Delhi, Sage, 1986.

11 TORRES, Ricardo Lobo. Vol. V – O Orçamento na Constituição. 3rd ed. Rio de Janeiro: Renovar, 2008, pp. 447-449.

with the LRF. (...)

What characterizes the risk society is the ambivalence embedded in its rules and policies, which simultaneously bring advantages and disadvantages to citizens. From the standpoint of the law, as noted by Luhmann, the future risks are unforeseeable and against them the legal categories of validity and efficacy start to wane. The LRF does not escape this ambivalence. It exhibits, in the effort to eliminate fiscal risks, aspects of extraordinary relevance in the control of budget management and rigor in the balancing of the public accounts, while at the same time it has economic and political grounds of doubtful efficacy and difficult adaptation to our constitutional structure.”

From this unpredictability that impairs adjusting budget planning to our constitutional system comes the possibility of changing the primary fiscal target established by the budget directives law, as discussed by Régis Fernandes de Oliveira¹²:

“There can be no doubt that the Multi-Year Plan can be altered at any time, in light of new circumstances. Since it is intended to cover a period of four years in Brazilian law while the empirical world is malleable, and thus can undergo alterations, it cannot be rigid. Times change, circumstances change, situations change. (...)

The same thing applies to the Budget Directives Law. When an imperious circumstance arises, the possibility of changes that will benefit the population cannot be discarded. The end is not the law itself, nor is the law an end in itself. What matters is society, and when obstacles arise, nothing is more reasonable than to think of altering the law.”
(emphasis added)

As everyone knows, during 2014 and 2015, Brazil’s economic situation deteriorated, due to both internal causes, such as the political crisis, and international ones, such as the declining value of the country’s

12 OLIVEIRA, Régis Fernandes. Curso de Direito Financeiro, p. 362.

commodities. This led to a shortfall in tax revenue, justifying alteration of the primary fiscal target determined by the Budget Directives Laws (LDOs) for 2014 and 2015.

The automatic consequence of these legislative alterations was legitimacy to open supplementary credits by decree during the year, since the condition set forth in Article 4 of the LOA/15 for that measure (compliance with the primary target) was satisfied. In other words, because of the amendment of the Budget Directives Law (LDO), the opening of supplementary credits by decree was authorized, as set forth in the Annual Budget Law (LOA).

Therefore, the limits for funding supplementary credits established in the budget law were revised before the end of the fiscal year. The question to be posed is whether it was legally possible to allow those supplementary credits based on the new limits before approval of the law that altered the primary result target.

In an ideal world, it would obviously be advisable to wait for Congress to approve the law to alter the primary target before using the authorization contained in it to open supplementary credits. However, it is necessary to recognize the “outlines” of the dynamic adopted by lawmakers themselves in establishing an uncertain future event as a “condition” for that authorization, one whose occurrence or not can only be ascertained at the end of the fiscal year in course.

In this scenario, the operative mechanism is a condition subsequent instead of a condition precedent. Were it necessary for a condition precedent to be satisfied to authorize opening supplementary credits by decree, this authorization would never occur within the current fiscal year, which would make that mechanism for authorization granted upon the enactment of the Annual Budget Law in practice futile.

However, with a condition subsequent, it is possible to open supplementary credits by decree any time up to the condition's confirmation. In other words, the extra credits can be authorized until it is verified in the current year that the target will not be met, which normally is only possible at the end of the year. With the legislative alteration of the target, the condition is also altered, which produces effects regarding its verification at the end of the year.

According to the reasoning used by the president of the Chamber, the partial picture revealed by the bimonthly primary revenue and expenditure reports can already be used to identify satisfaction of the condition subsequent, if from them it is possible to verify that the target will not be met at the end of the year, automatically canceling the authorization to open supplementary credits by decree.

However, this reasoning is faulty, because those reports, issued according to Article 165, § 3, of the Constitution and also Article 52 of the LRF, do not have such powerful effects. Instead, their objective, in

name of the principle of transparency, is only to reveal the evolution of fiscal execution at two-month intervals during the year.

Their disclosure, although it can reveal a potential difficulty of attaining the fiscal goal at the end of the year, prodding the executive branch to take the measures necessary to resolve the mismatch between the forecast revenues and expenditures and those actually realized, does not allow a definitive conclusion that the target will not be met. In short, only after the end of the year is it possible to ascertain whether or not the primary fiscal result was achieved. And in the case at hand here, enactment of Law 13,199/15 assured the target would be met that year. The bill that led to that law, proposed by the executive branch, was based on the realization that, in light of the bimonthly reports, the forecasts in the LDO were not compatible with the performance of the Brazilian economy in the first half of 2015.

Were the contrary argument to prevail – that the bimonthly reports already indicated interim failure to meet the fiscal target, thus implying confirmation of the condition subsequent and cancellation of authorization to open supplementary credits – the executive branch would be left without instruments to react to the effects of the economic crisis. This inability to assure supplementary credits to pay entitlements under legally established social programs when revenue falls short of the forecast, thus jeopardizing the fiscal target, would make the country's financial and budgetary life unmanageable. Logically, that reasoning must be rejected because it would lead to fiscal irresponsibility.

It should be noted that with the alteration of the primary surplus by Law 13,199/15, the Congress found a solution, and altered the limit for authorizing supplementary credits also set by it. This validation of acts practiced beforehand, to adjust the condition subsequent regarding supplementary credits to the new economic reality, is fully within congressional powers.

Were this not the case, economic difficulties arising after enactment of the Budget Directives Law could never be effectively faced by the government. Instead, the shortage of revenues would leave it in a conundrum of revising priorities between meeting the primary fiscal target or honoring the expenditures established in the budget. In any event, the decision to relax the target or cut spending rests with the Congress, and this was preserved in the case at hand.

The situation of binding the executive branch to a surplus target set in another scenario, without the legislative branch having the ability to consider the matter in light of the new reality, would mean subordinating the Brazilian state to the payment of interest to the financial sector, something that obviously is not a decision that can be automatically extracted from the current legal system. In short, the Congress must have the chance to give a different solution to the problem.

As seen, the primary target was altered in 2014, with the approval of Law 12,952/14, which modified Law 12,919/13 (LDO/14), and again in 2015, since the Congress approved, on the same day the president of the Chamber accepted the impeachment motion, Bill of Law 05/15, which became Law 13,199/15, reducing the primary target set in Law 13,080/15 (LDO/15).

In this normative context, there is no way to speak of opening of supplementary credits without legal authorization in 2014. With respect to 2015, after enactment of Law 13,199/15, the same observation applies. Moreover, it is not possible before the end of the year to state whether or not the decrees that opened supplementary credits overstepped the limits authorized in the budget for that purpose, since that authorization is subject to a condition subsequent whose satisfaction can only be ascertained at the end of the year.

Finally, it should be clarified that the fact the decrees were not given numbers is legally irrelevant. This is a common practice long used for executive orders on specific matters (as opposed to normative acts), as is the case of decrees to authorize supplementary budget credits.

Therefore, the issuance of decrees in 2015 to open supplementary credits was previously authorized by Article 4 of Law 13,115/15, that year's budget law, according to the primary target set forth in Law 13,080/15 (LDO/15), with the wording given to it by Law 13,199/15. Hence, there can be no legitimate claim that the supplementary credits were opened without legal authorization.

Finally, there is no way to claim that the issuance of those decrees can be subject to Article 10, items 2 and 3, of Law 1,079/50¹³, which penalizes the conduct of exceeding or carrying over budget appropriations without legal authorization.

3.3. The jurisprudence from the federal audit tribunal, the manifestations of congress and legal security

The Prior Opinion from the TCU in TC Proceeding no. 005.335/2015-9 has a technical and legal character based on interpretation of facts and rules of financial law. It recommended rejection of the executive accounts for 2014, in particular regarding the points that gave rise to the acceptance of the impeachment motion (the fiscal maneuvers and opening of supplementary credits by decree), even though not referring to conduct during the current presidential term, so that these matters cannot be considered by Congress with respect to impeachment (as recognized by the president of the Chamber

¹³ “Art. 10. The following are crimes of malfeasance against the budgetary law: 2 – Exceeding or carrying over budgeted appropriations without legal authorization; 3 – Canceling budget appropriations;”

in accepting the motion).

However, its interpretations are the fruit of one vision of the phenomena under examination, and just like interpretations by a police authority regarding criminal matters and revenue authorities regarding tax matters, they can be subject to other views, starting with Congress, which is entrusted with approving or rejecting the executive branch's accounts, pursuant to Article 49, IX, of the Constitution.

Specifically with respect to the two points mentioned above, the Federal Audit Tribunal itself has adopted a different interpretation in other cases. Indeed, in many previous cases, when faced with the same facts and the same legal rules, it adopted a different position, urging approval of the accounts.

The contracts between the federal government and public banks containing clauses authorizing the banks to act as conduits for payment of benefits have been approved by the TCU for more than 14 years, without any caveat regarding their legitimacy. During this entire period (since 2001), this mechanism has been used by the federal government (as well as the state and municipal governments), without any finding by the TCU (or the equivalent state and municipal audit tribunals) of violation of the rules of financial law. On the contrary, the report by the TCU in TC Proceeding no. 021.643/2014-8, in item 396¹⁴, recognized that the negative balances in the transfer accounts are not characterized as credit transactions, and has no influence on the primary result.

In the same sense, TCU-Plenary Decision no. 992/2015, in item 26, also recognized the impossibility of classifying the mechanism as a credit transaction:

“However, it is necessary to observe, in fact, that it would not be reasonable to classify as credit transactions mere brief delays in transferring funds from the Treasury, contemplated and with contractually stipulated conditions, as in the case of social programs paid through Caixa Econômica Federal. (emphasis added).”

As seen, although the so-called fiscal maneuvers are a longstanding procedure in budget management, until 2014 the TCU had expressed no concerns. On the contrary, it expressly allowed the practice.

¹⁴ “396. The delay in transferring funds did not produce any impact on the fiscal result, since the liabilities generated by the referred delays are recorded in the fiscal statistics by the Economic Department of the Central Bank, meaning to say that the respective primary deficit variations are adequately reflected when determining the fiscal result. Nor were they sufficient, in the interpretation of the audit team, to configure realization of a credit transaction between the federal government and the financial institutions.” (emphasis added)

In relation to the retroactive effects of approval of an alteration of the primary target, the same phenomenon of a shift in jurisprudence occurred. During 2009, it became clear that the fiscal target established in the LDO could not be met (as happened in 2014 and 2015). So, the executive branch sent a bill to Congress to change the target, but even before it was approved on October 9, 2009 (becoming Law 12,053/09), the government started using the new target to raise the budget appropriation limits. That practice was subsequently analyzed by the TCU and considered to be legitimate, as stated on pages 80 and 82 of the Previous Report and Opinion on the Federal Executive Accounts for 2009.¹⁵

In the conclusion of that report, on p. 409, the rapporteur of the case, Judge Raimundo Carreiro, considered the procedures followed by the executive branch to be correct, without any reservations or recommendations for changes in this respect:

“The analysis leads to the conclusion that the Federal Executive Branch observed the fundamental principles of accounting applied to the public administration, that the balance sheets adequately demonstrate the financial, budgetary and equity positions of the Federal Government on December 31, 2009, and that the parameters and limits defined in the Fiscal Responsibility Law were respected, reservation only made for the following aspects:”
(emphasis added)

The same thing happened in 2010, when the primary target established in the Budget Directives Law for 2010 was found to be unattainable, prompting the executive branch to send a bill to Congress that was only approved on December 30, 2010 (Law 12,377/10). The

¹⁵ “On October 13, 2009, Art. 3 of the LDO-2009 was altered, substituting the deduction from the primary surplus related to the Pilot Project for Public Investments (PPI) by the expenditures realized under the Growth Acceleration Program (PAC), increasing the amount subject to deduction to R\$ 28.5 billion. (...) At the end of the second two-month period, a complete evaluation was conducted of all the primary revenue and obligatory expenditure items of the Federal Government. The Executive Branch sent a bill of law to Congress (Bill 15 of 2009) which proposed reduction of the target to 1.4% of GDP for the Central Government and 0.20% of GDP for Government Companies, with further proposal to exclude the Petrobras Group from the calculation of the public-sector fiscal result. Those parameters started to be applied in the twice-monthly reappraisals even before approval by Congress, which only occurred on October 9, 2009, with enactment of Law 12,053/2009. After analyzing the new projection of the items at the end of the year, combined with the alteration of the fiscal targets proposed to Congress by the Executive Branch, it turned out to be possible to expand the limits of budget appropriations and financial movements by R\$ 9.1 billion in relation to the previous evaluation, under the terms of Art. 9, § 1, of the LRF.” (emphasis added)

alteration of the target legitimized the cancellation of appropriations and opening of supplementary credits that year. The procedure was again approved by the TCU without reservations or recommendations in this respect,¹⁶ through adoption of the report of the rapporteur, Judge Aroldo Cedraz.¹⁷

Furthermore, Congress approved the accounts for 2009 and 2010, as urged by the TCU, even though decrees were issued before revision of the fiscal target that legitimized the opening of supplementary credits by decree. In 2014, the Previous Report and Opinion on the Federal Executive Accounts¹⁸ was diametrically opposed to its previous jurisprudence, urging rejection of the accounts due to the alleged existence of flagrant disrespect for the constitutional principle of legality (Article 37, main section), the budgetary rules in effect and the presuppositions of planning,

16 As stated in the Previous Report and Opinion on the Federal Executive Accounts for 2010, on pp. 73 and 74: “Subsequently, through Law 12,377/2010, the fiscal result target was reduced to 3.10% of GDP, of that 2.15% for the Fiscal Budget and Social Security Budget, and 0.95% for the Overall Expenditures Program. The nominal target for the period was also altered, which thenceforth allowed deficits of 1.28% of GDP, as was the net indebtedness target, which increased from R\$ 795.977 billion to R\$ 983.263 billion, corresponding to 27.72% of GDP. (...) According to the table under analysis, the Federal Government produced a primary fiscal surplus of 2.14% of GDP, a percentage below the target of 2.15% set for 2010. In absolute terms, considering GDP for 2010 of R\$ 3.675 trillion as disclosed by the IBGE, the primary result target to be attained was R\$ 79.011 billion. Therefore, the surplus result of R\$ 78.100 billion was about R\$ 911 million below the target. However, taking into consideration Art. 3 of the Budget Directives Law for 2010 (Law 12,017/2009), that difference can be overcome by deduction from the target of the corresponding realization, under the “cash” concept, of PAC expenditures.”

17 As stated on p. 477: “The analysis leads to the conclusion that the Federal Executive Branch observed the fundamental principles of accounting applied to the public administration, that the balance sheets adequately demonstrate the financial, budgetary and equity positions of the Federal Government on December 31, 2010, and that the parameters and limits of the Fiscal Responsibility Law were respected, reservation made for the aspects indicated in this Report.” (emphasis added)

18 The Previous Report and Opinion on the Federal Executive Accounts for 2014 stated, on p. 180: “It cannot be alleged that the supervening enactment of Law 13,053/2014, which altered the fiscal target in the LDO for 2014 on December 15, 2014, overcame the requirement to limit the budgetary and financial execution. The reason is that the situation indicating the fiscal target would not be met stressed in the Report on Evaluation of Compliance with Fiscal Targets for the 2nd Four Months of 2014 thenceforth imposed adoption of the provision of Art. 9 of the LRF, combined with Art. 51 of the LDO for 2014. That fact characterizes a situation of omission, in light of estimates that already incorporated the effects of the bill of law sent to Congress, a bill that was at that time bereft of any legal force. This situation constituted flagrant disrespect for the constitutional principle of legality enshrined in Article 37, main section, of the Constitution, the budgetary rules in effect and the presuppositions of planning, transparency and responsible fiscal management to prevent deviations able to alter the balance of the public accounts, under the terms of Article 1, § 1, of Complementary Law 101/2000.”

transparency and responsible fiscal management to prevent deviations able to alter the balance of the public accounts, under the terms of Article 1, § 1, of Complementary Law 101/2000.

As can be seen, the position of the TCU changed totally on a key point of the matter: the influence of the supervening legal modification of the primary target in relation to the practice of acts associated with budget management in the period between when the bill was sent to Congress and was approved. Until 2014, the practice of acting immediately instead of waiting for Congress to approve the bill was accepted, without any reservation or recommendation. This gave all those involved in budget execution certainty that the practice was accepted by the TCU. To the general surprise, it took a diametrically opposed position in 2014.

Obviously, oversight authorities can change their interpretation of the rules, in name of better control over the public accounts. That jurisprudential evolution is also common by the judicial courts.

However, the new legal criteria utilized in interpreting facts and rules should only produce effects for the future, so as to respect legal security and protect legitimate confidence, as stressed by Ricardo Ribeiro Lodi¹⁹, based on the writings of Klaus Tipke, Garcia Novoa, Robert Alexy and Hartmut Maurer:

The State must guarantee legal security to citizens regarding the effects of the acts practiced by them according to the orientation given not only by the executive branch, but also the judicial branch, especially with respect to the jurisprudence from the highest courts. Although the effect of a judicial decision is, as a rule,²⁰ binding on only the parties to the case, the judicial orientation, once established in steady and consolidated form, winds up instilling an element of trust in citizens,²¹ who act according to the judicial orientation given by the precedent.²²

19 RIBEIRO, Ricardo Lodi. A Segurança Jurídica do Contribuinte – Legalidade, Não Surpresa e Proteção à Confiança Legítima. Rio de Janeiro: Lumen Juris, 2008, pp. 239-240.

20 Except in cases decided involving concentrated control of constitutionality, as per Art. 27 of Law 9,868/99, and those where the position of the Supreme Court has been consolidated with issuance of a binding precedent, under the terms of Art. 103-A of the Constitution, included by Constitutional Amendment 45/04.

21 TIPKE, Klaus. La retroactividad en Derecho Tributario, p. 354; GARCIA NOVOA, César. La Devolución de Ingresos Tributarios Indebidos. Madrid: Marcial Pons, 1993, p. 205.

22 For Alexy, the binding force of precedents derives from three reasons: predictability, protection of trust and equal treatment of similar cases. (ALEXY, Robert. La Institucionalización de la Justicia. Translated by José Antonio Seoane, Eduardo Roberto Sodero and Pablo Rodríguez.

On the other hand, the principle of protection of legitimate trust cannot prevent the jurisprudence of the courts from evolving according to new social facts and the development of the science of the law. But it is correct to assume that, in name of legal security, large jurisprudential ruptures only can produce effects in the future.²³

In the case here, the decisions of the TCU and of Congress in judging the executive accounts, and more so of the Chamber of Deputies and the Senate regarding the admissibility and judgment of the impeachment process, must also be based on protection of legitimate trust. And when the presidential mandate is in play, it is essential not only to observe legal security under an individual prism, but also to consider democracy and respect for the will of the majority of voters expressed in elections.

Also for these reasons associated with legal security and democracy, the so-called fiscal maneuvers and the approval of supplementary credits according to the new fiscal target cannot be utilized to configure malfeasance in office of the President of the Republic.

3.4. As financial nonconformities and typification of malfeasance in office

Even if the conclusions of the Federal Audit Tribunal for rejection of the executive accounts were correct, which is only mentioned for argument's sake, there was no nonconformity of the presidential actions with the budget law to configure the malfeasance in office established in one of the items of Article 10 of Law 1,079/50. As stated by Ricardo Lobo Torres²⁴, the principles associated with budget control must be weighed against others that govern the actions of the President of the Republic:

“The principle of balance has high relevance on the matter of the budget, since it permits weighing all the other legal principles pertaining to the ways and means law, both the underlying principles and those related to the ideas of freedom, justice and legal security. The principle of balance leads to choosing the principles that must prevail in light of urgent social interests, both at the moment of preparing the

Granada: Comares, 2005, p. 85).

23 MAURER, Hartmut. Elementos de Direito Administrativo Alemão, p. 81.

24 TORRES, Ricardo Lobo. Vol. V – O Orçamento na Constituição. 3rd ed. Rio de Janeiro: Renovar, 2008, p. 202.

budget and allocating funds and during the phase of discretionary management and control of budget execution.

In this respect, a certain flexibility in execution of the budget in relation to the original forecast is justified, to assure continuity of public policies, notably those aimed at the neediest people in a scenario of economic difficulty. This applies both to the executive and legislative branches, as observed by Régis Fernandes de Oliveira²⁵:

“It is important to attribute to agents instruments for flexibility in the use of public funds, to allow them to redirect allocations, facilitate tenders, alter expenditures, etc., all to attain the desired goal.

Obviously all must be subject to hierarchical control or it will be the exclusive responsibility of those tasked with managing the funds allotted to the program. What does not make sense is to attribute a purpose, appropriate funds and then restrict the actions of the agents. Trust must be placed in them to properly manage the available resources, while at the same time, not forgoing the control mechanisms. ”

In line with this flexibility, it is legitimate for the President of the Republic to seek alternatives, in the face of economic difficulties, to protect the continuity of social programs through mechanisms already used by past administrations through procedures approved by the Federal Audit Tribunal. One of these mechanisms is the opening of supplementary credits, which is justified because it is more important to continue paying social benefits than to generate fiscal surpluses. This has always been recognized as legitimate by the TCU and Congress. Otherwise, Law 13,199/15 would not have been approved.

Therefore, these practices cannot be classified as budgetary malfeasance, because the risks of not using them in 2015 would have placed severe constraints on the public finances. Furthermore, malfeasance in office requires malice aforethought to violate the budget law, which in the present case did not occur, because the President reasonably relied on the precedents from the TCU and Congress allowing those practices.

²⁵ OLIVEIRA, Regis Fernandes de. Curso de direito financeiro. 7th ed. São Paulo: Revista dos Tribunais. 2015, p. 685.

A president cannot be accused of malfeasance in office for making decisions to try to overcome difficult problems. Without the advance payment of social benefits by the public banks, would those obligations to the public have been met? The answer is no: without modification of the primary target and reallocation of budget rubrics with opening of supplementary credits, a series of legally authorized and required expenditures would likely not have been paid. The decisions on these matters are entrusted to the President of the Republic together with Congress, based on the best judgment of the balance of risks at the time. Wrong or right from a political or economic standpoint, the measures had legal support from precedents from the TCU and Congress.

Furthermore, the decision by the president of the Chamber did not refer to any indication of personal benefit or favoritism of other parties in the conduct imputed to the President of the Republic, which also impedes characterization as malfeasance in office.

Precaution must be taken regarding the admission and judgment of the impeachment motion, so as not to annul the popular manifestation of the Brazilian people at the polls due to an accounting technicality, common in managing the country's budget.

In light of all the observations above, we can conclude that:

a) The so-called fiscal maneuvers, defined as the delay in transferring funds from the Treasury to public banks for payment of social benefits and entitlements, under a service provision arrangement between these institutions and the federal government, cannot be classified as credit transactions, so they are not forbidden by Article 36 of the LRF.

b) Violation of the LRF cannot be classified as an impeachable offense for violation of a budget law, because neither the Constitution of 1988 nor Law 1,079/50 (in both cases as amended) contains any provision that violation of the Fiscal Responsibility Law can be construed as malfeasance in office.

c) Article 10 of Law 1,079/50 does not describe any conduct that can cover the facts narrated in the Opinion of the Federal Audit Tribunal (TCU), the impeachment complaint or the decision of the president of the Chamber to accept it.

d) It is not possible to prosecute the President of the Republic for acts supposedly committed before the start of her current term, on January 1, 2015. Therefore, the acts described in the Prior Opinion from the TCU, issued as part of TC Proceeding no. 005.335/2015-9, urging rejection of the executive accounts

for 2014, do not serve to support an impeachment proceeding.

e) The opening of supplementary credits was authorized by Article 4 of the Annual Budget Law for 2015, as amended regarding the primary target by Law 13,199/15, so there can be no claim that these credits were supplied without legal support.

f) The procedures imputed to President Dilma Rousseff in 2015 are supported by the jurisprudence from the TCU established up to 2014, and the interpretations were approved by Congress.

g) The modification of the criteria for interpretation of financial laws and the facts by the TCU and Congress can only have future effects, under pain of violating protection of legitimate trust, legal security and democracy.

h) Not just any violation of the budget law can be grounds for impeachment. The budgetary principles must be weighed against others, such as the need for continuity of public services, and the risks of government bankruptcy.

i) There are no legal reasons for admissibility of the impeachment motion by the president of the Chamber of Deputies.

4. THE ABUSES AND INJURIES TO THE CONSTITUTION COMMITTED BY BRAZILIAN COURTS: THE JUDICIALIZATION OF POLITICS AND “ACTIVIST JUDGES”

The intense demand and evident growth of mechanisms for “control” and “punishment” in the political world, headed by the judicial branch under the aegis of judicial activism, under the argument of fighting ethical deviations of political agents, has in reality become “judicialization of politics”, a proactive stance by the courts in performing their functions that improperly interferes in elections and the political actions of the other branches of government.

That reality has a negative repercussion on judicial activity, by creating the dangerous possibility of politicization of the judicial function, as recognized by the Portuguese professor Boaventura de Souza Santos in asserting that “the judicialization of politics leads to the politicization of justice.”

A derivation of this way of acting, particularly present in the pre-electoral period, is what can be called the “judicialization of the electoral and political process”, consisting of the excessive interference

of the judiciary in political activity.

This causes an undesirable state of ongoing political control by the courts, which should not be protagonists in the political process by improperly interfering in the democratic playing field.

Instead, the courts should only assure the legality and serenity of the natural political conflicts of the democratic process, because political activity should not be constrained, only modulated.

This situation is aggravated by the unconscious psychological factors, which are part of the personality of any person and influence the formation of critical judgment. When these factors prevail, notably ideological leanings, the judge's impartiality is impaired, regardless of his or her will. In this sense, knowledge of the subconscious psychological factors of the judge is essential for the judge to control these inclinations and with this preserve the maximum impartiality at the time of judging.

A related trend of concern is the intense mediatization of the natural disputatiousness of human relations. Sectors of the judicial branch, besides acting as protagonists of the political process at any price, including committing serious constitutional violations, have been swayed by media manifestations of popular commotion and the perceived need to satisfy the anxieties of a society controlled by the dictates of the communications media, spokesmen of the elites in Brazil, with the objective of purging from public life people seen as undesirable and unworthy of political office.

Even in the twenty-first century, an attempt exists to implement a "punitive society", fruit of a transnational political project that resorts to coercive legislation and police tactics to disperse or repress any opposition to the power of corporations, suppressing political dissent for the purpose of solidifying the neoliberal project. The fascism that emerges today is not political, but rather social, and coexists with a weak democracy, to paraphrase Boaventura de Souza Santos.

In this respect, it is important to outline the relations between the modern reality of criminalization of politicians in Brazil, representatives of the people, elected by popular vote, and the effects of a progressive weakening of fundamental rights, notably observed in the constant and terrifying relaxation of constitutional rights. This is the case of suppression of political rights, which are a subtype of human rights, as well as the sapping of fundamental rights to protecting citizens from criminal prosecution.

The effects of punitivism in electoral legislation, for example, relying on worrying theoretical support, are highly evident today. The spreading criminalization of politicians is most often presented in veiled form, as if this did not in reality involve a problem of criminality.

An ascending role can be observed of penal policy in politics,

oriented toward imprisonment, punishment and extirpation of constitutional rights through interpretive flexibility resulting from the phenomenon of pre-comprehension of the interpreter. Here mention should be made of the important teachings for constitutional hermeneutics of Konrad Hesse, in his work *Escritos de Derecho Constitucional*.

In this sense, any reflection that contests the criminological credo of the media discourse must be ignored or hidden from the public at large, the telespectators.²⁶

Foucault, in *Discipline and Punish: The Birth of the Prison*, teaches that the threat of prison is a versatile force that needs to be given a leading place in the study of contemporary power. For this reason, the idea of consolidation of discipline and punishment is found in various governmental entities, including in the motivation of members of the judicial branch who embrace the “judicialization of politics”

A parody can be made between the Foucaultian “discipline and punish” and “judge and punish”, critical of the action of the judicial branch in the administration of the “punitive machinery of the state”, with emphasis, as stated by Foucault, on the role of the prison in the society of discipline and control.

A distinction exists between judicial activism and judicialization of politics. The constitutional interpretation has been gradually providing more space, in Brazil as well as other countries, for judicial activism and consequently broader interpretations of the Constitution, as asserted by Pier Paolo Portinaro²⁷.

This situation of greater engagement of judges through judicial activism unleashes consequences for the constitutional role of the division of powers and in the materialization of the principle of legal security, raising concerns regarding the guidelines of hermeneutic processes.

Our objective is not to criticize judicial activism, but to find objective boundaries, limits to the actions of the judicial branch, because in the final analysis “who controls the controllers?”²⁸ if this dimension does not have appropriate parameters.

A critical analysis is needed of judicial activism and its distortion into judicialization of politics in constitutional matters. In this respect, it is enlightening to study the dichotomy seen between moderate political positivism, along the lines of Norberto Bobbio, and the post-positivist musings of these days, which in reality are anti-positivist. In the line

26 Op.Cit., p.6.

27 In his text “Beyond the Rule of Law: Judges’ Tyranny or Lawyers’ Anarchy?” in Pietro Costa and Daniel Zolo (Org), *The Rule of Law History, Theory and Criticism*. Springer Netherlands, 2007.

28 A classic question posed by Professor Celso Lafer on the matter, making reference to the work of Mireille Delmas-Marty, *La Refondation des Pouvoirs*, Paris: Seuil, 2007, in particular pp.38, 41-43 and 67.

advocating the moderate positivism of Bobbio, supported by the modern theory of interpretation, one can find Emilio Betti and Hans-Georg Gadamer, who methodologically allow the interaction between principles and rules.

The analysis of this problem implies considering the constitutional division of powers, as already stated, and the need to discern between the moment of the legislation and the moment of its application by the courts, eliminating the theses that defend a judicial activism that confers an elastic and subjective competence on the judge-interpreter, for the purpose of clarifying the *mens legis* of the tenets inserted in the Brazilian Constitution. The courts these days are stretching the interpretation far beyond what the Constitution establishes, at times contradicting its tenets.²⁹

On the contrary, value must be given to legal guarantism, an expression of the principle of legality, in matters of constitutional interpretation, because this is isolated from political value judgments, expressed in interpretations swayed by ideology and the axiological heritage of the judge at the moment of deciding.

Besides this, one cannot disregard the unconscious psychological factors and the necessary observance of the personal axiological background of the judge in constructing the decision.

For this challenge, we use as a paradigm the doctrine of Konrad Hesse regarding the pre-comprehension of the interpreter. According to this framing, there are no “aseptic” interpretations, not influenced by axiological or psychological elements, and political ideology is probably one of the strongest elements compromising the interpretation.

Obviously, all legal rules require an interpretation. Lawmakers present an “ascetic language”. For this reason, the judge, in applying the law, has the task of giving life to the rules. In analyzing the problem of constitutional hermeneutics, three guideposts are fundamental for the proper comprehension of the rules. They are the text itself (the corpus of the rules), the interpreter (and consequently his or her personal heritage), and the interpretation.

One must also consider that constitutional interpretation has a particular profile, because of its ideological content. Therefore, the central activity of applying the rule rests in the interpretation, with the interpreter being responsible for the real content of the rule.

Since the problem of constitutional interpretation is essentially a question of a political nature, because it seeks to correlate changes in scenario with guaranteed political rights, it is necessary to limit and coordinate the exercise of this political power, this being the

29 Norberto Bobbio, *Contribución a la Teoría de Derecho*, org. Alfonso Ruiz Miguel, Valencia: Fernando Torres Ed., 1980, “Formalismo Jurídico e Formalismo Ético”, p.105-117.

fundamental reason for having constitutional texts³⁰. Meirelles Teixeira says it is important that: “the Constitution be known not only in its letter, but also its spirit.”³¹

In this sense, the importance of constitutional interpretation is fundamental, given the open, vague and multiple meanings of many of its rules³². Besides this, through interpretation it is possible to know the “intimate meanings of a Constitution.”³³

With respect to constitutional hermeneutics, the American doctrine customarily distinguishes interpretation from construction.

For constitutional law, then, the importance of interpretation is fundamental because of the multiple meanings that can be assigned to its rules³⁴. On this matter, Ferrara believes that the interpreter’s mission is to search for the real content of the rule, since “the law does not contain unnecessary words.”

In this sense, the object of the interpretation is the will of the law, autonomous, not the will of the framers, much less the applier of the rule. This analysis allows a certain degree of leeway for the judge to interpret, but without inventing rules, taking the place of the framers. Kelsen states, in turn, that the judge may not create rules, but can create rights.

In various European countries in recent times it has been possible to observe the trajectory of constitutional jurisdictions, notably in the controversies produced by the so-called “interpretative verdicts”³⁵.

On this matter, Konrad Hesse makes an important contribution with the formulation of his famous thesis *The Normative Force of the Constitution*. The renowned author, professor and judge of the Federal Constitutional Court of Germany, a disciple of Smend, demonstrated his intention to succeed in the academic attempt to offer a balance able to avoid sacrificing the normative dimension of the Constitution in face of the contingencies of real life.

Hesse stresses, among the conditions that enable reaching a balance that preserves the normative dimension, the will of the Constitution, meaning an alternative in face of the mere will of power or formal and abstract normativity bereft of the volitive element. He further points out that the so-called will of the Constitution is based on three ideas: the conviction of the need for an objective and stable

30 Celso Ribeiro Bastos, *Interpretação e Aplicabilidade das Normas Constitucionais*, p. 16.

31 Meirelles Teixeira, *Curso de Direito Constitucional*, p. 266.

32 Paulo Ricardo Schier, *Filtragem Constitucional - construindo uma nova dogmática jurídica*, p. 113.

33 Meirelles Teixeira, *Curso de Direito Constitucional*, p. 266.

34 Paulo Ricardo Schier, *Filtragem Constitucional - construindo uma nova dogmática jurídica*, p. 113.

35 These are verdicts that determine or express, depending on the sense in which these are employed, constitutionality or unconstitutionality.

legal order, as a guarantee against arbitrariness and excesses of power in general; the belief in the importance of an order whose normative value does not depend exclusively on rationality; and the importance of acts of human will directed to the realization of the Constitution³⁶.

Hesse's contributions are of great help in the task of attaining a correct focus regarding constitutional interpretation. Nor does that process lack concrete and objective conditions from the historical framework to delineate the context of legitimacy in which constitutional legality operates, i.e., constitutional hermeneutics, far from being exhausted in the mere logical subjection or conceptual formulation, imposes the firm will of the interpreter with the purpose of realizing the constitutional objectives.³⁷

Hans-Georg Gadamer and Emilio Betti try specifically to detect this common universe, that of the intersection. They seek the meaning of the projection of the main factors that connote the distinct interpretive processes in the constitutional universe as well as the consequences of the main hermeneutical theories in this respect.

Today, the hermeneutics of interpretation is understood as a process of comprehension of meaning, including understanding of the text with the role played by the interpreter and his or her personal background in the composition and construction of the interpretation³⁸. It is necessary to invoke, in understanding the meaning of the words that integrate the text, the context in which they were written. Besides the question of analyzing the context, modern hermeneutics also deals with the problem of the interpreter's pre-comprehension, which Gadamer calls the "interpreter's prejudices".³⁹

For Gadamer, the comprehension of a text is similar to a dialog, which can only occur between people who speak the same language, or at least know the signs of the language in question.⁴⁰

In this sense, Pérez Luño stresses the importance of the tradition that resides in the community about the experience of each person in composing the common language, permitting inter-subjective communication in the community engaging in dialog.⁴¹

In the universe of constitutional methodology, hermeneutics has meant new attention to the pre-comprehensive structure of interpretation of the law combined with its historical conditions.⁴² Therefore, jurists

36 Ibidem

37 Op. cit., p. 254.

38 Maria Garcia, for example.

39 Antônio E. Pérez Luño, *Derechos Humanos, Estado de Derecho y Constitución*, p. 264.

40 Ibidem.

41 The comprehension of a text is not possible without considering the historical connection between the subject and the object of the interpretation.

42 Antônio E. Pérez Luño, *Derechos Humanos, Estado de Derecho y Constitución*, p. 264.

cannot interpret rules without being aware of the concrete situation in which they are inserted. In this form, the constitutional interpreter acts as a mediator between the normative text as promulgated and the demands of the present situation, engaging in a practical-normative activity that establishes a continuity between the moment of promulgation and the moment of application.⁴³

Therefore it must be concluded that the materialization of the constitutional rule cannot be bereft of analysis of the pre-comprehension of the interpreter, based on his or her experiences knowledge and prejudices resulting from the historical conjuncture. Likewise, the task of materialization and comprehension of the constitutional rule is impossible without considering the real problems.⁴⁴

Scientific purity requires excluding any question about the legitimacy and the justice of laws⁴⁵. On the other hand, the law is ideological to the extent it conceals the sense of the structural relations established among subjects, for the purpose of reproducing the mechanisms of social hegemony.⁴⁶

Therefore, Luís Roberto Barroso argues that “the belief is false that the law is a politically neutral domain,” because jurists only manage to formulate a “discourse that conceals the functions and functioning of the law in society.” Therefore, the so-called critical theory of the law aims to “revise the traditional concept of the legal science, demonstrating how starting from a discourse organized in name of the truth and objectivity, it is possible to deviate from the socio-political conflicts that are present in the individual relations that can be harmonized by the law.”⁴⁷

Joseph William Singer, writing about the American version of the critical legal studies movements, states that:

“The law is not apolitical and objective: lawyers, judges and scholars make highly controversial

43 Op. cit., p. 265.

44 Ibidem.

45 André Franco Montoro cites Del Vecchio to affirm that “the notion of fairness is the cornerstone of the legal edifice.” Therefore, the law does not exist without the notion of justice.

46 Luís Alberto Warat, *A produção crítica do saber jurídico*, for example.

47 Ibidem. Luís Roberto Barroso states in this respect:

“The critical theory of the law is eminently interdisciplinary. It is realized through a discourse of intersection, involving multiple bodies of knowledge: those accumulated by legal thinking over the centuries and those of other fields, such as linguistics, sociology, political economy, social psychology, anthropology, history and psychoanalysis. From an even more philosophical and profound perspective, it exhibits the influence of the philosophers of the so-called Neo-Marxist school of Frankfurt, which includes Max Horkheimer, Herbert Marcuse and Theodor Adorno. Also in the picture are the works on hermeneutics developed by Jürgen Habermas, Hans-Georg Gadamer and Paul Ricoeur, on the role of the interpreter and the indeterminacy of texts.”

political choices, but use the ideology of legal reasoning to make our institutions appear natural and our rules neutral.”⁴⁸

If the legal interpretation is a practical activity that seeks to achieve certain goals, the ideological horizon is a substantial element of any hermeneutical process, consciously or not⁴⁹. This matter is not recent. The ideological function of interpretation and its consequences have been the focus of constant reflections.

But what we intend to demonstrate on this point is that the alternative use of the law does not necessarily imply a progressive legal posture.

The Constitution, as expressed by Hesse, is not only an expression. of being (Sein), but also an expression. of duty (Sollen), since it “seeks to impress order and conformity on political and social reality.”⁵⁰ Therefore, for Hesse the activity of interpretation consists of expressing the constitutionally correct result, through a rational and controllable procedure, also rationally grounded and controllable, that enables the creation of a relative certainty and legal predictability⁵¹.

The legal world is being overwhelmed in the criminal sphere by the conservative credo of locking up miscreants en masse, while in the political sphere the equivalent is the penalty of ineligibility to hold office, particularly affecting the representatives of the less favored classes, amounting to their “banishment from the political world”, condemning them to political invisibility, the cruelest punishment that can be meted out to a politician.⁵²

A significant portion of the communications media has been increasingly relying on revelations of “misdeeds” obtained from dubious sources to discredit distasteful candidates, with no concern for the truth of the accusations.

These fallacious news stories, whose dissemination does not fall under the constitutional right of expression, are particularly destructive when they come on the eve of the election, not giving the accused candidate a chance to defend him or herself.

48 Luís Roberto Barroso, *Interpretação e Aplicação da Constituição*, p. 268, citing Joseph William Singer, “The player and the cards: nihilism and legal theory”, in *Yale Law Journal*, passim.

49 According to Antônio E. Pérez Luño, this theme was addressed at a congress held in Catania, in May 1972, about “The Alternative Use of the Law”.

50 Ibid.

51 Paulo Ricardo Schier, “Filtragem Constitucional - Construindo uma nova dogmática jurídica”, p. 113, in Konrad Hesse, *Escritos de Derecho Constitucional*, p. 104.

52 As previously mentioned, Complementary Law 135/2010, which amended the Statute of Political Ineligibility (Complementary Law 64/1990), established eight years of ineligibility to hold elected office, a period that can be considered, in most cases, a political death penalty.

This is not an argument to limit the freedom of information, nor the constitutional right to criticize. Experienced politicians know this is part of the democratic game and bear with resignation and restraint the personal bruises of public life and electoral disputes. Our protest is against cases that extrapolate the exercise of the democratic freedom of expression and the constitutional right to criticize.

Hence, there is a need for limits on the revelation of information that is known to be untrue or constitutionally protected by the right of privacy, something that unfortunately is becoming ever more common in our society.

The press has attained huge autonomy in contemporary society, to the point of exercising strong social power, often making citizens hostages to rather than receivers of information. Therefore, it is necessary to defend not just the freedom of the press, but also the freedom from the press.

The so-called “fourth power”, to paraphrase Norberto Bobbio in his work *Dicionário de Política*, is composed of information media that play a determining function in the politicization of public opinion. In constitutional democracies, the press has the ability to exercise critical control over the three governmental powers: legislative, executive and judicial.

Therefore, when a citizen goes to court to obtain redress for the publication of a lie or information protected by the constitutional right of privacy, this does not involve freedom of the press, but rather protection of civil rights.

On the one hand, society needs a press that is dignified, precise, honest, clear and objective. On the other hand, it is uncontestable that some “media barons”, only worried about the profits to be had from sensationalism, in particular electoral sensationalism, confuse freedom of the press, constitutionally protected, with the “freedom to print”, i.e., the possibility of publishing everything that is beneficial to them, whether from a political or economic standpoint.

The freedom of the press is not absolute or unlimited, because it does not extend to spreading untrue information, as specified in the constitutional text. Insisting that the press is totally free, without exceptions, does violence to the state of law.

It is no easy task to ascertain whether or not freedom of the press is exercised abusively. A good general framework can be gained from various opinions of Judge Nancy Andrichi⁵³, such as the following one:

“The freedom of information must pay heed to the duty of veracity, because disclosing false data

53 She is a member of the Superior Tribunal de Justiça (STJ), the highest court for non-constitutional matters, with responsibility for harmonizing interpretation of federal law by the state and regional federal courts of appeal.

manipulates instead of forming public opinion.”

Vital Moreira, in a monograph⁵⁴, expresses various conceptions that aim to justify, in doctrine and dogma, the right of response, while warning about the insufficiency of a “unifunctional explanation”, because the right of reply serves multiple functions: (a) the right to reply as “defense of the rights of personhood”, (b) the right to reply as an “individual right to express an opinion”, (c) the right to reply as an “instrument of informative pluralism”, (d) the right to reply as a “duty of truth of the press”; and finally (e) the right to reply as “a form of ‘sui generis’ sanction, or monetary compensation for slander.”

The American Convention on Human Rights, better known as the “Pact of San Jose, Costa Rica”, in its Article 14, recognizes that all persons who feel attacked by untrue or offensive information disseminated by the media have the right to reply and correction⁵⁵.

However, it is rare for the media to give equal time to reply, instead trying to destroy the public careers of those who participate in the political universe, by omitting or distorting information when not spreading outright falsehoods.

In this respect, it is worth recalling the figure of Homo Sacer, developed in the work of Giorgio Agamben, an enigmatic figure brought from Roman criminal law, a person who is banned and may be killed by anybody but may not be sacrificed in a religious ritual.

That attitude has prompted a counter-reaction by defenders of the democratic credo, who advocate legality and dedicate their academic efforts to sustain the inexistence of “aseptic” interpretations, not influenced by axiological and psychological elements. In this respect, political ideology and interests are among the strongest elements of interpretation. In Brazil, that dichotomy is aggravated by the fact that the judgments of the Supreme Court are televised.

“Media prejudgments” are constant in Brazil. On one side, society needs a press that is dignified, honest, clear and objective, while

54 MOREIRA, Vital. O Direito de Resposta na Comunicação Social, item n. 2.6, 1994, Coimbra: Coimbra Editora, pp. 24-32.

55 “Article 14 – Right of Reply:

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.
2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.
3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.

on the other some media barons are only interested in profiting from electoral sensationalism, confusing freedom of the press, constitutionally protected, with “freedom to print”, the possibility of printing anything of interest to them, from a political standpoint, and mainly an economic one.

The injurious and politically manipulated acts of the communication media provoke public mockery of people, without giving them a fair chance to defend themselves, in effect denying them of the constitutional right of due legal process.

In face of the current situation of constant criminalization of politicians and progressive disrespect for fundamental rights, notably observed in the odious relaxation of constitutional rights, as in the case of suppression of political rights (a type of human rights), it is necessary to strengthen constitutional legality to maintain the democratic order.

There are many differences between judicial activism and judicialization of politics. In particular, the latter sins by invading the competencies of the other two branches of government, injuring the principle of representation and popular sovereignty and dangerously flirting with politicization of the courts.

Besides this, there is evidence of political bias of judges, as seen by their ideological verdicts, revealing the aspirations and desires of social classes in conflict. This absence of impartiality of judgments in the political-electoral universe is an ailment that can only be attenuated, but not banished, through multidisciplinary self-reflection by judges.

5. THE DANGER OF INSTITUTIONAL RUPTURE AND THE DEFENSE OF DEMOCRACY

Brazilian democracy is very fragile at this moment, requiring proactive defense of the Constitution and the rule of law. Powerful internal and external forces, upset with the social and economic policies followed, have started to execute a process to destabilize the country, with the clear objective to recover the power they used to hold in the country.

This destabilization process has arrived at a crucial moment, because the democratic freedoms and fundamental rights assured by the Constitution of 1988 are under threat from the serious institutional crisis that has been created.

This is a serious step backwards from the democratic legitimacy and normality that was reestablished after the more than two decades of military dictatorship and human rights violations that victimized Brazil until 1985.

This defense of democracy does not mean those who have committed transgressions should not be held accountable. But in name of punishing wrongdoers, the Brazilian Constitution cannot be torn up; the fundamental rights of citizens cannot be left by the wayside

and replaced by guidelines imposed by elites, notably those defeated democratically in recent national elections in which the principle of the rule of law was strictly observed. In particular, the institutional rupture cannot be permitted of removing a chief executive from power in name of conducts of other people, not only those forming her support base (her own party and those of the broad governing coalition), but also her adversaries, many of whom are also being investigated, although protected by the nation's television networks, which flagrantly manipulate information and even present information that is demonstrably false in their pyrotechnic efforts.

For that reason, many intellectuals, of all parties and political ideologies, including noted adversaries of the governing coalition, have begun to protest against the impeachment drive, not only in academic and cultural institutions, but also in the streets, in defense of the Constitution and Brazilian democracy.

However, stronger vigilance is necessary, because powerful groups are working behind the scenes to stir up the "masses" with incitements of hate, trying to create violence to justify repression. Brazilian institutions, still relatively solid, need to rise to the occasion and play a decisive role in defending democracy. This is especially true the Supreme Court, which needs to be aware of the imminent danger of legal disorder and breach of the legal hierarchy, evils provoked by the excesses committed by some members of the bench, who appear to be committed to the demands of political groups, including disrespecting the Judgeship Law, which forbids political militancy by judges. Some have gone so far as posting in social networks their own photographs taken at political protests against defendants they will soon be called on to judge.

For these reasons, those who want to preserve Brazilian democracy need to make a herculean effort to overcome the danger of breaching the democratic system, including countering the propaganda disseminated by some extreme conservative sectors that even want closure of Congress and return to dictatorship.

Against this backdrop of discord caused by the protests for and against impeachment, marked by intolerance and lack of legal and political enlightenment, the essence of the legal question involving impeachment has largely been overlooked, namely the fundamental difference between presidentialism and parliamentarianism.

In presidentialism, the figures of the head of government and chief of state are unified in the same person, while in parliamentarianism these functions are exercised by different people.

The head of government in parliamentarianism exercises functions equivalent to those of the president in setting policy and administration of government, while the chief of state in most cases

basically has ceremonial duties.

More importantly for the discussion here, parliamentarianism has the mechanism of the no-confidence vote, by which the prime minister can be removed just by losing the confidence of the parliament. Therefore, if a grave crisis or other reason erodes lawmakers' support, they can remove the head of government and replace him or her with someone else (chosen depending on the rules of the country in question).

In this case, when the president is found guilty of an impeachable crime, as opposed to mere political discontent, he or she is removed and replaced by the vice president, while the members of the legislature keep their seats.

So, popular discontent over economic policies and/or performance, or loss of majority support in the legislature, does not serve as reason for impeachment. In parliamentarianism, many causes can lead to a no-confidence vote, but in presidentialism the rules of the game are different. When an attempt to remove the president is based on accusations not involving malfeasance in office, then that effort can be described as a coup attempt.

In Brazil, the impeachable crimes are those comprehensively set forth in the Constitution and the Impeachment Law (Law 1,079/50), without leeway for expansive interpretation or reasoning by analogy. Therefore, a vote in Congress to impeach the President of the Republic without proof of the occurrence of malfeasance in office would be unconstitutional. As a logical corollary, the Supreme Court has the duty, as guardian of the Constitution, to nullify any impeachment motion accepted by the Chamber of Deputies and/or approved by the Senate in a formal guilty verdict, based on conduct other than defined as an impeachable crime.

This question has largely been ignored by the media and by public discussion during this incredible and torturous impeachment process against President Dilma Rousseff. As demonstrated, she has done nothing that can be described as an impeachable offense, either in the Constitution or the Impeachment Law.

Hence, the Supreme Court has the constitutional duty to invalidate the impeachment motion now under consideration in the Chamber of Deputies, due to the absence of the substantive requirements for acceptance of the request.

Both the jurisprudence from the Supreme Court and the Impeachment Law and Constitution make it clear that the President can only be removed for criminal malfeasance in office. As any other crime, impeachable crimes must be interpreted literally. In the matter of criminal prosecution, there is no room for *in malam partem* analogy (to the detriment of the accused).

This does not mean that an impeachment request does not have

political content as well. But above all it is a legal procedure and must be treated with the necessary rigor, especially by strict observance of the constitutional dictates.

No evidence has been presented that the President was aware of any illegal acts, and (deliberately and maliciously) failed to intervene, much less that she ordered such acts. The mechanism of strict liability (regardless of gross negligence or intent) does not exist in criminal law as it does in some civil matters.

In the case now ongoing, only violation of rules in the budget law, as narrowly and comprehensively typified in Law 1,079/50 as crimes of malfeasance, can support the impeachment motion.

Congressional discontent, giving rise to “hermeneutical alchemy”, is not enough to configure malfeasance in office, so that the impeachment drive as framed now can only be described as an attempted coup d’état.

Obviously, the judgment of merit regarding whether or not the President committed a crime classified as impeachable rests with the Senate. But this does not mean that in Brazil’s democratic system it is possible for Congress to redefine what is and is not an impeachable offense, just by “political will”. Therefore, without causing a flagrant rupture of the democratic order, the Senate cannot vote to remove the President for acts that are not impeachable, nor can the Chamber of Deputies vote to approve the impeachment motion and send the accusation to the Senate for judgment.

As the guardian of the Constitution, the Supreme Court has the duty to prevent the Chamber of Deputies from voting on the impeachment motion, or to declare the nullity of any guilty verdict reached by the Senate, for lack of any impeachable crime. Otherwise, the impeachment mechanism will become equivalent to the no-confidence mechanism in parliamentary systems. The Supreme Court must guarantee the supremacy of the Constitution and the democratic state of law, by rejecting the idea of the Criminal Law of the Enemy (Feindstrafrecht) formulated by Günther Jakobs and preventing breach of the constitutionally imposed rules of the game, even though a good part of public opinion considers them execrable, to recall the denomination *Homo Sacer* of Giorgio Agambem.

The attempt to stretch the notion of malfeasance in office, including to disregard the time element for definition of the supposed infraction, reveals the intention to reduce the guarantees afforded to the President. While a move to impeach a president will naturally trigger a political crisis, the existence of a political crisis cannot be used as an expedient to remove the president. In Brazil this is only possible in

conformity with the Constitution and federal laws.⁵⁶

The issue of legality is at the heart of the democratic principle and must assure the existence of processes to judge the legal fitness to hold office without arbitrary “political trials”, which can serve as instruments for overthrowing a legitimate government, a veiled coup d'état. The impeachment process must respect the right to a fair proceeding, satisfying the rule of law, due process of law⁵⁷ and the international treaties to which Brazil is a signatory. These tenets are insurmountable obstacles to the current impeachment process.

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HUMAN RIGHTS, INEQUALITY AND PUBLIC INTEREST LITIGATION: A CASE STUDY ON SANITATION FROM BRAZIL

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Abstract: Disaggregated data on the relative success of the UN millennium goals made clear that the progress achieved in many countries, Brazil included, was not equitable, positioning the question “How to address inequalities?” as the next pressing challenge in human rights. Public law litigation could be regarded as a tool to reduce inequality, particularly in Brazil, given a unique institution of its legal system, the Public Prosecutors Office. This paper uses public interest litigation discussing access to sanitation services to test this hypothesis. In 2013, only 58.2% of the households had access to sanitation, with significant regional inequality in coverage. Boolean analysis was applied to assess court orders (2003-2013) and results showed a disconnect between litigation and demand for sanitation, indicating that areas that were better off in various social and economic indicators were the ones receiving attention. The paper suggests reflections on how public interest litigation could target those most in need.

Keywords: Human rights - Access to sanitation - Public interest litigation

1. INTRODUCTION

The UN millennium goals were able to concentrate efforts to enhance access to human rights over the globe. Access to basic sanitation was one of these goals, described modestly as access to improved sanitation facilities (in contrast with open defecation practices). Progress was made, no doubt. However, as disaggregated data become available, it is clear that progress was not even, and in some occasions worsened inequalities were observed.¹

Public law litigation could be a tool to help reduce inequalities in access to rights. Public interest litigators could focus their attention on the most in need, leading Courts and defendants in charge of providing for these rights to pay attention to these specific populations. This hypothesis would seem even more appealing in Brazil, where there is this unique institution in charge of pursuing public interest through litigation, although not exclusively: the Public Attorney's Office.

The data collected and discussed in this paper on cases addressing access to sanitation services in Brazil do not confirm this hypothesis, though. It seems that the way Public Attorneys organize their work according to a complaint-reacting logic, as most public interest litigators do around the world, prevents them to reach the most excluded and disenfranchised. The paper suggests reflections on how public interest litigation could target those most in need.

2. HUMAN RIGHTS INEQUALITY IN BRAZIL: A GLIMPSE

Regional inequality in Brazil regarding access to services connected to rights, as well as social and health outcomes, has been widely recognized. The South and Southeast regions regularly have better outcomes, while the North and Northeast regions often lag behind.² According to data from 2010 Population Census, the North and Northeast regions concentrated 36.22% of Brazilian population, 73% in urban areas, but only 18.8% of the GDP. These regions often observe lower socioeconomic status, higher mortality and fertility, and low access to health services. While recent improvements have been

1 United Nations (2015) The Millennium Development Goals Report. New York: United Nations.

2 Hoffmann R (2000) Mensuração da desigualdade e da pobreza no Brasil. In: Henriques R, editor. Desigualdade e pobreza no Brasil. Rio de Janeiro: IPEA. pp. 81-107. Medici AC, Agune AC (1994) Desigualdades sociais e desenvolvimento no Brasil: uma análise dos anos 80 ao nível regional. Ensaios, FEE, Porto Alegre 15: 458-488. Rocha S (1998) Desigualdade Regional e Pobreza no Brasil: A Evolução - 198/95 - Texto para discussão nº 567. Rio de Janeiro: IPEA.

observed³ major regional inequalities still persist in the country.⁴

In 2010 the deficit in sanitation services for the North and Northeast regions was, respectively, 86.0% and 66.0%, while in the Southeast region the deficit was 18.9%⁵. Disparities between urban and rural areas also exist. In 2013, 67.1% of the urban households in Brazil had access to sanitation; in rural areas the coverage was only 4.6%. Further, 90.8% of urban households in the Southeast region had access to sanitation, against only 18.2% in the North region; rural households in those regions had coverage of 13.7% and 0.6%, respectively.

Others indicators describe the same picture⁶. Although infant mortality rates in Brazil dropped from 29 to 15 between years 2000 and 2013, regional inequalities still persist. In 2013, the infant mortality rate for both the North and Northeast regions was 19,2, while in the South region it was only 10,4. Inequalities in access to other rights, such as education, also exist. In the Southeast Region, 85% of the children ages four and five attended school in 2013; in the North Region this figure amounted to only 67,9%. Age-grade distortion is also more frequent in the North and Northeast Regions (55,2% e 52,2%, respectively).

Inequality can be framed from other perspectives, as race and wealthy. From 1999-2002, infant mortality in black children was 30% to 80% higher than that of white children, and disparities could be even larger depending on the scale of analysis and the level of underreporting⁷. School attendance has improved in the last years in Brazil. However, according to 2013 data, though 93,1% of children ages four and five from the wealthiest quintile attended school, the figure was 75,2% for the poorest quintile, and age-grade distortion in the poorest quintile was 3,3 times that of the wealthiest quintile.

Notwithstanding the importance of other perspectives in inequality, in this paper we approach inequality in access to sanitation services using a regional/spatial framework combined with the Human Development Index (HDI) for municipalities as a social-economic indicator. Although disparities in sanitation access also exist at much

3 Castro MC (2009) Spatio-temporal trends of infant mortality in Brazil. XXVI IUSSP International Population Conference. Marrakech, Morocco.

4 IPEA (2012) Políticas sociais: acompanhamento e análise. Brasília Instituto de Pesquisa Econômica Aplicada, Diretoria de Estudos e Políticas Sociais.

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6 IBGE (2014) Síntese de Indicadores Sociais. Uma análise das condições de vida da população brasileira. Rio de Janeiro: Instituto Brasileiro de Geografia e Estatística - IBGE.

7 Cardoso AM, Santos RV, Coimbra Jr. CEA (2005) Mortalidade infantil segundo raça/cor no Brasil: o que dizem os sistemas nacionais de informação? Cadernos de Saude Publica 21: 1602-1608.

finer scales (e.g., neighborhoods within cities), such detailed data are not available for the entire country.

This glimpse on Brazilian inequality illustrates that although public policies have achieved important progress on human rights access in Brazil in the last decades, this progress has not removed the inequalities that exist in the country. Could public interest litigation help change this pattern through targeted interventions?

This paper will focus on the right to sanitation as a case study, trying to assess how public interest litigation could help address inequalities. The next topic discusses why sanitation is a good case for this kind of endeavor.

3. HUMAN RIGHT TO SANITATION: THE BRAZILIAN CASE

“Sanitation is a cornerstone of public health” said the World Health Organization (WHO) Director-General Dr. Margaret Chan. Access to proper sanitation improves human health and well-being and contributes to reductions in the burden of diseases such as diarrhea, cholera, schistosomiasis, and trachoma, especially among children⁸. Combined, proper access to water, sanitation and hygiene could prevent at least 9.1% of the global disease burden and 6.3% of all deaths⁹. There is international consensus that promoting equitable access to basic sanitation services would reduce child mortality, improve overall health and education outcomes, reduce poverty, and contribute to sustainable development¹⁰.

Moreover, access to both water and sanitation was explicitly recognized as a human right by the United Nations in 2010¹¹. Yet, access to sanitation is inequitably distributed and an estimated 2.5 billion people worldwide lack access to basic sanitation.¹²

The Millennium Development Goal (MDG) 7, target C, set the aim to halve the proportion of people without sustainable access to safe drinking water and basic sanitation by 2015¹³. In 2010, UNICEF stated

8 Fewtrell L, Kaufmann RB, Kay D, Enanoria W, Haller L, et al. (2005) Water, sanitation, and hygiene interventions to reduce diarrhoea in less developed countries: a systematic review and meta-analysis. *The Lancet Infectious Diseases* 5: 42-52. Montgomery M, Elimelech M (2007) Water and Sanitation in Developing Countries: Including Health in the Equation. *Environmental Science & Technology* January 1: 17-23.

9 Prüss-Üstün A, Bos R, Gore F, Bartram J (2008) *Safer water, better health: costs, benefits and sustainability of interventions to protect and promote health*. Geneva: World Health Organization.

10 United Nations (2005) *UNICEF Water, Sanitation and Hygiene Strategies for 2006-2015*. New York: United Nations (UN).

11 United Nations (2010) Resolution 64-292: The human right to water and sanitation. United Nations (UN).

12 Lancet (2014) Water and sanitation: addressing inequalities. *Lancet* 383: 1359.

13 United Nations (2005) *UNICEF Water, Sanitation and Hygiene Strategies for 2006-2015*.

that, although significant progress had been made, evidence suggested that achievements had often not reached those who were mostly in need¹⁴. The 2015 UN Report confirmed precisely that: uneven achievements are a challenge for the next era of development¹⁵. The world has met the access to safe drinking-water target, albeit with uneven progress across regions and socioeconomic groups. The target to improve access to basic sanitation, however, was not met: despite improvement, in 2015 about 2.4 billion had no access to improved sanitation (946 million still practicing open defecation)¹⁶. The conclusion is straightforward: if human rights efforts should focus on the worst off populations, inequality in access should be a major concern.

In Brazil, the official report to the UN stated that target C of MDG was met both in what concerns access to water and to sanitation¹⁷. There is no controversy around the access to water, but a non-governmental analysis may have a different assessment on improved sanitation. Researchers considered not likely that target C would be met with regards to sanitation.¹⁸

Leaving the MDG discussion aside and considering more broadly the available data on sanitation services in Brazil (here defined as sewage collection and treatment), in 2001, 45.4% of the households had access to sanitation services. In 2013, the figure increased to 58.2%. The households with access to sanitation are concentrated in some cities: according to the 2010 Population Census, only 28.5% of Brazilian municipalities had sewage treatment systems, and sewage collection systems were available in only 55.2% of municipalities.¹⁹

Although this increase in access to sanitation had important environmental and health impacts²⁰, marked regional and socioeconomic

New York: United Nations (UN).

14 UNICEF (2010) Social Protection: Accelerating the MDGs with Equity. UNICEF.

15 United Nations (2015) The Millennium Development Goals Report. New York: United Nations.

16 WHO (2014) Millennium Development Goals (MDGs). Fact sheet N°290. Updated May 2014. World Health Organization. <http://www.who.int/mediacentre/factsheets/fs290/en/> Assessed Oct 8, 2014.

17 IPEA (2014) Objetivos de Desenvolvimento do Milênio: Relatório Nacional de Acompanhamento. Brasília: Instituto de Pesquisa Econômica Aplicada, Secretaria de Planejamento e Investimentos Estratégicos. 208 p.

18 Neri M, Osório R (2014) V National Monitoring Report on the Millennium Development Goals. Brasília: Brasil - Secretaria de Assuntos Estratégicos (SAE/PR). <http://www.sae.gov.br/site/wp-content/uploads/Release-ODM-English-Final.pdf>. Assessed September, 2014.

19 IBGE (2011) Atlas de Saneamento 2011. Rio de Janeiro: Instituto Brasileiro de Geografia e Estatística - IBGE.

20 Barreto ML, Genser B, Strina A, Teixeira MG, Assis AMO, et al. (2007) Effect of city-wide sanitation programme on reduction in rate of childhood diarrhoea in northeast Brazil: assessment by two cohort studies. *Lancet* 370: 1622–1628.

inequalities in access are observed, with the northern portion of the country and poor people lacking the proper facilities, mirroring inequalities observed in other social and health-related indicators²¹.

The cost to achieve complete coverage of access was estimated in 2013 at 7.4% of the national gross domestic product (GDP).²² And evidence suggests that economic development per se will not overcome the sanitation deficit nor increase access in the most needed areas in the short run; instead, it can make the sanitation deficit and the inequality even worse over time²³. Empirical studies have accessed that hypothesis in light of Kuznets theory that suggests an inverted U-shape for the relationship between economic development and inequality²⁴.

From a legal perspective, Brazilian Law qualifies sanitation as a public service since 1970's and the 1988 Brazilian Constitution stated a duty of all levels of Government to improve sanitation conditions. Municipalities are in charge of delivering the services, although States can also be involved in metropolitan areas. Federal Government is in charge of establishing national guidelines for sanitation, technical and financial support.

Privatization has been taking place since the late 1990's and according to 2014 data, 297 municipalities had decided to privatize to some extent the delivery of sanitation services.²⁵ The experience is still being assessed from multiple perspectives, but in regards to the quality of the service, the evidence so far suggests no differences between

21 Mejia A, Azevedo LGT, Gambrill MP, Baltar AM, Triche T (2003) Água, redução de pobreza e desenvolvimento sustentável. Brasília: Banco Mundial. Saiani CCS, Junior RT (2010) Evolução do acesso a serviços de saneamento básico no Brasil (1970 a 2004). *Economia e Sociedade Campinas* 19: 79-106.

22 Trata Brasil (2014) Benefícios econômicos da expansão do saneamento no Estado de Rondônia. Porto Velho, RO: Trata Brasil; Exante.

23 Saiani CCS, Junior RT, Dourado JA (2013) Déficit de acesso a serviços de saneamento ambiental: evidências de uma Curva Ambiental de Kuznets para o caso dos municípios brasileiros? *Economia e Sociedade Campinas* 22: 791-824. Victora CG, Vaughan JP, Barros FC, Silva AC, Tomasi E (2000) Explaining trends in inequities: evidence from Brazilian child health studies. *Lancet Vol* 356: 1093-1098.

24 IPEA (2014) Objetivos de Desenvolvimento do Milênio: Relatório Nacional de Acompanhamento. Brasília: Instituto de Pesquisa Econômica Aplicada, Secretaria de Planejamento e Investimentos Estratégicos. 208 p. Saiani CCS, Junior RT, Dourado JA (2013) Déficit de acesso a serviços de saneamento ambiental: evidências de uma Curva Ambiental de Kuznets para o caso dos municípios brasileiros? *Economia e Sociedade Campinas* 22: 791-824.

25 ABCON, SINDCON (2014) Panorama da Participação Privada no saneamento Brasil - 2014. ABCON (Associação Brasileira das Concessionárias Privadas de Serviços Públicos de Água e Esgoto), SINDCON (Sindicato Nacional das Concessionárias Privadas de Serviços Públicos de Água e Esgoto). <http://abconsindcon.com.br/wp-content/uploads/2014/05/Panorama-da-iniciativa-Privada-do-Setor-Saneamento-Brasil-2014.pdf>. Assessed May, 2015.

services provided by public and private entities.²⁶

Notwithstanding its significance for health and for other rights, sanitation still struggles to be regarded as a political priority for Governments in democracies like Brazil. It is only natural that decisions about where to invest limited resources will consider also, and sometimes mainly, the political criteria of the electoral return each choice can provide to public officials. Sanitation policies, although very cost-effective in the long run, are more connected with prevention – not with the cure of an actual disease –, and require long time and continuous investments to be implemented, in such a way the benefits they produce are not as clearly perceived by the population as the ones associated with pharmaceuticals. Furthermore, Brazilian law requires minimum investments in the public health system by all three levels of Government (Federal, State and Municipal), but expenses on sanitation services cannot be included under this item of expenditure.

Therefore, and despite the need to bridge the gap in access to sanitation, public expenditure makes up a consistently low percentage of GDP, ranging from 0.13% in 1996 to 0.09% in 2005, and the percentage of the total federal expenses applied to sanitation investments varied from 0.31% in 1994 to 0.15% in 2005²⁷. In 2010, for instance, the Brazilian Ministry of Health spent 45.93% of its budget in specialized hospital care, 8.82% in pharmaceuticals, and only 2.13% in sanitation initiatives²⁸. It seems that there are low political incentives for governments to prioritize sanitation policies.

At the same time, poor people suffer more without sanitation services than the better off and usually have less capacity to be heard in the political arena, as they lack the necessary time, information and ability to organize in order to effectively influence public officials. The inequality, tough, hits twice. Not only the groups in need of sanitation services will face more difficulties to get them from the political dispute, but the more politically articulated groups – that already enjoy sanitation services – will mostly likely advocate public resources to be invested in other services, not on sanitation.

Brazilian Law does not describe sanitation services as a right, but

26 IBGE (2014) Síntese de Indicadores Sociais. Uma análise das condições de vida da população brasileira. Rio de Janeiro: Instituto Brasileiro de Geografia e Estatística - IBGE. Cardoso AM, Santos RV, Coimbra Jr. CEA (2005) Mortalidade infantil segundo raça/cor no Brasil: o que dizem os sistemas nacionais de informação? *Cadernos de Saude Publica* 21: 1602-1608

27 RIPSAs (2008) Indicadores básicos para a saúde no Brasil: conceitos e aplicações. Brasília: Rede Interagencial de Informação para a Saúde (RIPSAs), Ministério da Saúde; Organização Pan-Americana da Saúde. available at <http://www.sae.gov.br/site/wp-content/uploads/Release-ODM-English-Final.pdf>

28 IPEA (2012) Políticas sociais: acompanhamento e análise. Brasília Instituto de Pesquisa Econômica Aplicada, Diretoria de Estudos e Políticas Sociais.

Courts construe sanitation rights enforceability from the duty imposed upon the Government and also from rights the Constitution provides for as access to health, housing and environmental rights. Public interest litigation could help at least as a tool to help set the political agenda in this scenario.

4. HUMAN RIGHTS LITIGATION AND INEQUALITY

Framing a claim as a human right, or as a right more broadly, may allow the use of legal apparatus to have it adjudicated and enforced, which include Court proceedings and orders. However, when the defendant is the government and adjudication involves tax payers' money, human rights litigation can raise specific concerns on the inequality effects it may trigger. The main reason for these concerns is simple: going to Courts also requires time, money and information, and it is not an option easily available for the most disenfranchised in societies. Therefore, better-off groups are the ones who most file lawsuits and benefit from them, using the human rights grammar in Courts.²⁹

This critique has been particularly directed toward conventional health rights litigation: lawsuits asking for pharmaceuticals and medical procedures. The criticism is that health rights litigation promotes inequality because it concentrates resources in a small number of plaintiffs and because plaintiffs usually are not from the worst-off groups within the population. This would mean not only that plaintiffs get more from the health system than the rest of the population, but also that the worst-off are, after all, paying that bill.

As already mentioned, disenfranchised people in developing countries usually have fewer means to be heard in the political arena. For similar reasons (limitations on time, money, information and ability to organize), poor people face many more hurdles to suing for their rights, and it is unlikely they will surmount them.

But what about public interest litigation? Would this kind of criticism apply the same way? Hypothetically, public interest litigators would be in a better position to reach those most in need and use the legal apparatus to benefit them. So, it is possible that this general criticism to litigation does not apply particularly to public interest litigation.

Moreover, countries have different standing rules for filing public interest lawsuits and this feature can make a difference in the inequality discussion. In some places, lawsuits may only be filed by people who will be directly impacted by the court decision, while in other countries those rules are more flexible and third parties can file on behalf of needy populations. Usually these third parties – NGOs, public

29 Bilchitz D (2007) *Poverty and fundamental rights: the justification and enforcement of socio-economic rights*. Oxford; New York: Oxford University Press. xviii, 279 p.

defenders, etc. – are free to qualify a population as needy and to choose what kind of claim they are going to pursue in court. Although free to choose the aim of their efforts, these individuals could (and should) establish an agenda of litigation on behalf of the poor.

When it comes to sanitation, the legal framework in place in Brazil does not allow individual home owners to claim for sanitation services in Courts. However, Public Lawyers, Environmental Agencies, and Public Prosecutors are allowed to file lawsuits, and ask for sanitation services that should be provided by municipalities and/or States. The odds of better-off home owners going to Courts are reduced in this environment, therefore the inequality criticism may not be so relevant here. Anyway, better-off home owners probably don't need to use Courts for that, because they already enjoy sanitation services.

The hypothesis that public interest litigators could help poor people's needs to be heard by the judicial system and by society should be stronger in Brazil also because of the existence of the Public Prosecutors Office, an institution unique to the Brazilian legal system that has the main goal of protecting the public interest mostly through litigation.³⁰ Public interest includes actions in several areas, such as criminal prosecution, environment and other diffuse and collective interests, rights of Indigenous populations, and human rights related to issues such as health, education, and housing. Public Prosecutors are functionally independent, and thus it is common that they file lawsuits against the government, despite being a public institution. While not all municipalities have a Public Prosecutor's Office (about half of the municipalities do have an office), each branch acts on a defined catchment area that includes a set number of municipalities in order to provide full geographical coverage.

But what does the data can tell about this hypothesis? Is public interest litigation on sanitation rights in Brazil really prioritizing the poor?

5. PUBLIC INTEREST LITIGATION AND INEQUALITY: THE CASE ON SANITATION IN BRAZIL

Previous research has shown that from January 2003 to March 2013, at least 258 court orders (court orders were used as a proxy measure of lawsuits, since there is no database of lawsuits filed) were issued addressing sanitation rights, and 85% of those were filed by Public Prosecutors. These court orders referred to lawsuits filed from 1990 to 2012. The requests may encompass different provisions, such as the expansion of the sewage collection systems for a neighborhood,

30 Brasil (1988) Constituição Federal de 1988 (updated version: 2014). Brasília. Available at http://www2.camara.leg.br/atividade-legislativa/legislacao/Constituicoes_Brasileiras/constituicao1988.html/ConstituicaoTextoAtualizado_EC82.pdf.

or the construction of a sewage treatment plant for public buildings or for a whole city, among others. Courts have granted 77% of these requests; the other 23% of the requests were initially not granted but plaintiffs can file an appeal.³¹ Of the granted requests, 4% have already been fully implemented (meaning that the sanitation construction has been finalized). The implementation of this kind of court order takes time, and it can take up to 20 years depending on the complexity of the project³², requiring active monitoring effort from Public Prosecutors. Enforcement is still taking place in the remaining of cases, albeit in a clumsily way sometimes. Nevertheless, results from Court orders have been documented. For example, in 2014, to comply with a court order from 2011, the construction of a plan to provide sewage collection and treatment for Barra do Sul, a municipality in the southern state of Santa Catarina was initiated benefiting 8,500 people. Also, a state prison (with about 2,500 inmates) located in the northern state of Amapa was equipped with a system to treat and adequately discharge its sewage as a result of a court order.

In 2010, less than half of the households in 71% of the 5,565 Brazilian municipalities had access to sanitation³³. Considering the very small number of court orders (only 258) addressing the issue, one could question if the Courts are playing an important role in improving the sanitation conditions of those municipalities with most precarious access to sanitation. When and where judicial interventions occurred and whom they benefited depend mostly on the public law litigators' priorities and on their comprehensive knowledge of local needs. While it is unreasonable to expect that the Public Prosecutors Office can solve the sanitation gap in Brazil, this legal mechanism does provide a unique opportunity to areas traditionally burdened by social inequalities to fulfill their rights to basic services. The extent to which the Public Prosecutors Office is indeed contributing to reduce inequalities in access to sanitation at the municipal level in Brazil is currently unknown.

This paper addresses those issues and evaluates if there is a direct connection between sanitation needs and litigation through the Public Prosecutors Office in Brazil. We assembled data from Population Censuses regarding access to sanitation by municipality, in order to identify areas most in need for services, and to assess the extent to

31 Barcellos APd (2014) Sanitation Rights, Public Law Litigation, and Inequality: A Case Study from Brazil. *Health and Human Rights* 16.

32 Brasil (2012) Termo de Referência para elaboração de planos municipais de saneamento básico. Procedimentos relativos ao convênio de cooperação técnica e financeira da Fundação Nacional de Saúde. Brasília: Fundação Nacional de Saúde (FUNASA), Ministério da Saúde (MS).

33 IBGE (2011) Atlas de Saneamento 2011. Rio de Janeiro: Instituto Brasileiro de Geografia e Estatística - IBGE.

which court orders were issued in those areas. All information was geocoded in order to assess the existence of regional differences.

Our results showed that based on the court orders that were issued (positive or negative) there is no indication that lawsuits were filed in municipalities with the largest sanitation gap, highlighting a rarely discussed subject: the priority targets elected by public law litigators and how they decide over them. This is particularly important to Public Prosecutors in Brazil, as they are public officials, publicly funded to promote human rights, and thus should follow an informed and accountable process of setting priorities. Our analysis points out to the need of establishing protocols for priority setting, and of increasing the visibility of the Public Prosecutor's role to the population as a way to empower communities.

6. METHODS

Data sources

Data utilized in this analysis were obtained from multiple sources, and were aggregated at the municipal level – until 2010 there were 5,565 municipalities distributed across 26 states and one federal district (Brasília, the capital), and 5 regions. Data on court orders issued from January 2003 to March 2013 and the respective year when the lawsuits were filed were extracted from the website of each State and Federal Court of Appeals, with the exception of two states that did not have online data for the period analyzed. In the cases when the date of filing the lawsuit was not available, it was estimated that filing took place 18 months prior to the time when the first Court order was issued. It is important to emphasize that there is no database that records all lawsuits that have been filled. Therefore, court orders were used as a proxy for the existence of lawsuits. From the websites of the State and Federal Public Prosecutor's Offices we obtained information on the location of branches by municipality in order to appraise if the lack of an office could be a barrier for increasing the visibility of those areas most in need for sanitation.

The data about court orders in Brazil have some limitations. First, two states did not have online records for the 10-year period analyzed, and did not allow access to paper records. Yet, it is unlikely that the profile of sanitation lawsuits from these states would be different from the one here presented (based on the remaining 24 states and the Federal District). Second, the search could not capture information about other activities Public Prosecutors could be carrying out to advance access to sanitation, apart from filing lawsuits (e.g., negotiations with public

officials). Also, it was not possible to track lawsuits still awaiting a decision, but plaintiffs usually ask for preliminary injunctions, so it only takes some months, after the lawsuit is filed, for a positive or negative decision to be issued.

Information on the percentage of households with access to sewage collection, and on total population was obtained from the 1991, 2000 and 2010 Population Censuses. We included the three censuses to cover the estimated time period when the lawsuits were filed. From the Brazilian Superior Electoral Court we assembled information on the political party governing the municipality, state, and the country, in an attempt to evaluate if municipalities whose mayor was affiliated to the same political party of the state governor could facilitate sanitation rights litigation. Municipal gross domestic product per capita (GDP per capita) was obtained from the Brazilian Institute of Applied Economic Research (IPEA), and is an indicator of the municipality's wealth. We also obtained data on the municipal Human Development Index (HDI), extracted from the Human Development Atlas³⁴, as a proxy for the municipality's standard of living. Although the Multidimensional Poverty Index (MPI) would be a better index for that purpose³⁵, it was not available at the municipal level for Brazil.

A map of Brazilian municipalities was obtained from the Brazilian Institute of Geography and Statistics - IBGE (http://downloads.ibge.gov.br/downloads_geociencias.htm). All spatial information was projected using WGS 1984 UTM Zone 22S, which is the central longitude Universal Transverse Mercator band in Brazil. Map design and management was conducted in ArcGIS 10.2 (ESRI; Redlands, CA).

Analytical approach

We began by measuring non-spatial descriptive statistics for all variables. In order to appraise inequality in the access to sanitation we calculated the concentration index³⁶, considering the municipality as the unit of analysis, the municipal Gross Domestic Product (GDP) as an

34 UNDP, IPEA, FJP (2013) Atlas of Human Development in Brazil 2013. United Nations Development Programme (UNDP), Brazilian Applied Economic Research Institute (IPEA), João Pinheiro Foundation (FJP). <http://www.atlasbrasil.org.br/2013/en/home/>. Assessed January, 2014.

35 Akire S, Santos. M (2010) Acute Multidimensional Poverty: A New Index for Developing Countries New York: UNDP-HDRO.

36 Wagstaff A (2000) Socioeconomic inequalities in child mortality: comparisons across nine developing countries. Bulletin of the World Health Organization 78: 19-29. Wagstaff A, Paci P, van Doorslaer E (1991) On the measurement of inequalities in health. Social Science and Medicine 33: 545-557.

income-related indicator, and the number of households with access to sanitation as the health variable. The concentration index ranges from -1 to 1, with a value of -1 indicating that access to sanitation is concentrated amongst poor municipalities (or those with the lowest GDP), and a value of 1 indicating that access to sanitation is concentrated amongst rich municipalities (or those with the highest GDP). All calculations were performed in Excel (Microsoft, Seattle, WA, USA), and STATA v.11 (Stata Corp., College Station, TX, USA).

Spatial patterns in the proportion of households with access to sanitation by municipality was assessed through the use of the $G_i^*(d)$ local indicator of spatial association³⁷. Considering the varying size of the municipalities in Brazil, a first-order queen contiguity neighborhood definition was utilized and therefore only municipalities sharing borders were considered neighbors. All results were corrected for multiple and dependent tests utilizing the false discovery rate control procedure³⁸. Data management was done in Stata 11 (Stata Corp.; College Station, TX, USA), and spatial analyses were conducted in GeoDA³⁹.

Boolean operators (e.g., or, and, not) were applied in order to identify overlap (or the lack of thereof) between the 258 court orders and the municipalities that tested significant for clusters of high or low proportion of households with access to sanitation. Additional variables described above were utilized to summarize the overall profile of municipalities targeted and not targeted with court orders, in light of levels of access to sanitation.

7. RESULTS: THE GAP PERSISTS

Based on Census data, access to sanitation presented inequalities both between and within regions; better access to sanitation was observed in the Southeast region, while the worst coverage was in the North (Table 1).

37 Getis A, Ord KJ (1996) Local Spatial Statistics: An Overview. In: Longley P, Batty M, editors. *Spatial Analysis: Modelling in a GIS environment*. pp. 261-277.

38 Castro MC, Singer BH (2006) Controlling the false discovery rate: a new application to account for multiple and dependent tests in local statistics of spatial association. *Geogr Anal* 38: 180-208.

39 Anselin L, Syabri I, Kho Y (2006) GeoDa: an introduction to spatial data analysis. *Geogr Anal* 27: 93-115.

Table 1. Access to sanitation and selected indicators by region, Brazil

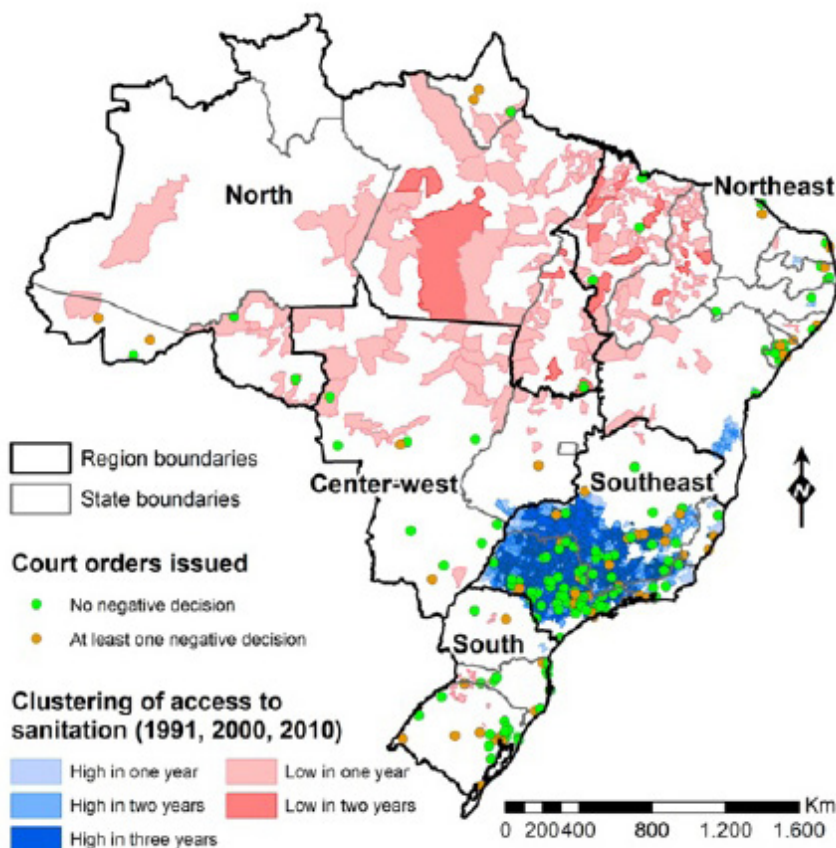
Region	Year (*)	% households with access to sanitation		HDI (max,min)	Lawsuits with Court Orders issued in 2003-2013	
		Median	(max,min)		Approved	Denied (under appeal)
North	1991	0	(33.29, 0)	(0.562, 0.138)	2	0
	2000	0.16	(41.12, 0)	(0.654, 0.222)	11	5
	2010	0.53	(45.43, 0)	(0.788, 0.418)	2	0
Northeast	1991	0	(72.24, 0)	(0.576, 0.120)	2	0
	2000	1.43	(86.57, 0)	(0.694, 0.208)	25	4
	2010	6.56	(91.80, 0)	(0.788, 0.443)	17	5
Center- West	1991	0	(73.65, 0)	(0.616, 0.183)	1	0
	2000	0.64	(87.36, 0)	(0.725, 0.373)	8	2
	2010	1.33	(91.09, 0)	(0.824, 0.526)	2	1
Southeast	1991	43.68	(95.76, 0)	(0.697, 0.174)	16	3
	2000	60.78	(99.26, 0)	(0.820, 0.336)	56	15
	2010	70.25	(99.76, 0)	(0.862, 0.529)	14	8
South	1991	0	(70.97, 0)	(0.681, 0.208)	1	0
	2000	2.32	(83.37, 0)	(0.777, 0.377)	41	12
	2010	4.42	(92.59, 0)	(0.847, 0.546)	1	4

(*) Access to sanitation and HDI were calculated for the year indicated in the column, which refers to the year when the Population Census was conducted. Frequency of lawsuits was computed for time periods (1991-1999, 2000-2009, and 2010-2012).

This regional pattern is also clear in Figure 1. Significant clusters of high access to sanitation were concentrated in the southern portion of the country (with some municipalities consistently showing significant high access to sanitation over all the three census years analyzed), while significant clusters of low access were observed in municipalities located in the northern part. Clustering of sanitation in space was expected, since access to sanitation is correlated with poverty and

other social and health indicators, and thus often shows geographical variations that resemble the pattern of spatial effects observed for these other indicators.

Figure 1. Clustering pattern of access to sanitation and court orders issued by municipality



These spatial patterns have their roots in history, political decisions, marginalization of specific population groups, environmental vulnerabilities, and limited financial resources, among others. Indeed, the regional pattern here presented is quite similar to the spatial distribution of the Municipal HDI in Brazil⁴⁰.

40 UNDP, IPEA, FJP (2013) Atlas of Human Development in Brazil 2013. United Nations Development Programme (UNDP), Brazilian Applied Economic Research Institute (IPEA), João Pinheiro Foundation (FJP). <http://www.atlasbrasil.org.br/2013/en/home/>. Assessed

The inequality in access across municipalities was corroborated by the concentration index: 0.8958 (standard error (SE) = 0.0087) in 1991, 0.8681 (SE=0.0086) in 2000, and 0.8509 (SE=0.0084) in 2010, indicating that (i) there was a large concentration of access to sanitation in municipalities with better GDP; and (ii) the improvements in the provision of sanitation during the past three decades, albeit with positive impacts in people's health, had a marginal contribution to reduce inequalities in access.

Figure 1 also shows the municipalities where court orders were issued and highlights three important issues. First, municipalities that have a historical pattern of low access to improved sanitation were not targeted by public law litigations. Second, and in contrast, municipalities with much better access to sanitation (and higher GDP and HDI) had lawsuits filed for the purpose of enforcing sanitation rights. Third, the distribution of lawsuits reinforces the pattern of regional inequality in Brazil: the South and Southeast regions have more representation, while the North and Northeast regions remain unattended (despite being those most in need).

The 258 court orders issued between 2003 and 2013, covered 180 unique municipalities (143 municipalities had one single court order issued, 22 had 2, 9 had 3, 2 had 5, and 4 municipalities had 6 or more), and 35% were issued a negative decision, currently under appeal. Roughly a quarter of the court orders in each region were issued a negative decision, with the exception of the Northeast region (17%) and the South (27%). Of note is the fact that no municipality that tested for a significant cluster of low access to sanitation, and for which a lawsuit was filed to claim sanitation rights, was issued a negative decision.

Regionally, of the total court orders 43.4% were issued in the Southeast region and only 7.6% in the North, a disparity if one considers where the lack of sanitation facilities is, as shown in Table 1 and Figure 1. In addition, 69.8% and 73.6% were issued in municipalities with GDP per capita above the GDP state and national averages, respectively. Considering the significant clusters of access to sanitation, about one third of the court orders were issued in municipalities that significantly tested for a cluster of high access to sanitation, while only 8 court orders were issued in municipalities identified as clusters of low access to sanitation (thus, the majority of court orders were issued in municipalities not significant for clustering). Regarding the presence of a branch of the Public Prosecutor's Office, only 10.5% of the court orders benefited municipalities that did not have an office. Considering the HDI, 48.5% of the court orders benefited municipalities with an index below the national HDI. Taken together, these indicators expose

a conflict between public law litigation and reduction of the inequality gap in access to sanitation facilities.

With respect to political representation, no evidence was observed regarding a possible coalition of municipal, state, and national representatives from the same political party that could eventually influence the Public Prosecutors' decisions. Of the 258 lawsuits filed from 1990 to 2012, 79% were observed in municipalities where the mayor and the governor had different political party affiliations, and 92% in municipalities in which the parties of mayors, governors, and the president of the nation were different.

8. DISCUSSION

This paper assessed if sanitation court orders issued from 2003 to 2013 (corresponding to sanitation lawsuits filed from 1990 to 2012), were targeted to municipalities most in need of services. Results showed a disconnect between litigation and demand for sanitation, and indicated that municipalities that were better off in various social and economic indicators were the ones receiving attention, which contributes to further exacerbate regional inequalities.

Our findings raise prioritization issues. One could argue that the presupposition that Public Prosecutors should prioritize the most in need of sanitation services is not sound enough because the lawsuits that were filed did address real needs of the population (intra-municipal inequality in the distribution of resources is also observed, and thus, unless 100% of the population has access to sanitation, there is room for improvement). However, three questions regarding inequality need to be brought to discussion.

First, Brazilian Law has set a goal of inequality reduction; not only income inequality, but also in access to basic rights (both aspects being connected). Thus, one would expect that Public Prosecutors should guide their actions to these provisions⁴¹. Notwithstanding, no standard operational protocol exists regarding how prosecutors should become aware of local needs, engage with local communities, and prioritize actions they pursue. International organizations have also been concerned that public policies engaged in the promotion of human rights should prioritize the poor⁴². Second, a human rights approach for sanitation rights suggests that a lexical order must be observed in the initiatives, so that every person should have access to basic services

41 Brasil (1988) Constituição Federal de 1988 (updated version: 2014). Brasília. Available at http://www2.camara.leg.br/atividade-legislativa/legislacao/Constituicoes_Brasileiras/constituicao1988.html/ConstituicaoTextoAtualizado_EC82.pdf.

42 Mestrum F, Özden M (2012) The Fight against Poverty and Human Rights. Critical Report no. 11. Geneva: CETIM.

before some groups receive enhanced services⁴³. Third, without a targeted initiative to prioritize their needs, the most marginalized are likely to be the last to benefit from any public policy, as suggested by the inverse equity hypothesis⁴⁴. As noted, the MDGs experience, despite its partial success, confirmed that.

Regarding priority setting criteria, Public Prosecutors Offices are internally organized in teams who concentrate in topics (e.g., criminal prosecution, human rights, and environment). but there is no internal proceeding or general criteria on how to decide what their priorities should be. Public Prosecutors report that they usually act after receiving complaints from society. But there is no public information of all the complaints received, who presented them, which ones have triggered initiatives and why. In addition, even if poor communities lacking basic sanitation services could have correct information about the role of Public Prosecutors and the means to self-organize and bring their complaints, they may be too distant from the nearest Public Prosecutor, and the municipality where they live may lack a branch of the Public Prosecutor's Office, as our results indicated. In other words, the complaint-reacting criteria will probably concentrate the Public Prosecutors activity in other groups' interests, not in those of the most in need, as has been reported to happen with Courts⁴⁵.

Moreover, it is expected that Public Prosecutors visit all municipalities in the catchment area of the Public Prosecutor's Office where they work in order to identify issues that could benefit the community through litigation. However, the diversity of topics which the office oversees – criminal prosecution, children's rights, elderly rights, Indigenous rights, human rights in general, environmental, etc. – could result in passive actions. Without a standard protocol on priority setting, prosecutors are probably only able to respond to demands that are brought to their attention by individuals or community groups. This possibility, coupled with the fact that those most in need may not be empowered to claim for their rights (and may live in municipalities without a Public Prosecutor's Office) would contribute to the reduced number of lawsuits in the most underserved areas.

43 United Nations (1966) International Covenant on Economic, Social and Cultural Rights.

44 Victora CG, Vaughan JP, Barros FC, Silva AC, Tomasi E (2000) Explaining trends in inequities: evidence from Brazilian child health studies. *Lancet* Vol 356: 1093-1098.

45 Chieffi AL, Barata RB (2009) Judicialização da política pública de assistência farmacêutica e equidade. *Cad Saúde Pública*, Rio de Janeiro 25: 1839-1849. Silva VA, Terrazas FV (2011) Claiming the Right to Health in Brazilian Courts: The Exclusion of the Already Excluded? *Law & Social Inquiry* 36: 825–853. Ferraz OLM (2009) The right to health in the courts of Brazil: worsening health inequities? *Health and Human Rights* 11: 33-45. Ferraz OLM, Vieira FS (2009) Direito à Saúde, Recursos Escassos e Equidade: Os Riscos da Interpretação Judicial Dominante. *DADOS – Revista de Ciências Sociais*, Rio de Janeiro 52: 223-251.

In addition, to guarantee transparency of the process, information systems should be put in place facilitating the issuing, on a regular basis, of reports summarizing: lawsuits filed by area, what/who originated the complaint, and time between filing and implementation, among other variables. Such reports should follow the transparency policy implemented by the Brazilian government in 2011 (Federal Law 12.527) and be made publicly available. Also, through cooperation with institutions that produce and/or have access to information (e.g., universities, non-governmental organizations, and public agencies), Public Prosecutors could be better informed regarding local needs, and thus better equipped to set priorities. For example, data used in this paper were collected by Brazilian public agencies and are freely available to anyone through institutional websites. The proposed information systems combined with socio-demographic and economic data would allow a comprehensive analysis of the role played by the Public Prosecutors Office in protecting the public interest.

9. CONCLUSIONS

Although public law litigation can be a tool to address inequalities in access to rights, this paper has shown that efforts of Brazilian Public Prosecutors to seek the promotion of sanitation rights are mostly concentrated in areas with already higher access to sanitation. Albeit with positive impacts, these actions fail to target areas most in need and thus do not contribute to reduce the sanitation gap. These results suggest the need for an open debate regarding three important issues: (i) the possibility of establishing priority setting guidelines for Public Prosecutors, (ii) the demand for an integrated information system that promotes transparency of the activities of the Public Prosecutors Office, and (iii) the need to create effective mechanisms that allow Public Prosecutors to reach out (on a regular basis) to communities they serve.

Although the Public Prosecutor Office is an institution unique to Brazil, some of the ideas discussed above could be useful for public law litigation in other developing countries. If institutional public interest litigators (mostly non-governmental organizations) are located in the central areas of major cities and work with the complaint-reacting logic, as is usually the case, they probably are facing (and will continue to face) similar hurdles trying to prioritize their efforts to reach disadvantaged populations and to get Court orders enforced.

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LATIN AMERICAN AND BRAZILIAN CONSTITUTIONALISM: THE RIGHTS OF THE TRADITIONAL PEOPLES

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Abstract: This article presents the XXI's constitutionalism as the doctrine of the constitutional law which supposes to be a theoretical framework able to assure the interpretation of the political and social processes from which political constitutions emerge. Thus, the 88's Brazilian Constitution proceeded to the recognition of the fundamental rights and norms regarding the protection of minority rights. The purpose of this work is to investigate if this supposed innovative characteristic of the 88's Brazilian Constitution is able or not to set historical constitutionalism as the continuity or maintenance of the conservative processes of the political and social status quo in the country. This article intends to discuss the nature of constitutional changes and the impacts of these changes on the development of constitutionalism in Brazil by analyzing the extent to which political, social, and cultural latin-american processes influenced changes in Brazilian constitutionalism.

Keywords: Constitutionalism - Substantialism - Procedimentalism - Fundamental rights - Minorities

1. INTRODUCTION

This work starts from the general hypothesis according to which the theoretical history of constitutionalism is constructed based on the empirical and historical context of constitutions and that it defines historicism as a perspective for the study of constitutions and different forms of constitutionalism. Thus, the historical characteristics of particular constitutions in specific contexts should also define constitutionalism in a particular way on its particular historical trajectory. Conservative or innovative character of specific constitutions would set constitutionalism according to their continuities and ruptures and translate the nature of the social and historical contexts of those constitutions.

However, the relationship between constitutionalism and constitution according to the historical perspective and their contexts has not been doctrinally established by the jurists in the framework of constitutional law. And this is not because the basic unit of analysis of constitutions has been defined by normative categories that these constitutions do enshrine and express, but because such categories have not been understood according to their historical contexts and their political and / or social processes. At most, these contexts and processes appear as rhetorical constructions in the doctrinal field of constitutional law.

The absence of real history leads the Brazilian constitutionalism to produce a view of itself as a set of doctrinal constructions deduced in a mechanical way from constitutional norms. It is precisely the split between the “real constitutionalism”, regarding the relationship between historical and social contexts in the XXI century and that define the crisis of Western modernity, and the “doctrinal constitutionalism”, as the detailed studies of the Brazilian Constitution of 1988 according to epistemological reflection of theoretical and methodological nature, that has produced the reduction of the Brazilian constitutionalism to the formal analysis of the constitutional norms and prevented the understanding of what has been defined as the “innovation” that characterizes both the said constitution as the constitutionalism. Out of history “it is not possible the novelty, the dialectical leap that lets you step from one level of achievement to another, the emergence of new forms of existence.” (BONDY, 1982: 130). This is a set of ideas that defines the specific hypothesis of this study. Brazilian constitutionalism does not seem to consider that constitutionalism is built as a doctrine of constitutional law or the constitution according to theoretical and methodological requirement that implies both the definition of constitution and a theoretical model to ensure the interpretation of the context or the political and / or social context in which the phenomenon “constitution” (WOLKMER, 1989:13-15) happens.

And this context, in the XXI century, does not only show the advance of social and economic globalization, but also that of the globalization of law. The various dimensions of globalization processes have produced different ways of confronting investigations concerning elaborations of constitutions, studies of constitutional rights and different constitutionalisms. Without such a view, the study of Brazilian Constitution of 1988 and the Constitutionalism from this period will always be conducted independently of Latin American constitutions and constitutionalism itself in Latin America. The absence of epistemological reflection on it institutionalizes Brazilian constitutionalism as the study of constitutions as a natural fact, as the study that does not guarantee understanding the nature of the changes of the constitutions and constitutionalism as to the senses of its historical trajectory in Brazil or in Latin America. The practical objective of this work is to characterize and feature the reified and reifying dimensions of this framework in the field of constitutional argumentation.

The descriptive methodology of this kind of investigation shifts the condition of possibility of thinking the trajectory of constitutionalism in Brazil from the traditional and positivist field of the jurists to the field of historians by strengthening modern and artificial separation as to the field of study based on the specialization of tasks. In the field of the constitutionalists, the history of the constitutions and constitutionalism would only be conceived as an expression of unique and unquestionable facts, according to a linear and homogeneous time, as true foundational myths. Another view of history would only be possible in the field of the historians, and outside the law. On the one hand, the positivist methodology has legitimized the use of foreign doctrines and theories in order to explain changes in the Brazilian constitutional right, but they have remained unexplained. On the other hand, that methodology has been grounded in the XXI century on classic ruptures introduced by Western modernity, which is in crisis since the twentieth century, and it has not guaranteed the questioning neither of the originality nor of the singularity of the Brazilian constitutionalism.

This is a set of ideas that allows specifically demarcating the field of argumentation in this work and defining one of its major theoretical purposes: to characterize the current stage of constitutionalism in Brazil as to the recognition of fundamental rights in the Brazilian Constitution of 1988 and the rules destined for minority rights. It is also this set of ideas and the hypotheses above that legitimate the problematic that this paper seeks to address with respect to the following questions: In the study of Brazilian constitutional norms, the Brazilian constitutionalism has revealed paradigmatic shift regarding the importation of European and North American theories and ideas so as to recognize the political and social, historical and cultural influence

from the Brazilian or Latin American context in the production and understanding of the Brazilian Constitution of 1988 as well as in the understanding of the trajectory of constitutionalism? If not, what factors or processes may explain, in the works of constitutionalists, the absence of that influence in explaining the emergence of the Brazilian constitution of 1988 and especially in the Brazilian constitutionalism?

The condition for the formulation of questions and hypotheses in this work reveals the condition that is absent in the works of Brazilian constitutionalists in general, namely: the questioning of the crisis of modernity with reference to Brazil and Latin America. "First of all we must destroy that logic by which our societies are hopelessly outside the process of modernity and that their modernity can only be true deformation and degradation" (Martin-Barbero, 2006: 23).

From a theoretical and methodological perspective, this work is based on the presentation, characterization and definition of ideas and categories of thought by two Brazilian constitutionalists and professors of constitutional law: Daniel Sarmiento (2006, 2009) and Luis Roberto Barroso (2004).

Without assigning them the status of national representatives of theoretical and doctrinal trends of constitutionalism followed in Brazil, those constitutionalists were chosen as representatives of constitutional doctrines underlying the training of students of the faculty of law of the State University of Rio de Janeiro. The faculty in question is regarded as a national reference in Rio de Janeiro and Brazil. And this is the school where those constitutionalists graduated. The relationship articulating "constitution", as a particular and concrete fact, and "constitutionalism", as a universal doctrine, will be investigated through some fragments of works of those writers on the Brazilian Constitution of 1988.

This choice is justified by the argument that there are contradictions between professional practice and discourse in the Brazilian constitutional doctrinal field since the promulgation of the Brazilian constitution. Sarmiento has been a member of the Federal Public Ministry, where he has been part of the committee for the defense of collective rights, and Barroso has been a member of the Federal Court of Justice. The most significant contradiction lies in the following fact: both constitutionalists seek to solve specific cases in the context of Brazilian peculiarities, and they do so in the light of theoretical and doctrinal models and conceptions with reference to historical and social reality that those jurists conceive as being universal, according to Western and European criteria they adopt in their works. This means that they produce the same abstractions and dichotomies that legitimized the emergence and the development of Western modernity and its universal ideas and thoughts.

As for Sarmiento's thought, emphasis will be given mainly to the

analysis made by him of constitutional norms on minority rights, as well as his conception of constitutionalism and the Brazilian Constitution of 1988. Regarding Barroso's ideas, the analysis of his interest and concern for fundamental rights will be preceded by the presentation he makes about the historical and philosophical antecedents of contemporary Brazilian constitutionalism. The comparison and confrontation between the two constitutionalists are intended not only to establish the similarities and differences in explaining the relationship between constitutionalism and constitution and point out the innovations in constitutional matters, but mainly to know whether and to what extent it is possible to speak of paradigmatic change as legitimate recognition of the historical and social reality of Latin American constitutionalism through Brazilian constitutionalism.

The rationale underlying this theoretical and methodological approach is grounded on the distinction by Horkheimer between "traditional theory", which is descriptive of reality and is referred to the separation between the individual and the society, and "critical theory", which is based on the critical behavior and on the understanding of the fragmented reality as a contradiction of the social system itself. If the former does not produce emancipation, the latter generates transformation. After all, critical theory "dispenses the pragmatic character that comes from traditional thought as a professional matter that is socially useful" (HORKHEIMER, 1980: 131).

The production of conditions for thought in accordance with the logic that ensures the confrontation with the traditional categories of Western thought is the epistemological condition for the recognition of the "novelty" in the Brazilian constitutionalism based on the innovations enshrined in the Brazilian constitution in the context of political and social change in Brazil and also in Latin America. This relates to the "machine for intellectual decolonization and therefore for political and economic decolonization" (MIGNOLO 2003: 76). This border thinking lets face "emancipatory rhetoric of modernity from the cosmologies and epistemologies of the subaltern, located in the oppressed and exploited side of the colonial difference" (GROSFOGUEL, 2008: 138). The border issue also allows thinking in theoretical terms the issues of this study as to the historical relationship between past and present, between yesterday and today, often despised by Brazilian constitutionalists. Recognize that the present is "the current time" (Benjamin, 1989: 191) means that the past is always open, and so it is not closed on the facts already produced. The past will not have accomplished everything, and there remain things to be done in the present. It is this past that is destabilizing of current modernity in Brazil and Latin America, and it should operate as a condition for the production of authentic thinking in the field of constitutional law.

These theoretical frameworks will allow not only to face the problem constructed in this work but also to point in the direction in which it is possible for constitutionalists to approach constitutional peculiarities of the Brazilian Constitution of 1988 and also to consider the changes in the Brazilian constitutionalism referred to the ways of thinking and explaining the processes of formation of the State and the Society themselves.

2. BRAZILIAN CURRENT CONSTITUTIONALISM AND THE MINORITY RIGHTS

Daniel Sarmento conceives the emergence of the Brazilian constitution of 1988 as the crowning achievement of the transition process from authoritarian regime to democratic regime. While recognizing in the Constituent Assembly the presence of powers that gave support to the “authoritarian regime”, he acknowledges that this fact did not prevent the drafting of a constitution with “deep commitment to the fundamental rights and democracy” (SOUZA NETO, SARMENTO, 2012: 170). He also points out the influences that the Portuguese constitution of 1976, which exceeded the authoritarian regime in a revolutionary way, and those of the Spanish constitution of 1978, which achieved the same result by an agreed transition, exerted on the Brazilian constitution.

When this constitution was enacted in 1988, it had 245 permanent articles and 70 temporary constitutional provisions. It emerged therefore as a long and analytical charter. The author of *Livres e Iguais* still defines the constitution as “a compromise charter”, because it does not represent the “crystallization” of a pure and orthodox political ideology. He claims that it was the result of a compromise between various interests and political forces in the Constituent Assembly. He further qualifies the Brazilian Magna Charter as being director and programmatic of its nature. If it “is not limited to organize the state and list the negative rights” (SOUZA NETO, SARMENTO, 2012: 171), it continues “providing positive rights and establishing goals, objectives, programs and tasks to be pursued by the state and the society”, Sarmento asserts.

The elaboration of the Brazilian constitution of 1988 arouses attention when it is compared with previous constitutions. The pre-World War II Constitutionalist movement was concerned with the structure of the state. In the post-World War II, it went on to enshrine fundamental rights and guarantees. These rights were generally listed in the first chapters of the constitutions and only in later chapters there was concern about “disciplining state organization.” The Brazilian Constitution of 1988 adopted the same innovation.

It has its high point on fundamental rights. On grouping civil

and political rights, the Brazilian Charter guaranteed social rights and added to itself, in Sarmiento's words, rights of third dimension. In this sense, it showed concern about the enforcing of these rights, a fact that can be confirmed through the provision of article 5, § 1¹. Also according to Sarmiento, the Constitution regulates the same time as it turns its attention to the most vulnerable subjects of Brazilian society. It proceeds "to the defense of women, consumers, children and adolescents, the elderly, indigenous peoples, Afro-descendants, quilombola [descendants of slaves], disabled people and prison inmates" (SOUZA NETO, SARMENTO, 2012: 173). Citing permanent articles such as articles 215, 216, 231 and the temporary article 68, the constitutionalist argues that the Brazilian constitution consecrated "some openness to multiculturalism, to take charge of the protection of different cultural and ethnic identities that comprise the Brazilian nation." Despite this, he acknowledges that conservative constituents considered the fundamental rights of the Constitution more as "props to embellish" than as rights endowed with practical significance.

As far as the organization of the three powers is concerned, the Constitution expanded the powers of the Legislature and the Judiciary – designated as required for a political system that aims to overcome the authoritarian period. The Executive power was strengthened with the prerogative to issue interim measures and to maintain the control of the 'parliamentary agenda.' However, according to the dominant political engineering, the executive always depends on the legislative majority and on the necessary alliances to build parliamentary majority, a fact that some constitutionalists call "coalition presidentialism".

The Legislature, in comparison with limiting military regime, was reinforced as for the production of standards and the oversight function of the other powers. However, the change that has generated more debate is that concerning judiciary.

By arrangements made with numerous instruments of judicial review, combining an extensive and invasive Constitution, it has become difficult for some more relevant political decision not to be subjected to the judiciary, which often decides against the wishes of the other branches of government. This phenomenon, which has become more acute in recent years, has raised complex questions about the limits of democratic legitimacy of the actions of the judiciary, since its members are not elected neither dismissible by popular vote, and that often the Judiciary decides highly controversial issues based on the exegesis of constitutional clauses and open spaces, which are subject to different interpretations (SOUZA NETO, SARMENTO 2012: 175).

Thus, the debate is open with respect to the possibility about the

¹ The provisions defining fundamental rights and guarantees are immediately applicable.

weightings between constitutional principles and values².

A phenomenon that can be seen as a result of a constitution that is as extensive as analytical as it is the Brazilian constitution of 1988 is called “constitutionalization of the law” by Sarmento.

It is almost impossible today to find a lawsuit in any area - civil, criminal, labor, etc. – in which the Constitution is not at some moment invoked by the litigating parties and then employed by the judge or the court to reason their decisions. But it is not only in the courts that this phenomenon takes place. Constitutional discourse has, to some extent, penetrated into the parliamentary debates, the claims of civil society and even in the routine of technocrats, (SARMENTO, 2009:167).

In short, the conclusion at which Sarmento arrived is that the 1988 Constitution, unlike the constitutions of other times, has been present in various ways in day-to-day lives, in the main events of the Brazilians, and especially in the demands of social movements.

From a theoretical point of view, the affiliation underlying the author’s works can be deduced both from the substantialist and the proceduralist currents. The former imposes limits on political deliberations; the latter refuses limits to the democratic system of deliberation.

One of the leading exponents of procedural theory, and affiliated to the Frankfurt School, Jürgen Habermas has criticized the role of the German Constitutional Court regarding its view of the constitution as an “order of values”, thus pointing out the “undemocratic and paternalistic nature” of this conception (SOUZA NETO, SARMENTO, 2012: 225):

By letting itself be led by the idea of conducting material values, preliminarily taken for granted in constitutional law, the Constitutional Court becomes an authoritative instance. In the event of a collision of rules, all the reasons may assume the character of arguments geared towards the realization of objectives, a fact that makes collapsing the corner stone introduced in legal discourse by deontological understanding of standards and principles of law (...). As a constitutional court adopts the theory of the order of values and takes it as the basis of its decision, grows the danger of irrational judgments, because in this case the functionalist arguments take precedence over the normative ones (HABERMAS, 2003:321 - 322).

Inversely, substantialism endorses the legitimacy of substantive decisions regarding fundamental rights. In this sense, *A Theory of Justice*, by John Rawls, first published in 1971, may be cited as a paradigm that influenced this doctrine:

Each person should have an equal right to the most comprehensive overall system of equal basic liberties compatible with a similar system of liberty for all; social and economic inequalities should be arranged

2 Hence the debate about the legitimacy of the judiciary to decide important issues.

so that, at the same time, they: (a) bring the greatest benefit to the least advantaged, obeying the constraints of just savings principle, and (b) are linked to jobs and open positions to all under conditions of fair equality of opportunity (Rawls 1976: 3-4).

Combining the two theories in a brief summary, two conclusions can be inferred from the thoughts of the Brazilian constitutionalist. First, it is legitimate to set limits for the majority of every moment, especially when they are linked to the protection of fundamental rights and to the access to the democratic process itself. Thus, he believes that the Constitution gives the judiciary the power to enforce these limits (SARMENTO 2009: 186). Second, the Constitution cannot be considered as a source capable to provide answers to all national problems. "A minimally committed constitutional theory to democracy must recognize that the Constitution leaves several spaces of freedom for the legislature and for individuals, in which the political autonomy of the people and the private autonomy of the human person can be exercised" (SARMENTO 2009: 186).

Thus, the author of Constitutional Law is in favor of a constitutional model that should be enough opening for political deliberations "of each generation," and he is against the excesses of the substantialism in constitutional theory in order not to limit its democratic components. However, he recognizes substantialism as a possibility when the protection of the human being concerns the fundamental rights of minorities against majorities in the democratic process. In this case, Sarmento states that the judiciary plays an important role.

In this context, interpretation given by the Brazilian constitutionalist to the constitutional provision that expressly refers to the right to possession of the territory occupied by descendants of slaves makes this provision clearer. He recognizes substantialism as a possibility as for the protection of minorities. For Sarmento, the article 68 establishes a fundamental right³. Based on a teleological reading combining § 1 and § 2 of the article 5 of the Constitution, the right to land of the quilombolas can thus be linked to the fundamental right to culture, according to the article 215 of the Constitution, and this right binds to the cultural identity of the community members.

Thus the article 68 would provide the territories of the quilombola communities affected to the government with specific public purpose, and it would not relate to a simple property right, but to a guarantee of the existence of the quilombolas as a right holder. Thus, the quilombolas could avail themselves of all legal instruments for the defense of such a right to the detriment of third parties or the owner himself. Thus, the article 68 would be directly

3 To the remaining communities of descendants of slaves who are occupying their lands is recognized the property outright, and the State shall send them deed of property.

linked to the principle of human dignity – an axiological standard that underlies the whole constitution. This principle should thus be invoked to preserve the identity and culture of the Quilombolas.

Moreover, Sarmento uses the philosophy of recognition to support the right of minorities in the Brazilian constitution, especially the one by the Canadian philosopher Charles Taylor.

From this most appropriate anthropological perspective, it was possible to build, for example, the idea of the “right to recognition”, claiming respect for collective identities of non-hegemonic groups, given the fact that the social devaluation of groups tends to hurt deeply the dignity of each of its members. When, for example, society fails to appreciate black culture and the importance of his legacy to the country; when it values only the European contributions to the formation of the Nation, prioritizing their values and their aesthetics, it hurts directly the self-esteem of black people, who may even compromise their ability to independently formulate and follow their life plans, as enforced by the liberals. The understanding of this form of exclusion, which is not necessarily related to economic oppression, and the search for remedies to combat it are on the basis of the so called “politics of recognition”, which have unequivocally emancipatory dimension. The Brazilian constitution of 1988 has clear openings for this emancipatory bias characterizing communitarianism (...). This is clear, for example, in article 216, § 1, of the Constitution, which imposes to the State the duty to protect “the expressions of popular, indigenous and Afro-Brazilian cultures, and other groups participating in the national civilizing process” (SOUZA NETO, SARMENTO 2012: 213).

Last but not least, Sarmento claims that the Brazilian constitution demonstrates thus openness to communitarianism. However, he points out that one should not confuse it with a “community” Constitution. The Charter of 1988 is a social constitution “that is concerned with the protection and promotion of national culture (articles 215 and 216 of the Constitution) and consecrates trans individual rights, collective ownership” (SOUZA NETO, SARMENTO 2012: 214).

3. HISTORICAL AND PHILOSOPHICAL BACKGROUND OF THE CURRENT BRAZILIAN CONSTITUTIONALISM AND THE FUNDAMENTAL RIGHTS

Barroso understands jus naturalism as a philosophical current that defines law based on the existence of natural right. Thus he acknowledges that there are in society “a set of values and legitimate human pretensions that do not arise from a legal rule emanating from the state, that is, independent of positive law (BARROSO, 2004: 318).

According to him, the explanation of that right would find its roots in Hugo Grocio’s philosophy. In the first half of the seventeenth

century in Europe, he developed the idea that natural law is the set of rights that should be recognized as valid by all people, regardless of divine will and that it was endowed with its very existence. He recognizes in Grocio's thought the start of the Thomistic reasoning to the humanities. The influence of St. Thomas Aquinas is recognized by Barroso as "the most influential" with respect to the philosophical system he developed during low European middle ages, delimiting boundaries of acting and reasoning between faith and reason: "Preaching that law is an act of reason and not of will, he distinguished four kinds of law: eternal law, natural law, human positive law and divine positive law" (Barroso, 2004: 318). The influences of rationalism are felt in practice as regards the recognition of written documentation, of compiles rules, as the source of law, applicable, due and enforceable. And this is to protect law from religious and metaphysical interpretations until then in force and externalized by the sovereign will of absolutist rulers.

For the Brazilian constitutionalist, *jus naturalism* therefore puts forward, as an important influence for both contemporary and modern law, the ruptures produced in relation to the medieval scholastic thought. As influences for modern constitutional law, *jus naturalism* states the recognition of man as a being whose existence and destiny are no longer subject to the metaphysical principles, values and norms of religion. By joining the Enlightenment in the eighteenth century, *jus naturalism* asserts the need for the state to be recognized as an abstract entity possessing abstract principles and objectives and being detached from the person of the ruler.

The Constitution is the document that regulates par excellence these principles and objectives of the State and delimits by describing and limiting the relations between state, government and society. As a written text, it has the power to clarify and link the actions of the State, the Government and its citizens, by prescribing to them accurate legal consequences. The School of exegesis, by prioritizing allegiance to the legal text as a way of maintaining and developing socioeconomic existing order, releases constitution of any whims and arbitrariness, especially on the part of government.

For the contemporary constitutional law, *jus naturalism* is presented as the systematizer of the constitution as an institution that underlines obedience and linkage between State, Government and Society. This fact made possible the development of the liberal state, based on an economy and a social context in which the autonomy of will could only suffer the limitations prescribed the Constitution, a fact that objectively subordinated the action of state and government to the constitutional provisions laid down by a Constituent Assembly composed of the representatives of the people, who were also the representatives of the industrial and bourgeois majority.

According to Montesquieu, the tripartite division of powers - in its classical form, with emphasis on the complete independence capable of producing perfect harmony between legislative, executive and judiciary – aimed to assign the judiciary the power to judge not only according to the law, but mainly and strictly as to the letter of the law, without any other further possibility of interpretation than that of grammatical, historical and teleological.

As for Barroso, this theoretical and methodological alliance between the jus naturalism and the School of Exegesis also represented the historical overcoming of jus naturalism, because the literalness in the interpretation and application of legal rules did not allow any possibility for external values to penetrate into the law: natural law was then considered to be metaphysical and unscientific. It was sidelined on behalf of the prevailing positivist movement in the nineteenth century, and positivism became, “in the first decades of the twentieth century, the philosophy of the jurists.”

Instrumentalized by the school of Exegesis, legal positivism was presented as an effective weapon for maintaining the socio-economic order established by the French Revolution. It had as its theoretical basis Comte’s classical positivism, as its philosophical foundation St. Thomas’ thought, and as its methodological basis the Enlightenment. “The man had come to his rational age, and all had become science: the only valid knowledge, the only moral, even the only religion. The universe, as disclosed by Galileo, would have a mathematical language, integrating a system of laws to be discovered, and the valid methods in the natural sciences should be extended to the social sciences “(Barroso, 2004: 322).

The author of Interpretation and Application of the Constitution asserts that the heyday of legal positivism occurred with Kelsen’s positivism, whose main characteristics are: a) the complete approximation between law and norm; b) the emanation of law from the state; c) the completion of the legal system; d) the validity of the norms dependind of the procedure adopted in their creation, regardless of their contents.

The Brazilian constitutionalist states that for the jurists of the twentieth century, the extreme reduction to which the right was taken, as a set of independent rules within a closed system, was unable to guarantee the neutrality of interpreters in law enforcement. Quite the contrary: he notes that law has never failed to be a means of maintaining of social order. And to achieve this result, the methodological mechanism of legal positivism proved to be quite effective in that it allows no influence from any other value, knowledge or moral criteria in the application of pre-established rules.

Barroso points out two major political and military movements

as the historical landmarks of the decay of legal positivism: Italian fascism and German Nazism.

At the end of the Second World War, the idea of “a legal system indifferent to ethical values” and that of the law as a purely formal structure (a packaging for any product) were not more accepted in the enlightened thinking. The historical supersession of *jus naturalism* and the political failure of positivism gave way to a wide range of reflections on the law and its function and social interpretation. Post-positivism is just a provisional and generic designation of a diffuse set of ideas, under which are included the definition of the relationships between values, principles and rules (the so called new hermeneutic aspects) and the theory of fundamental rights (BARROSO, 2004: 325).

Barroso features neo-positivism as the “return to values, a rapprochement between ethics and law” (Barroso, 2004: 326), a fact that does not mean the reincorporation of abstract and subjective metaphysics in law. This means the redemption of natural law values that should be included in the closed system of interpretation and application of positive law, this time with ethical and objective criteria founded on the dignity of the human being. The Kantian turn is sustained by Barroso as a socio-philosophical movement enriching man and his nature as a radiating center of validity, both of the contents of legal rules and of the interpretation and application of legal rules in particular cases. Freedom, equality and material life of man became the vectors of validity, enforcement and interpretation of legal norms, elevated to the category of fundamental rights, through the redefinition of the legal and social function of “legal principles”. Such vectors were then characterized as legal principles, endowed with the same effectiveness of legal norms in the event of the existing legal rules governing such matters in a certain legal system are not sufficient to respect the dignity of the human being in particular cases.

The novelty of the last decades is not exactly the existence of principles and their possible recognition by the law. Principles coming from religious, philosophical or *jus naturalistic* texts have a long time pervaded reality and imagination of law, directly or indirectly. (...) The constitutional principles, therefore, explicit or not, become the synthesis of the values laid down in the legal system. They mirror the ideology of society, its basic assumptions, and its purposes. The principles provide unity and harmony to the system, and they integrate its different parts and attenuate normative tensions. (...) On the trajectory leading to the center of the system, the principles had to gain the status of a rule, overcoming the belief that they had a purely axiological and ethical dimension, without legal efficacy or direct and immediate applicability. The modern dogmatic endorses the view that the standards in general and the constitutional norms in particular fall into two major different

categories: the principles and the rules. Generally, the rules contain more objective reporting, with their application restricted to specific situations to which they are addressed. As for the principles, they have higher levels of abstraction and a more prominent purpose in the system. There is no hierarchy between the two categories, in view of the principle of unity of the Constitution. This does prevent the principles and rules from performing different functions within the system (BARROSO, 2004: 328).

And even more:

The qualitative distinction between rule and principle is one of the cornerstones of the modern constitutional dogmatic, fundamental to the overcome the legalistic positivism, according to which rules remained, connected to legal rules. The Constitution starts to be regarded as an open system of principles and rules, permeable to supra positive legal values, in whose scope the ideas of justice and the realization of fundamental rights play a central role. The paradigm shift on this matter is particularly tributary to systematization Dworkin's systematization. His elaboration on the different roles played by rules and principles earned universal acceptance and became the consensus regarding the subject (BARROSO, 2004: 328).

Barroso is influenced both by the conceptual distinction between principles and rules and the functional distinction made by those authors, for the purpose of enforcement of fundamental rights, especially in the field of collision of fundamental rights. He makes this distinction in order to affirm the need for the human rights to be effected once classified as normatively principles and despite the concrete situation to which those rights are referred. This reasoning seeks to prevent, in a concrete situation, a fundamental right from being rejected by the full and complete implementation of another right, if it were only considered as a rule in strict accordance with classical positivism. The aim of characterizing the fundamental right as a principle and as a legal norm (post-positivism), and not as a rule, is to minimize the contempt for fundamental right that would be disregarded.

Rules are legal provisions provided with specific and determined contents and specific addressees. They are to be applied to court cases in the hypothesis whether or not the real fact is submitted to the norm. Due to their high valuative load, the principles have legal high density and therefore they will be turned to specific addressees whose

concrete cases will only be individualized when they will happen in the real world. The principles are generic, provided with indefinite legal contents and high density because they may be related to various specific cases, even in the hypothesis of apparent collision between two or more principles applicable to a particular case. Therefore, principles will be only applied to particular cases after their contents are set in respect to social and legal requirements regarding the case.

Rules are normative propositions applicable according to the rule of all or nothing. If the facts laid down by the rule come to occur, the rule must be directly and automatically applied, producing thus its effects. (...) Generally, principles grounded in greater valuative load, ethical foundation, relevant political decision, and they point out a particular direction to follow. It happens that, in a pluralistic order, there are other principles that comprise decisions, values or several fundamentals, sometimes contradictory. The collision of principles, therefore, is not only possible but it is also part of the logic of the system, which is dialectical. So their application cannot be carried out in terms of “all or nothing”, of validity or invalidity. It should be recognized to the principles their importance and value. In view of the facts of the case, the interpreter should make choices in a reasoned manner when he confronts inevitable antagonisms, such as those that exist between freedom of expression and right to privacy, free enterprise and state intervention, the right to property and its social function. The application of principles takes places predominantly through a process of weighting (BARROSO, 2004: 329).

Habermas understands that principles and values are vectors that unify demands for access to the democratic process, so that requesters should use democratic procedural instruments provided for in the Constitution in order to demand legislative reform to meet their demands. Dworkin (1977) and Alexy (2011) understand that principles are norms capable of solving concrete cases whose applicable legal rules do not offer a legal solution based on the enhancement of human dignity, a fact required by litigants. Such demands must be met regardless of prior and specific legislative amendment.

Under Brazilian law, legal rules and principles laid down in the 1988 Constitution form a set of “rules of low valuative strength, applicable in the everyday life.” The author of Interpretation and Application of the Constitution is critical to this situation because he considers that it is important to value principles as legal norms laid down in the 1988 Constitution. According to Barroso, the interpretation of norms already written and laid down may by law do lead or not to the application of rules “in a fair way”, thus valuing and effecting fundamental rights. It is the “new constitutional interpretation” whose goal is the preservation of traditional concepts allied to ideas that

announce new times and meet new demands (BARROSO, 2004: 346).

These new demands would be those that result from postmodernism, which is portrayed by Barroso as the individualization of the individual as a subject of law - and not the object of law - who must accomplish his or her intellectual, social and cultural potentialities. The rules that were already laid down and addressed to specific and individual cases in the context of a sociocultural positivist era, and before globalization time, do not solve these “new demands” because those rules are referred to distinct theoretical and methodological foundation. Therefore, given the inability of the Executive and the Legislature to meet the needs represented by those “new demands” through rules and enforcement of rules, the individuals – the new plaintiffs- are forced to resort to the courts in order to have their rights applied. The judiciary, particularly through the exercise of judicial review, would thus be legitimated to meet such demands, and the instrument that would be available to them would be just the use of the principles of the fundamental rights as vectors of weighted principles as vectors as normative standards or state power to justify not application prejudicial to the dignity of the human person in this case rules.

This is the political use of the legal system in order to accomplish rights until then not entitled. The main agent would not be only the judiciary, because it just receives the demands and has the constitutional duty to provide judicial protection based on the specific case according to the constitutional principle of the unrestricted access to justice. And as it would not be able solve the case brought before it by applying only rules according to the classical positivist method; it is obliged to apply principles that serve as the foundation for the “new demands”. The main agent is then the interpreter in so far as this category includes all persons who deal with specific cases in justice, ranging from the members of the judiciary to other legal professionals by going through individuals, social groups and social movements that identify and individualize the “new demands” to the State.

Barroso recognizes the importance of the role of the interpreters in the Brazilian constitutional order since 1988, especially those who operate in the judiciary for the purpose of producing positive and fair results in the requests that do not meet legal support in the established rules. This is because the role of the interpreter is to deduce from principles the norm able to bring the solution for the case brought to trial.

Facts and interpreters have always been present in constitutional interpretation. (...) In several situations, especially those regarding the collision of legal rules and constitutional rights, it is not possible in theory to deduce from the system the appropriate solution. It can only be formulated in view of the facts referred to the case (...), and it allows to state what outcome corresponds to the constitutional will.

Furthermore (...) it is necessary to know if the application of the norm to the case carries out the constitutional law. (...) The modern constitutional interpretation involves choices by the interpreter as well as subjective principles of integration, open standards and indeterminate concepts. Much of the scientific production has been focused precisely on the study of the restriction of judicial discretion through the definition of criteria weighting values and interests (...) (BARROSO, 2004: 360 -361).

The political function of the interpreter is described by Barroso as based on the Argumentation Theory, which assigns the interpreter the function to investigate and defend from possible interpretations the one which is the more accurate, i.e., the one that can present a consistent and rational foundation for the studied case (BARROSO, 2004: 363).

The constitutionalist presents the following constitutional principles that he regards as fundamental to the interpretation: legal superiority of constitutional norms (BARROSO, 2004: 369), open and indeterminate nature of the constitutional language and specific contents and political character of constitutional norms (BARROSO, 2004: 369).

4. THE CONSTITUTIONALISM BY THE CONSTITUTIONALISTS IN QUESTION

The predominantly doctrinal and rhetorical approach to the relationship between constitution and constitutionalism in legal works by Sarmento and Barroso expresses mainly their practical interest in the interpretation and application of the Brazilian constitution regarding conflict resolution by the Judiciary. In this sense, the two constitutionalists wander from constitutionalism as a doctrine that focuses on problems of different nature. For example, they do not question about the particularity of the Brazilian or the Latin American constitutionalism. They do not take into account the fact that the development of these expressions of constitutionalism follows the same standards and principles originating in the Western cultural reason, a fact that implies the denial of their history. "To deny our origins is a curse that crosses our Latin America [and also Brazil]. It is a damn that is based on the criterion of (...) modernizations without modernity" (ROSENMANN, 2008: 09). Both constitutionalists recognize the importance and expansion of the role of the Judiciary in enforcing rights related to the changes advocated by the Brazilian Constitution of 1988. Barroso addresses the issue of new demands, individual or social demands, in the context of what he called "postmodernity". Sarmento shows concern about the supervision of the limits to be set on the relationship between majorities and minorities.

Sarmento seeks to explain the production of the Constitution on the basis of a normative axis and a political plan. After all, the Brazilian constitution resulted from the influence of both Portuguese

and Spanish constitutions as well as the from political forces and divergent national interests that constituted the Constituent Assembly. Barroso approaches the Brazilian constitution in such a neutral manner as if it was “a written paper” that makes the “crossing” between legal facts - the established order - and political facts - the Constituent. Sarmento characterizes the constitution as a “possible compromise” between antagonistic forces and interests in the Constituent Assembly. The political nature of the Constitution can be recognized as the fact that it expresses the “crowning” of the transition from an authoritarian regime to a democratic system. For Barroso, the political dimension of the Constitution is related to the function that performs its interpreter as the investigator and defender of the interpretative possibility the most accurate.

However, none of the two constitutionalists take into consideration the empirical and critical knowledge about legal and constitutional reality in the light of modernity or postmodernity crisis. Each of them proceed as if they produced the interpretation or the interpretative model to which the facts to be analyzed would be mechanically submitted. “Set their location [the location of the facts in time], their ability to change, the determinations that make it possible to explain their specificity, it does not enter the field of conditions over which should begin the discussion to explain their operation” (ROSENMAN, 2008:18).

The relationship between the Constitution and the society is not addressed in the same way by both constitutionalists. For the author of Interpretation and Application of the Law, the second term of this relation is represented by the “new social demands”, and it depends on the exercise of judicial review by the judiciary through “the principles of fundamental rights.” For the author of Free and Equal, that term transcends the limits of legal proceedings to accommodate social justice claims, political debates, and technical decisions, even from the standpoint of speech. Sarmento calls this situation “constitutionalization of the law.” Even though the theme of “universality” does not disappear from the works of both constitutionalists, it seems mainly to justify concern about certain kind of philosophical attitude “more concerned with the effective action than with theory. A philosophy that shows the possibilities of this action and its possible effectiveness” (ZEA, 2005:484).

From the standpoint of theory, the rationale of constitutionalism in the light of interpretative models of the Brazilian Constitution delimits the field where it is possible to recognize the differences between Sarmento and Barroso. On concrete and different situations, Sarmento lets know the influences he undergone from both Habermasian proceduralist conception and Rawlsian substantialist formulation with regard to the issue concerning the acceptance or rejection of limits on the democratic political deliberations. Dworkin and Alexy are the main

influences undergone by Barroso. However, neither of the two Brazilian constitutionalists seeks to study the gray and silent areas that allow distinguishing Brazilian constitutionalism from European and American constitutionalisms and approaching Brazilian constitutionalism to Latin American constitutionalism. They not even dared to think the fact that Latin America was the birthplace of “the historical process that defined the historical and structural dependence of Latin America and that it was that process that, at the same time, led to the constitution of Western Europe as the world center of control of that same process.” (QUIJANO 2006: 49).

By accepting substantialist formulation in order to defend the rights of minorities, Sarmento adopts the conflitualist conception of society and recognizes the role of guardian of the judiciary under whose context he considers minorities and majorities in situation of opposition. However, he does not take into account neither the concern about the overcoming of utilitarianism and perfectionism nor Rawlsian liberal thesis about the good life for citizens and the defense of this life by these same citizens. Moreover, the Habermasian proceduralism implies the conception of social consensus and the rejection of limits imposed by the values, mainly by the material values. As Habermas, Sarmento thinks over the values in the light of the functionalist perspective and he opposes such values to normative arguments. He does not consider Dworkin’s substantialism regarding the access to democracy on the basis of historical continuity. Had he done so, he possibly would have come to the followings results. On one hand, to consider the constitutional principles as the substantive contents of the constitutional order and in a position to resolve “empirical problems” referred to social inequalities based on the pragmatic function of law. On the other hand, by distinguishing between Rawls’ and Dworkin’s substantialism, to substantiate Habermasian proceduralism, which presupposes the historical rupture that can logically explain the adoption of constitutional principles as a result of an “ethical agreement” valid to societies and states emerging from authoritarian and totalitarian forms of government. However, neither Sarmento nor Barroso problematize functionalism as do the social sciences. The idea that society works well, for example, is not questioned. Moreover, they exclude normative arguments and categories from the functionalist field and analysis. The idea that the rules run above and outside the range of values, for example, is taken for granted, that is, it is accepted as a fundamental principle.

As to the question regarding Habermasian proceduralism, Barroso describes the post-positivist and jus-philosophical movement as a theoretical and philosophical result of the Critical Theory of Law. However, he extends - or reframes – the validity of the Critical Theory of Law so as to take into consideration the theoretical contributions

by Dworkin and Alexy. Or otherwise, it does not come to talk neither about expansion nor about redefinition, but about the mere importation of theoretical formulations in a mechanical and passive manner. Barroso is not clear as to the objective of deepening the theoretical and methodological ruptures between Dworkin and Alexy and the Frankfurt School. His main purpose seems to be to describe, to justify and to argue favorably on the characterization of principles as legal norms, as being as effective as the rules. Moreover, the author of Constitutional Law does not problematize nor Dworkin's liberal nature and individualistic conception of society neither Alexy's theory of fundamental rights in his reference to the German constitution.

Barroso is not concerned with the explanation about the refusal of Habermasian proceduralism as a method of effectiveness of law. He shows no interest in explaining the reasons for the rejection of Habermasian jus-philosophical contribution to neo-positivism and the neo-constitutionalist movement of the twentieth century.

This negative dimension of his thought may be explained by two reasons. First: the concern of the constitutionalist to promote a historical and functional introduction of the law, since the conception of the modern state Constitution, from the American and French Revolutions to the post-World War 2nd as facts that triggered the need for changes to the legal and normative features characterizing principles so as to ensure the adaptation to the legal and social system in Brazil of the XXI century. This is the reason why he characterizes the Critical Theory as a theoretical foundation of neo-constitutionalist movement. Second: through specific conception of postmodernity, Barroso portrays humanization and individualization of social needs as socio-philosophical foundations that promote the extension and deepening of the normative effectiveness of constitutional principles.

However, when it comes to recognize "the others" and "their differences" on the question of minority rights, Sarmento seems to abandon Rawls' substantialism to claim Taylor's communitarianism. This is such a theoretical shift that allows Sarmento to affirm the emancipatory character of communitarianism to the Brazilian Constitution and recognize the role of legal and social policies for recognition of democratic governments. Moreover, this "communitarian turn" does not hide the distinction between communitarian constitution and social constitution made by Sarmento. As a social constitution, the Brazilian Constitution of 1988 aims at the promotion of national culture, besides consecrating trans-individual rights and collective holders of rights.

The question of the universal and particular dimensions of law is differently approached by Barroso. His historical and functional introduction of law depends on three aspects: the socio, economic and political functionalities of law, the state and legal power structures

and the theoretical and philosophical conceptions underpinning the first two aspects. As for the functionalities of the law and the powers of state, they are broadly and deeply presented as defining the model of the Liberal State. As for the functional changes that the powers of State and the law have undergone during the Social Welfare State, they are timidly defined. Then again, he presents quite deeply the socioeconomic consequences of the superposition of these models, associated with the effects of economic and social globalization, so as to justify his particular conception of postmodernity as a historical moment of valorization of the individual potentials. And in so doing, he assigns a universalizing character to the human beings as for their need for protection by the State and an individualizing character as for their peculiarities, which should also be subject to protection.

Barroso and Sarmento understand that the legal principles should have their contents and socio-legal functions reinterpreted from the classic positivism to the post-positivism. This is the condition for the realization of human dignity as a vector of the legal system. However, they differ on the instrumentalization and the enforcement of this reasoning.

Whereas for Barroso, the constitutional principles “reflect the ideology of society”, for Sarmento the Constituent Assembly is characterized by the absence of “pure and orthodox political ideology”, as well as the Constitution and the constitutional rules and principles. Whereas Sarmento’s argument allows asserting “the compromising character” of the Brazilian Constitution of 1988, Barroso’s argument assures to support the effectiveness of constitutional principles, in so far as they are normatively ranked as fundamental rights, regardless their concrete situations.

In this sense, Sarmento’s argument is consistent with the view that the Brazilian Constitution reveals the same emancipatory character featuring the community perspective. Unlike Sarmento, Barroso’s reasoning shows concern about the neutrality of interpreters in the context of constitutional law as “a set of independent rules inside a closed system”. To affirm “the return of values” provides for Barroso the opportunity to define neo-positivism through the relationship between ethics and law and to recognize a “new constitutional interpretation”. To deny the “order of values” provides for Sarmento the opportunity, in the footsteps of Habermas, to recognize proceduralism as a method for the interpretation of Brazilian Charter. The reasoning of both constitutionalists leads to the same result: the naturalization of the constitutional categories “fundamental rights” and “human dignity”. Neither the use of Taylor’s communitarianism by Sarmento nor Barroso’s concern with the historical background of the Brazilian constitutionalism produces reflection of sociological and historical nature. Perhaps the influence of Bobbio’s systematizing and moderate thought and the

influence of Taylor's decontextualized communitarianism stand for the difficulties of the Brazilian constitutionalists as to the recognition of the need to distinguish the value and the meaning of constitutional categories such as "fundamental rights", "rights of minorities" and "human dignity" from a legal, historical and social point of view.

Anyway, the studies of the Brazilian constitutionalists show the limits in respect for which it is necessary to "be vigilant and suspicious to the extreme, to avoid - by critics and consultation to reality - the resumption of alienating models of reflection" (BONDY, 1982:132) caused by the use of imported values and concepts.

5. CONCLUSION

Barroso's concern with the historical and philosophical background of the current Brazilian constitutionalism as well as his use of some categories of thought by Dworkin and Alexy do not lead the Brazilian constitutionalist to produce historical works or a philosophical reflection. Sarmento's concern with the community character of the Brazilian Constitution as well as his use of some philosophical and political categories of thought by Taylor are not enough to place minority rights in Brazil in a specific social and historical configuration. This may account for the more topic and rhetorical character of the dogmatic formulations of the two Brazilian constitutionalists who show greater practical and professional preoccupation with conflict resolution within the framework of constitutional law and through it.

Sarmento's concern with the reasoning focused on the defense and enforcement of the rights of real minorities leads the constitutionalist to proceed in a traditional manner. Theoretically and methodologically, he adopts the perspective of the classic dichotomies and places proceduralism and substantialism in the field of mutual and reciprocal exclusions. The ontological ruptures he uses are less liable to criticism because they are used in view of his preoccupation with the concrete reality of minority rights. In this case, he seems to establish some principles for interpretation and application of the Constitution in Brazilian society according to the association that he ends up doing between proceduralism and generality, on the one hand, and substantialism and particularity, on the other hand. Nevertheless, contemporary constitutionalism should claim an approach that should be able to cope with the question concerning integration between generality and specificity, and not a perspective that should underpin such a cleavage.

Barroso's concern with the interpretation and application of the Brazilian Constitution in society takes the constitutionalist to lean less on the rights of minorities than on the question of human

dignity. By proceeding in a rhetoric and dogmatic way, he makes use of the argumentation theory and the distinction between rules and principles for defining human rights as fundamental principles of the Brazilian Constitution endowed with normative function and so as a criterion for the interpretation and application of the constitutional law.

Thus, according to the Brazilian constitutionalists, the current stage of the Brazilian constitutionalism is primarily the result of the political and social processes that resulted from the correlation of distinct and contradictory forces and interests in Brazilian society and also from the participation of various and social movements and sectors of civil society, and all this gave rise to the National Constituent Assembly meeting. Despite this, both the Constituent as a “product” and the political and social interests and forces as a “process” appear primarily as a figure of rhetoric in the ideological universe of the two constitutionalists. Paradoxically, the changes in the so-called “constitutional law” define both the political ruptures with military authoritarianism, by the advancement of the process of democratization of Brazilian society, and the theoretical, dogmatic and methodological continuities, that define the limitations of the Brazilian constitutionalists to the problem of incorporating into their reflections the constitutional reality and the Latin American constitutional thought.

The consequences arising from this framework do not prevent the realization of analysis of conjuncture on specific situations concerning the Brazilian reality and relating to the “holder of right” and the “right of holder” in the field of minority and fundamental rights.

Those consequences notwithstanding, the fact is that they define the limits of Brazilian constitutionalism in terms of reflection in the context of the critical theory of law facing the problem of emancipation and transformation. Even if such limits can be credited not to the analysis of the works of the authors as a whole, but to the fragments of these works, the fact is that the western and traditional way of thinking of and researching the right, without questioning the relationship articulating “theoretical object” and “empirical object”, led the Brazilian constitutionalists to consider the emergence of the Constituent and the Brazilian Constitution out of the context of real political, social, economic and cultural processes of their formation. Thus, the Brazilian Constitution was approached both by Sarmento and Barroso as a rhetorical product of reasoning driven by practical concerns regarding conflict resolution by the judiciary. Ultimately, the current stage of the Brazilian constitutionalism ends up being defined by constitutional changes naturalized in the discourse of the constitutionalists.

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DOMESTIC LAW AND INTERNATIONAL LAW IN BRAZIL

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Abstract: International law, which main sources are agreements and international conventions, is increasingly present in internal affairs in such way that it is difficult to imagine an area of national law which has not been affected in some way by standards imposed by agreements. But how and to what extent international law will be applied internally will depend on the way in which States comply with their international obligations. Therefore, it is essential to know how States bestow domestic legal effect to their agreements. The theoretical question about the relationship between domestic law and international law is usually presented on the basis of dualistic (or pluralistic) and monistic theories, that can not, however, comprehensively cover all aspects of this relationship. The Constitution of the Federative Republic of Brazil recognizes, yet indirectly, international agreements as part of domestic law, but left important aspects related to its application without answers. Thus, the Brazilian judiciary has faced critical issues relating to the impact of agreements in domestic law, particularly regarding its duration, effects and hierarchical position. Despite the Brazilian judicial performance, legal uncertainties regarding the matter persist, which will be exposed in this article.

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1. INTRODUCTION: THEORETICAL FRAMEWORK OF THE MONISTIC AND THE DUALISTIC THEORIES VERSUS PRACTICE

The relationship between domestic law and international law is a problem that has been worrying the legal community for a long time. There are countless cases where international rules have dispositions in conflict with domestic rules, but the most important historical event in Brazilian history is the conflict between the Geneva's Uniform Law For Bills of Exchange and Promissory Notes, which was promulgated into law by the Decree 57.663 on January 24, 1996, and the Law-Decree 427 of January 22, 1969¹.

The normative conflict, however, is not the only problem. In fact, at least three other relevant aspects should be taken into consideration while analyzing the interaction between domestic law and international law: the conjugation of the conceptions related to the structure of the international law with the domestic law; the pattern utilized to give domestic relevance to norms of international law and the hierarchy relations between the norms of international law and the ones of domestic law².

There is not, in practice, a prevailing answer to the questions emanating from those aspects, and the preeminence of the international law, defended by many internationalists, is only a doctrinal position, inasmuch as *"decentralized the international society sees each of its members defining for its own interest the rules regarding the relation between international law and domestic law"l order and not the people in the internal order"*³.

On the other hand, the doctrine segregates itself into two schools of thoughts to answer those questions, the thirst school of thought, that, based on legal and philosophical foundations, tries to explain how the relationship between international law and domestic law works, and

1 In this case, the Brazilian domestic law instituted an registration obligation of Bills of Exchange and Promissory Notes, which was not part of the Geneva's Uniform Law. The case was submitted to the Supreme Federal Court, whose decision is currently one of the major case law on the relation between international and domestic law. This decision (the Extraordinary Appeal 80.004/SE) will be later analyzed on this article.

2 BYSTRONSKI, Guilherme Fonseca. *Concretismo : uma abordagem institucional para analisar as relações entre o direito internacional e o direito interno*. 2003.301p. Dissertação (Mestrado em Direito Internacional e da Integração Econômica) – Faculdade de Direito, Universidade do Estado do Rio de Janeiro, 2003, p.21.

3 CASTRO, Amílcar de. *Direito Internacional Privado*. 3ªed, Rio de Janeiro:Forense, 1977, p.93.

the second school of thought of practical nature, that tries to find on the norms of the legal systems involved the solution for a potential conflict⁴.

The theoretical view about the relationship between international law and domestic law is generally presented based on the dualistic (pluralistic) and the monistic theories, according to Ian Brownlie⁵.

The dualistic doctrine, which one of the biggest exponents was Triepel, whose work *Völkerrecht und Landesrecht* (1899) can be considered the first systematic study of the matter, champion that the essential difference between domestic law and international law consists primarily on the fact that those laws are applied to different subjects: the international law governs the relations between sovereign states, whilst the domestic law governs the relations between individuals or between those and the executive power. Triepel, while analyzing the relationship between international law and domestic law, begins from the premise that both are different notions⁶.

Triepel asserted that the international law and the domestic law were distinct legal systems, and were not distinct parts of a single system, however it was certain that there could be contact points, but not intersections and, as a result, conflicts⁷.

Based on this theory, neither of those laws have jurisdiction to make or to modify norms of the other. When domestic law asserts that international should be applied, integrally or partially, to domestic jurisdiction, it is only exercising its authority of domestic law, adopting or transforming norms of international law into domestic norms. In case of conflict between international law and domestic law, the second should have primacy over the first⁸. This is due to the fact that the nature of interstate relations is fundamentally different from the nature of intrastate relations, from which it follows that international law would only produce any domestic effect when authorized by the domestic legislation⁹. Triepel's ideas find support on the Italian doctrine, manly

4 BYSTRONSKI, Guilherme Fonseca. Concretismo : uma abordagem institucional para analisar as relações entre o direito internacional e o direito interno. 2003.301p. Dissertação (Mestrado em Direito Internacional e da Integração Econômica) – Faculdade de Direito, Universidade do Estado do Rio de Janeiro, 2003, pp.21-22.

5 BROWNLIE, Ian. Principles of Public International Law. Sixth Edition. New York: Oxford University Press Inc. 2003, p. 31. Note-se que, em realidade, o autor refere-se ao direito municipal, e não ao direito interno, haja vista a autonomia legislativa dos estados federados norte-americanos.

6 TRIEPEL, Carl Heinrich. Les rapports entre le droit interne et le droit international. Recueil des Cours. Académie de Droit International de la Haye. Dordrecht (Pays-Bas) : Martinus Nijhoff. Tomo 1, 1923. pp. 79.

7 TRIEPEL, Carl Heinrich. *Völkerrecht und Landesrecht*. Leipzig : C.L. Hirschfeld, 1899, p.111.

8 BROWNLIE, Ian. Principles of Public International Law. Sixth Edition. New York: Oxford University Press Inc. 2003, p. 32

9 SHAW, Malcolm N. International Law. Seventh Edition. Cambridge: Cambridge University

after the works of Anzilotti¹⁰.

In Brazil, the dualistic Italian doctrine was followed by Amílcar de Castro, according to whom *“treaty is no law, it is na international act which obliges the people considered as a whole, obliges the government in the external order; and not the people in the internal order”*¹¹.

The dualistic theory is adopted specially in the United Kingdom of Great Britain and Northern Ireland and in its previous colonies, with the notorious exception of the United States of America, because of its extreme separation of powers. In the former country, the fact that the British crown had maintained the powers to conduct foreign relations and to establish agreements without the intervention of the parliament, while it maintains the power to legislate almost exclusively has made the prevalence of dualism unavoidable¹².

In opposition to the dualistic doctrine, appears the monistic view, which essence can be extracted from the fact that a treaty can become, without the necessity of a domestic normative act, part of the domestic law since the moment that it is concluded in accordance to constitutional dispositions¹³. The monistic view, therefore, admits the existence of normative conflicts between international treaty and domestic norm¹⁴.

One of the biggest exponents, and perhaps the main monistic theorist, was Hans Kelsen, who suggests that domestic law and international law are parts of the same normative order, namely, there is a unitary view of law¹⁵. For Kelsen, domestic law and international law are just two normative systems that are in correlation, composing only one legal order, dispelling the idea of the state as a stranger to the law, and, therefore, not bound to international law¹⁶. Moreover, both domestic and international law would have their validity grounded

Press, 2014, p.93.

10 DOLINGER, Jacob. *Direito Internacional Privado: parte geral*. 9ª ed, Rio de Janeiro: Renovar, 2008.

11 From the original in portuguese: “tratado não é lei; é ato internacional que obriga o povo considerado em bloco; que obriga o governo na ordem externa e não o povo na ordem interna”. In: CASTRO, Amílcar de. *Direito Internacional Privado*. 3ªed, Rio de Janeiro:Forense, 1977, p.93.

12 AUST, Anthony. *Modern Treaty Law and Practice*. Third Edition. Cambridge: Cambridge University Press, 2013, p.167.

13 Idem, p.163.

14 DINH, Nguyen Quoc; DAILLER, Patrick; PELLET, Alain. *Droit International Public*. 7e edition. Paris: L.G.D.J., 2002. p.277.

15 SHAW, Malcolm N. *International Law*. Seventh Edition. Cambridge: Cambridge University Press, 2014, p.94.

16 KELSEN, Hans. *Les rapports de système entre le droit interne et le droit international public*. Recueil des Cours. Académie de Droit International de la Haye. Dordrecht (pays-Bas) : Martinus Nijhoff. Tomo 14, 1926p.231

on a basic norm, which, for the referred author, would consist on the obligation of states to continue to act as they usually had done¹⁷.

In Kelsen's logic, the referred basic norm gives base to the international law and allows revolutions to be facts that result on the creation of norms. As a result of the necessary effectiveness of the basic norm, the primary constituent, while determining the new fundamentals of the domestic law, is constricted by international law¹⁸.

Indeed, the method utilized by Kelsen to elucidate his monistic perception utilizes Kant's philosophy as a base, treating the law as an order that stipulates patterns of actions that must be observed, followed by sanctions that can be applied when an illegal act is committed. As the same logic can be applied to domestic law and international law, there is a legal unity, and as the states must obey in their relations with others to the international norms, such as those that establish equality between them, international law would be superior, or at least would be closer to the basic norm, in relation to the domestic law¹⁹.

Even though Kelsen establishes the monistic view with formal bases of his own theory and defends more proximity of international law with the basic norm, he does not defend the absolute primacy of the international law above the domestic law, because, for him, the question of primacy can only be decided taking into account considerations that are not strictly legal. It can be speculated if Kelsen avoided an element of admission when he established that the basic norm of international law in a way determines the validity of the domestic basic norm: the validity of each one would depend more on the relation of interdependency than on a "hierarchical relationship"²⁰.

Other monistic theorists tend to justify their positioning with ethical arguments, showing concern with the protection of human's rights. This is the case of Hersch Lauterpacht, a British lawyer, that see the protection of individual's welfare as the key objective of law, being the supremacy of international law the best method to achieve this end²¹.

There is also a naturalistic monism, which, at least superficially, is similar to Kelsen's provision of a universal basic norm. According to this theory, domestic and international legal systems are subordinated to

17 BROWNLIE, Ian. *Principles of Public International Law*. Sixth Edition. New York: Oxford University Press Inc. 2003, p. 32.

18 BROWNLIE, Ian. *Principles of Public International Law*. Sixth Edition. New York: Oxford University Press Inc. 2003, pp. 32-33.

19 SHAW, Malcolm N. *International Law*. Seventh Edition. Cambridge: Cambridge University Press, 2014, p.94.

20 BROWNLIE, Ian. *Principles of Public International Law*. Sixth Edition. New York: Oxford University Press Inc. 2003, pp. 33.

21 SHAW, Malcolm N. *International Law*. Seventh Edition. Cambridge: Cambridge University Press, 2014, p.94.

a third legal system, usually postulated in terms of natural law or general principles of law, superior to them both and capable of determining their respective spheres²².

In addition to the monistic and dualistic theories, many conciliatory have appeared, among which the group formed by Spanish doctrinaires stands out. These vindicate that domestic law and international law compose independent legal systems, but coordinated by natural law²³.

Some other authors set aside the monism-dualism dichotomy, establishing that the logical consequences of both theories are in conflict with the way that domestic and international organs behave. Gerald Fitzmaurice challenge the premise, adopted by monists and dualists, that the domestic law and the international law have the same field of operation. According to the author, both systems do not enter into conflict as systems, for they act in different spheres. Each one is supreme in its own field. However, a conflict of obligations can happen, an inability of the state, in domestic level, to act as is determined by international law: the consequence of this will not be the invalidity of domestic law, but the responsibility of the state in international level²⁴.

Rousseau, for his turn, proposed similar view when characterized international law as a law of coordination which do not determine automatic derogation of the domestic norm that is in conflict with international obligations. These authors, among others, express their preference for the practice above the theory.²⁵

If in domestic level there are doubts about the production of direct effects of norms of international law, in international level there are no doubts that domestic law cannot be called upon to discharge the state of an obligation internationally accepted. Therefore, international law has, in international level, unequivocal supremacy, defined in article 27 of the 1969's Vienna Convention on the Law of Treaties, from a series of sentencings posteriors to its elaboration, which, no doubt, consisted in established case law about the matter²⁶.

For Aust, the supremacy of international law, at least in international level, comes from the principle *pacta sunt servanda*, being certain that the failure of the state obliged by a treaty to assure its

22 BROWNLIE, Ian. Principles of Public International Law. Sixth Edition. New York: Oxford University Press Inc. 2003, pp. 33.

23 MELLO, Celso D. de Albuquerque. Curso de Direito Internacional Público. 1º Volume, Cap. XXII, 14ª. ed. Rio de Janeiro: Renovar. 2002, p.125.

24 BROWNLIE, Ian. Principles of Public International Law. Sixth Edition. New York: Oxford University Press Inc. 2003, pp. 33.

25 Idem, pp. 33- 34

26 BROWNLIE, Ian. Principles of Public International Law. Sixth Edition. New York: Oxford University Press Inc. 2003, pp. 34.

domestic application can result in his responsibility²⁷.

2. ENTRY INTO FORCE OF INTERNATIONAL TREATIES IN BRAZIL'S LEGAL SYSTEM

Apart from discussions about the relationship between international law and domestic law, the international treaty, to enter into force in the domestic legal order, needs to follow the conditions of form and substance that are imposed.

In general, the regulation established by the Constitution of the Federative Republic of Brazil de 1988 (CFRB) manifests that a huge part of the script for internalization of treaties in Brazil's legal order is based on customary norms resulting from a ritual consolidated in practice by domestic authorities. It is important to highlight that Brazil, after almost four decades from the signature, has ratified the 1969's Vienna Convention on the Law of Treaties in 2009, being it now fully applicable.

The procedure of internalization of international treaties can vary in some aspects depending on their object, but there will always be, in the begging and ending of the procedure, the imperative participation of the President.

The procedure begins with the negotiations between the involved parties and the signing of the final version, acts exercised by the President or by plenipotentiary nominated by him, because, in accordance to article 84.VIII of the CFRB, the President has the exclusive power to "*conclude international treaties, conventions and acts, ad referendum of the National Congress*". Once the treaty is signed, the President submit it to the National Congress by means of a presidential message²⁸.

The CFRB establishes, in its article 49, I, that the National Congress has exclusive jurisdiction to "*to decide conclusively on international treaties, agreements or acts which result in charges or commitments that go against the national property*". There is, in this point, clear contradiction between the text of the cited disposition and the article 84 VIII already mentioned, because one requires National Congress endorsement for any and every treaty, and the other attributes to the National Congress only the appreciation of treaties that results in onus or harmful commitment to national property.

The mismatch between the text of both dispositions maintained, in practice, the jurisdiction of the President to sign the so called "executive agreements", which do not need legislative endorsement. This legislative intervention, established in the Constitution of the majority of states, had as goal the democratization of foreign relations,

27 AUST, Anthony. *Modern Treaty Law and Practice*. Third Edition. Cambridge: Cambridge University Press, 2013, p.161.

28 TIBURCIO, Carmen. *Temas de Direito Internacional*. Rio de Janeiro: Renovar, 2006, p.5.

admitting that the power with theoretically more popular representation, especially if we consider monarchic states, integrates the procedure²⁹.

The delay on the ratification entailed by the complex procedure of treaty celebration, and, in Brazil's case, the text of article 49, I, of the CFRB, led to the proliferation of the so-called executive agreements. Therefore, the dual procedure, with concurrence of the Legislative, was reserved to the more complex matters that indeed result in onus or harmful commitment to national property.

According to Paula Almeida, *"currently the majority of the treaties is concluded following the simplified process, excluding the participation of the legislative and as consequence the need of ratification"*³⁰. As a general rule, those treaties have as object matters of exclusive jurisdiction of the Executive, but the absolute absence of control has made it possible that in Brazil 80% of the International Acts are made only by the Executive, involving even matters of great complexity that, in theory, should follow the ordinary procedure for ratification, involving the Legislative Power³¹. In these cases, the mere signature of the treaty by the President or his plenipotentiary already bounds Brazil definitively, in the terms of article 12 of the Vienna Convention on the Law of Treaties.

The National Congress concurring for the treaty ratification, it deliberates by majority of the presents, in separated polls at the Chamber and the Senate, without being able to modify the text of the international act, being able only to approve or reject it. The decision is published by legislative decree promulgated by the President of the National Congress and it authorizes the ratification or accession to the treaty by Brazil³².

For the next step on the dual procedure, the Legislative is governed by the Vienna Convention on the Law of Treaties. It consists on the manifestation of the definitive consent to be bound by the treaty. Generally, it is given by the ratification or the accession to the treaty, necessarily signed by the Head of State, by the Head of Government, by the Foreign Minister or by a plenipotentiary³³. A long standing doctrinaire discussion has developed in Brazil about the necessity of

29 ALMEIDA, Paula Wojcikiewicz Almeida. A tendência de conclusão dos acordos em forma simplificada: evolução e prática brasileira. Assunção, Paraguai. Revista da Secretaria do Tribunal Permanente de Revisão, vol.1, 2003, p.183.

30 From the original in portuguese : "atualmente a maior parte dos tratados internacionais é concluída seguindo o trâmite dos acordos em forma simplificada, ou seja, excluindo-se a participação do poder legislativo e, consequentemente, a exigência de ratificação". Ibidem.

31 Ibidem.

32 TIBURCIO, Carmen. Temas de Direito Internacional. Rio de Janeiro: Renovar, 2006, p.6.

33 AUST, Anthony. Modern Treaty Law and Practice. Third Edition. Cambridge: Cambridge University Press, 2013, p.99.

ratification by the President of treaties approved by Brazil. Nowadays, the majority of the doctrine understands that the ratification is a private and discretionary act of the President³⁴.

Another relevant controversy that appeared on this specific phase is related to the possibility of the President ratify treaties that create obligations to states, counties and the federal district, because, in the terms of article 1º of the CFRB, the Brazilian state is organized in the form of a Federative Republic, which results that each entity of the federation has its own field of attributions.

Especially problematic was the question of the ratification of treaties, by the Union, which resulted in the exemption of taxes that were of the jurisdiction of another entity, because article 151, III, of the CFRB forbids the Union *“to institute exemptions from tributes within the powers of the states, of the federal district or of the municipalities”*.

The question of the possibility of ratification of a treaty that resulted in heteronomous exemption, in theory forbidden by the above mentioned article, was analyzed by the Supreme Federal Court on the judgement of the Extraordinary Appeal (RE) n.º 229.096-0/RS³⁵, on 16/08/2007. In these case, the validity/applicability of article III.2 of The General Agreement on Tariffs and Trade (GATT) to the case sub judice was questioned utilizing the argument that the article regulated a matter that was of exclusive jurisdiction of the states of the federation, the Tax on the Circulation of Good an on the Rendering of Interstate and Intermunicipal Transportation Services and Services of communication

34 TIBURCIO, Carmen. *Temas de Direito Internacional*. Rio de Janeiro: Renovar, 2006, p.6.

35 EMENTA: DIREITO TRIBUTÁRIO. RECEPÇÃO PELA CONSTITUIÇÃO DA REPÚBLICA DE 1988 DO ACORDO GERAL DE TARIFAS E COMÉRCIO. ISENÇÃO DE TRIBUTO ESTADUAL PREVISTA EM TRATADO INTERNACIONAL FIRMADO PELA REPÚBLICA FEDERATIVA DO BRASIL. ARTIGO 151, INCISO III, DA CONSTITUIÇÃO DA REPÚBLICA. ARTIGO 98 DO CÓDIGO TRIBUTÁRIO NACIONAL. NÃO CARACTERIZAÇÃO DE ISENÇÃO HETERÔNOMA. RECURSO EXTRAORDINÁRIO CONHECIDO E PROVIDO. 1. A isenção de tributos estaduais prevista no Acordo Geral de Tarifas e Comércio para as mercadorias importadas dos países signatários quando o similar nacional tiver o mesmo benefício foi recepcionada pela Constituição da República de 1988. 2. O artigo 98 do Código Tributário Nacional “possui caráter nacional, com eficácia para a União, os Estados e os Municípios” (voto do eminente Ministro Ilmar Galvão). 3. No direito internacional apenas a República Federativa do Brasil tem competência para firmar tratados (art. 52, § 2º, da Constituição da República), dela não dispondo a União, os Estados-membros ou os Municípios. O Presidente da República não subscreve tratados como Chefe de Governo, mas como Chefe de Estado, o que descaracteriza a existência de uma isenção heterônoma, vedada pelo art. 151, inc. III, da Constituição. 4. Recurso extraordinário conhecido e provido. (RE 229096, Relator(a): Min. ILMAR GALVÃO, Relator(a) p/ Acórdão: Min. CÁRMEN LÚCIA, Tribunal Pleno, julgado em 16/08/2007, DJe-065 DIVULG 10-04-2008 PUBLIC 11-04-2008 EMENT VOL-02314-05 PP-00985 RTJ VOL-00204-02 PP-00858 RJTJRS v. 45, n. 275, 2010, p. 29-42)

(ICMS), of state jurisdiction. According to the authors of the action, the cited disposition affronts the article 151.III of the CFRB of 1988, which forbids the Union, one of Brazil's administrative entities, to establish exemptions of taxes that are of the jurisdiction of the states, the federal district or the municipalities.

According to the Supreme Federal Court (SFC)'s understanding, the President, while exercising its private jurisdiction to maintain foreign relations on the terms of article 84, VIII, of the CFRB, acts as Head of State, representing the Federal Republic of Brazil, and not as a representative of the Union, which is seen as a composing part of the federation.

Finally, the ratified treaty – and, except in suspensive conditions, bounding for Brazil in the international level – is submitted to promulgation by the President and, subsequently, it is published. These acts are not prescribed by the CFRB or by Brazil's legislation, but consist on the existing practice since the Empire of Brazil³⁶.

The SFC has decided on the judgement of the Letter of Request 8.279/AT³⁷ that treaties only are binding in domestic level

36 TIBURCIO, Carmen. *Temas de Direito Internacional*. Rio de Janeiro: Renovar, 2006, p.7.

37 E M E N T A: MERCOSUL - CARTA ROGATÓRIA PASSIVA - DENEGACÃO DE EXEQUATUR - PROTOCOLO DE MEDIDAS CAUTELARES (OURO PRETO/MG) - INAPLICABILIDADE, POR RAZÕES DE ORDEM CIRCUNSTANCIAL - ATO INTERNACIONAL CUJO CICLO DE INCORPORAÇÃO, AO DIREITO INTERNO DO BRASIL, AINDA NÃO SE ACHAVA CONCLUÍDO À DATA DA DECISÃO DENEGATÓRIA DO EXEQUATUR, PROFERIDA PELO PRESIDENTE DO SUPREMO TRIBUNAL FEDERAL - RELAÇÕES ENTRE O DIREITO INTERNACIONAL, O DIREITO COMUNITÁRIO E O DIREITO NACIONAL DO BRASIL - PRINCÍPIOS DO EFEITO DIRETO E DA APLICABILIDADE IMEDIATA - AUSÊNCIA DE SUA PREVISÃO NO SISTEMA CONSTITUCIONAL BRASILEIRO - INEXISTÊNCIA DE CLÁUSULA GERAL DE RECEPÇÃO PLENA E AUTOMÁTICA DE ATOS INTERNACIONAIS, MESMO DAQUELES FUNDADOS EM TRATADOS DE INTEGRAÇÃO - RECURSO DE AGRAVO IMPROVIDO. A RECEPÇÃO DOS TRATADOS OU CONVENÇÕES INTERNACIONAIS EM GERAL E DOS ACORDOS CELEBRADOS NO ÂMBITO DO MERCOSUL ESTÁ SUJEITA À DISCIPLINA FIXADA NA CONSTITUIÇÃO DA REPÚBLICA. - A recepção de acordos celebrados pelo Brasil no âmbito do MERCOSUL está sujeita à mesma disciplina constitucional que rege o processo de incorporação, à ordem positiva interna brasileira, dos tratados ou convenções internacionais em geral. É, pois, na Constituição da República, e não em instrumentos normativos de caráter internacional, que reside a definição do iter procedimental pertinente à transposição, para o plano do direito positivo interno do Brasil, dos tratados, convenções ou acordos - inclusive daqueles celebrados no contexto regional do MERCOSUL - concluídos pelo Estado brasileiro. (...) A recepção dos tratados internacionais em geral e dos acordos celebrados pelo Brasil no âmbito do MERCOSUL depende, para efeito de sua ulterior execução no plano interno, de uma sucessão causal e ordenada de atos revestidos de caráter político-jurídico, assim definidos: (a) aprovação, pelo Congresso Nacional, mediante decreto legislativo, de tais convenções; (b) ratificação desses atos internacionais, pelo Chefe de Estado, mediante depósito do respectivo instrumento; (c) promulgação de tais acordos ou tratados, pelo Presidente da República, mediante decreto, em ordem a viabilizar a produção dos seguintes

after the promulgation and the publication of the presidential decree. This understanding results in severe situations, if we consider the common practice of the last Presidents of promulgating and publishing ratified treaties. Indeed, the Inter-American Convention on Forced Disappearance of Persons of 1994 was ratified by Brazil on the 2nd of March of 2014 and, more than two years later, the promulgation is still pending. A more concerning situation is that of The International Convention for the Protection of All Persons from Enforced Disappearance, ratified on the 29th of November of 2011 and waiting for promulgation and publication for almost 5 years. In these interim, these texts are internationally, but not internally binding.

These peculiarity of the regime of internalization of treaties by Brazil makes part of the doctrine characterize the Brazilian system as dualist, because these complex mechanism of reception, with the demand for a particular normative act (presidential decree), would consist in clear evidence of the absence of practicability and of effect of the international law in domestic level³⁸.

The Brazilian law, however, is integrally clear, being indispensable the concession of publicity to all the normative acts by means of promulgation and publication on the *Diário Oficial*³⁹. Moreover, the CFRB establishes, in its article 105, III, a, that the Supreme Federal Court has the competence to “judge, on special appeal, the cases decided, in a sole or last instance, by the federal regional courts or by the courts of the states, of the federal district and the Territories, when the decision appealed is contrary to a treaty or a federal law, or denies it effectiveness”; and in its article 102, III, b, to be of the Supreme Federal Court jurisdiction the judgement of, by an extraordinary appeal, law suits judged, in single or only instance, when the appealed decision declares the unconstitutionality of treaty or federal law.

Now, if it is possible the constitutional control of the international treaty – and not of the presidential decree that promulgated it – there is no doubt that it emanates effects by itself in Brazil, and the presidential decree has the sole role of making public the ratification of the international treaty.

efeitos básicos, essenciais à sua vigência doméstica: (1) publicação oficial do texto do tratado e (2) executoriedade do ato de direito internacional público, que passa, então - e somente então - a vincular e a obrigar no plano do direito positivo interno. (...)

(CR 8279 AgR, Relator(a): Min. CELSO DE MELLO, Tribunal Pleno, julgado em 17/06/1998, DJ 10-08-2000 PP-00006 EMENT VOL-01999-01 PP-00042)

38 ARAUJO, Nadia de. *Direito Internacional Privado: teoria e prática brasileira*. 4ªed., Rio de Janeiro: Renovar, 2008.p.166

39 REZEK, José Francisco. *Direito Internacional Público*. 11ªed, São Paulo: Saraiva, 2008, pp.78-79.

3. EFFECTS OF TREATIES IN BRAZILIAN LAW

The fact that an international treaty has been incorporated to a legal system of a given state, however, does not signify that it will be considered capable of creating rights or obligations demandable at local courts⁴⁰.

On the other side, in international law there are obligations that can (or must) be followed directly by states, like treaties that aim sole the accession to an international organization, and obligations which its fulfillment depends on the adoption of practical measures by states, especially its domestic regulation. Therefore, when ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, there was not the instant criminalization of torture in Brazil's legal system, there was, however, the assumption of the commitment by the state to adopt all the necessary measures to thwart the practice of those acts.

In both of the mentioned cases, what is discussed is the nature of the accepted obligation by the state in international level: on the first, the main obligation, which is the accession to the international organization, was a direct obligation that was fulfilled in the moment of ratification, while on the second there are indirect obligations that still need to be satisfied. In relation to the direct as well as the indirect obligations, there is still the analysis of the substance of the norms of the treaty, if they are programmatic norms or self-executing norms.

Treaties which norms are self-executing will establish rights and obligations demandable at local courts, while treaties which norms are simply programmatic will not. The most sensitive question, however, is the fact that it is domestic law that determines if a certain category of treaties will be considered as consisting of self-executing norms or simply programmatic norms⁴¹.

One of the most relevant cases analyzed by the Brazilian judiciary involving the question was about the TRIPS Agreement. The controversy consisted on the production, or not, of direct effects of the cited Agreement for the individual, namely, if an individual could claim at national courts a right founded on the Agreement⁴².

In a brief summary, the cases taken to the Brazilian judiciary were about the period of duration of the letters patent issued before the Agreement was in force in Brazil, because the deadline established by

40 BUERGENTHAL, Tomas. Self-Executing and Non-Self Executing Treaties in National and International Law. *Recueil des Cours. Académie de Droit International de la Haye. Dordrecht (Pays-Bas) : Martinus Nijhoff. Tomo 235, 1992. p. 317.*

41 Ibidem.

42 PEREIRA, Ana Cristina Paulo. *A Proteção Patentária Interna e Internacional: implicações do acordo TRIPS/OMC na ordem jurídica brasileira.* Rio de Janeiro: Lumen Juris, 2009, p.35,

the Agreement (20 years) was superior to the deadline of the protection of patents established by the legislation in force⁴³ (15 years).

The firms that, in 1995, were almost losing patent protection started an action claiming basically that the TRIPS Agreement had direct application in Brazilian territory, without the need of regulation, because it is a self-execution agreement.

For the identification of the self-execution of an international treaty it is indispensable the analysis of its norms. The interpreter must utilize the adequate interpretative methods to determine if the treaty has norms of programmatic nature, about principles, establishing goals, guidelines, etc., or if there are norms with full applicability.

Article 1.1 of the TRIPS Agreement refers expressly to the domestic law of OMC members, establishing clearly the necessity of regulation, even because the Agreement establishes only minimum of patent protection, being the state able to offer a bigger protection. There wasn't, however, an established jurisprudence over the matter.

At this point, it is convenient to remember two fundamental concepts: uniformity of international law and harmonization of international law. The first are "*activities which are essentially international, object of international conventions that uniformize the juridical rules applicable to a given matter through uniform laws*"⁴⁴. The second are the activities practiced only to achieve the harmonization of the treatment of certain matter generally establishing minimum parameters to be followed, but leaving to the state the choice of the best way to adapt his legal system.

As a general rule, treaties that aim for the uniformity of law, namely, the adoption of the same rules by states – the case, as an example, of the Geneva's Uniform Law For Bills of Exchange and Promissory Notes –, are self-execution treaties. Now, treaties that aim only for the harmonization of laws tend to be considered as simply programmatic, in need, therefor, of posterior regulation.

Except for punctual examples, it is not possible to fully define which treaties will be considered as self-executive in a certain state, especially for being the classification of a treaty as simply programmatic utilized frequently as a subterfuge by local judiciary to evade the application of a treaty that is considered as undesirable⁴⁵.

43 Lei 5.772. de 21/12/1970, que permaneceu em vigor até 21/12/1970.

44 From the original in portuguese: "atividades de caráter internacional, objeto de convenções internacionais que uniformizam as regras jurídicas disciplinadoras da matéria por meio de leis uniformes". In: DOLINGER, Jacob. *Direito Internacional Privado: parte geral*. 9ª ed, Rio de Janeiro: Renovar, 2008, p.40.

45 BUERGENTHAL, Tomas. *Self-Executing and Non-Self Executing Treaties in National and International Law*. *Recueil des Cours. Académie de Droit International de la Haye*. Dordrecht (Pays-Bas) : Martinus Nijhoff. Tomo 235, 1992. pp. 368-369.

4. HIERARCHICAL POSITION OF TREATIES IN BRAZILIAN LAW

Established the initial assumptions for the theme's comprehension, it is time to analyze the predominant positioning in Brazil about the hierarchic position of treaties.

Brazilian doctrine historically defended the direct application of treaties in domestic level, with their absolute preponderance. It was adopted, therefore, the absolute monism, as defended, among others by Oscar Tenório and Haroldo Valladão⁴⁶. Nevertheless, the predominance of the filiation to absolute monism by the majority of the international Brazilian doctrine, the constituent opted for the omission, not being any disposition on CFRB about the matter⁴⁷, with the exception of human rights treaties, that will be analyzed posteriorly.

Even theoreticians that defended absolute monism diverged about conflicts between treaties and the constitution. According to Jacob Dolinger, Valladão affirmed that a new constitution would not revoke a treaty that had already been ratified, but a treaty ratified in contradiction with the constitution would be internationally invalidated, while Hildebrando Accioly would defend the predominance of international treaties even in relation to the constitution, utilizing for that a 1932's jurisprudence of the International Court of Justice⁴⁸.

Rezek, analyzing the matter, concluded that by occupying the summit of the domestic legal system, the constitution has an especially important role, from what follows that *"hardly one of these fundamental laws would despise, in this historical moment, the ideal of safety and stability of the juridical order subjecting itself to the State's normative exterior commitments"*⁴⁹.

Nowadays, the text of the already mentioned 102, III, b, of the 1988's CFRB, which establishes expressly the unconstitutionality of international treaties does not leave doubts about the supremacy of the constitution, even in relation to international law. But what if there were constitutional rules that affronted imperative international rules, like the prohibition of genocide? In these cases, the majority of the

46 DOLINGER, Jacob. *Direito Internacional Privado: parte geral*. 9ª ed, Rio de Janeiro: Renovar, 2008, p.92.

47 TIBURCIO, Carmen. *Conflito entre fontes: os casos da prisão civil*. In: BAPTISTA, Luiz Olavo; MAZZUOLI, Valerio de Oliveira. *Doutrinas essenciais: direito internacional*. São Paulo: Revista dos Tribunais, 2012, p.96.

48 DOLINGER, Jacob. *Direito Internacional Privado: parte geral*. 9ª ed, Rio de Janeiro: Renovar, 2008, pp. 94-95.

49 From the original in portuguese: "difícilmente uma dessas leis fundamentais desprezaria, nesse momento histórico, o ideal de segurança e estabilidade da ordem jurídica a ponto de subpor-se, a si mesma, ao produto normativo dos compromissos exteriores do Estado". REZEK, José Francisco. *Direito dos Tratados*. Rio de Janeiro: Forense, 1984, pp.461 – 462.

doctrine defends the predominance of international law even in relation to the republic constitution.

Moreover, during the judgement of the Direct Action of Unconstitutionality (ADI)1480, the SFC ended all doubts about the possibility of abstract control of constitutionality of international treaties, relevant exposure, before the omissive disposition of article 102, I, a of CFRB, that does not include the agreements as possible objects of a direct action of unconstitutionality⁵⁰.

Indeed, *“so strong is the conviction that the fundamental law cannot succumb in any kind of confrontation, that even in the most obsequious systems with the International Law one can find the precept according to which all treaties that contradicts the constitution can only be completed after the promotion necessary constitutional reform”*⁵¹.

The Minister of the SFC Luís Roberto Barroso refutes the idea of the unlimited sovereignty of the constituent power, affirming that international law, especially certain universal values, impose limits to the original constituent⁵². Thus, even though, as a rule, the constitution prevails before international treaties as a whole, it, as defended by Kelsen, is subject to limits imposed by international law.

About the unconstitutionality of treaties, two possibilities are indicated: formally unconstitutional treaties, namely, ratified in disagreement with the constitutional order, and substantially unconstitutional treaties, which substance contradicts constitutional norms.

Formal unconstitutionality of treaties occurs when they are completed in disagreement with the ritual established constitutionally, for example, if ratified by incompetent authority. This is the only hypothesis, by the way, admitted by the Vienna Convention on the Law of Treaties. Indeed, according to it, *“the claim of a certain state, in the sense that its consent to be bound by the treaty was invalid for violating provision of its domestic law, will lack value internationally, unless such provision (internal law) is about the competence to conclude a*

50 Art. 102. The Supreme Federal Court is responsible, essentially, for safeguarding the Constitution, and it is within its competence: I - to institute legal proceeding and trial, in the first instance, of: a) direct actions of unconstitutionality of a federal or state law or normative act, and declaratory actions of constitutionality of a federal law or normative act;

51 From the original in portuguese: *“tão firme é a convicção de que a lei fundamental não pode sucumbir, em qualquer espécie de confronto, que nos sistemas mais obsequiosos para com o Direito das Gentes tornou-se encontrável o preceito segundo o qual todo tratado conflitante com a constituição só pode ser concluído depois de se promover a necessária reforma constitucional”*. In: REZEK, José Francisco. *Direito dos Tratados*. Rio de Janeiro: Forense, 1984, p. 462.

52 BARROSO, Luís Roberto. *Constituição e tratados internacionais: alguns aspectos da relação entre direito internacional e direito interno*. In: BARROSO, Luís Roberto; Tiburcio, Carmen. *Direito Constitucional Internacional*. Rio de Janeiro: Renovar, 2013, p.201.

treaty and it's also of a fundamental importance"⁵³.

About the substantial control of constitutionality, this has been admitted since the first Republic Constitution⁵⁴. In this sense, while judging the Representação 803/1977, the Supreme Federal Court decided for the unconstitutionality of parts of the ILO's Convention 101⁵⁵. In the same sense, while judging Extraordinary Appeal 109.173, the SFC affirmed to be inadmissible the predominance of international treaties and conventions before the Republic Constitution⁵⁶.

53 From the original in portuguese: "a alegação de determinado Estado, no sentido de que seu consentimento em obrigar-se pelo tratado foi inválido por violar disposição de seu Direito interno, carecerá de valor no âmbito internacional, a menos que tal disposição (do Direito interno) seja sobre competência para celebrar tratados e, ainda, de importância fundamental". MAZZUOLI, Valerio de Oliveira. Curso de Direito Internacional Público. 8ªed. São Paulo: Revista dos Tribunais, 2014, p.318.

54 BARROSO, Luís Roberto. Constituição e tratados internacionais: alguns aspectos da relação entre direito internacional e direito interno. In: BARROSO, Luís Roberto; Tiburcio, Carmen. Direito Constitucional Internacional. Rio de Janeiro: Renovar, 2013, p.211.

55 REPRESENTAÇÃO QUE SE PRENDE AO DECRETO LEGISLATIVO N.33, DE 5.8.1964, QUE RATIFICOU A CONVENÇÃO N. 110, RELATIVA AS CONDIÇÕES DE EMPREGO DOS TRABALHADORES EM FAZENDAS, CELEBRADA EM GENEVRA A 26.6.1958, E AO DECRETO N. 58.826, DE 14.7.1966. II- INCONSTITUCIONALIDADE DAS LOCUÇÕES 'SEM AUTORIZAÇÃO PREVIA' E ' COM A ÚNICA CONDIÇÃO DE SE SUJEITAREM AOS ESTATUTOS DESTAS ULTIMAS', CONSTANTES NO ART. 62, POR AFRONTAREM O DISPOSTO NO ART. 159 DA CONSTITUIÇÃO FEDERAL. VENCIDO, EM PARTE, O MINISTRO ELOY DA ROCHA. III- O ART. 63 NÃO PADECE DE INCONSTITUCIONALIDADE POIS PRESSUPOE O RESPEITO A LEI, SEGUNDO ESTA DITO NO SEU N. 2 . ADEMAIS, MERECE CONJUGAÇÃO COM O ART.68, N.1, ONDE SE FALA EM OBEDIENCIA AS LEIS LOCAIS. DECISÃO POR MAIORIA DE VOTOS. IV- INCONSTITUCIONALIDADE DA EXPRESSAO 'OU SUSPENSÃO' DO ART. 64, POIS SE CONTRAPOE AO ALCANCE DO ART. 159 DA CONSTITUIÇÃO. DECISÃO POR MAIORIA DE VOTOS. V- REJEITADA, POR MAIORIA DE VOTOS, A ARGÜIÇÃO DE INCONSTITUCIONALIDADE DO ART-65,DESDE QUE A REGRA SE HARMONIZA COM O DIREITO DE ASSOCIAÇÃO. VI- REJEITADA A ALEGAÇÃO DE INCONSTITUCIONALIDADE DOS ARTS. 66 E 67, DESDE QUE FORAM EXPUNGIDOS DOS ARTS. 62 E 64 AS EXPRESSÕES CONTRARIAS A CONSTITUIÇÃO. VENCIDOS O RELATOR E O PRESIDENTE, QUE OS CONSIDERAVAM ILEGITIMOS NAS REMISSÕES AOS ARTS. 62 E 64. VII- ACOLHIDA A INCONSTITUCIONALIDADE DO ART. 68, N.2, POR VIOLAR O ART. 159 DA CONSTITUIÇÃO, VENCIDO O MINISTRO ELOY DA ROCHA. VIII- REJEITADA A ILEGITIMIDADE DOS ARTS. 69 E 70. O PRIMEIRO CINGE-SE A FIXAR O CONCEITO DE ORGANIZAÇÃO, EM TERMOS QUE NÃO CONTRARIAM O NOSSO SISTEMA CONSTITUCIONAL, ENQUANTO O SEGUNDO PRENDE-SE A UM COMPROMISSO PARA TORNAR EFETIVO O LIVRE EXERCÍCIO DO DIREITO SINDICAL. INFERE-SE DA SUA LEITURA A INEXISTÊNCIA DE CONFLITO MANIFESTO COM A LEI MAGNA. (Rp 803, Relator(a): Min. DJACI FALCAO, Tribunal Pleno, julgado em 15/09/1977, DJ 17-03-1978 PP-01414 EMENT VOL-01088-01 PP-00019 RTJ VOL-00084-03 PP-00724)

56 EMENTA: - ICM. Importação de bens de capital. Súmula 575 (inaplicação). Art. 23, II, §

In this context, appears discussions about treaties which have themes that are subject to special treatment on the established constitutional regime. In the cited Extraordinary Appeal n.º 229.096-0/RS, although the SFC decided in favor of the validity of GATT based on the understanding that the treaty was celebrated by the Head of State, and not the Head of Government (Union), this argument, standing alone, would not suffice to dispel the prohibition of the supra constitutional disposition. In this sense, the vote of the SFC Minister, Sepúlveda Pertence, in this case, clarify that the simple fact of being the Head of State whom is compromised in international level does not suffice by itself to allow the celebration of treaties that establishes taxes exemptions that are of the jurisprudence of States, the federal district and municipalities. Indeed, it is necessary that the contested disposition, i.e. the article 1.II of GATT, is not about matter that by constitutional force is of exclusive jurisprudence of the states of the federation. In this sense, he clarifies on his vote that:

(...) To the argument that it is not the Union as a partial legal order firming na international treaty, but the Federative Republic of Brazil, as a global legal order (the Brazilian State), we oppose that, internally, even when that political person represents the Federation, it cannot grant heteronymous exemptions except those expressly authorized in articles. 155, § 2, XII, 'and', and 156, § 3, II both from the Federal Constitution⁵⁷.

As the rapporteur of the judgement, Minister Ilmar Galvão, well explains on his vote, the GATT does not offend the norm of article 151. III of 1988's CFRB, inasmuch as it does not impose a tax exemption or something similar. Furthermore, the disposition determines that the members of the World Trade Organization (WTO) must confer equal

11, da Constituição Federal. Se a importação ocorreu na vigência da Emenda Constitucional n.º 23/83, incide o ICM na importação de bens de capital. Inadmissível a prevalência de tratados e convenções internacional mais contra o texto expresso da Lei Magna. Recurso extraordinário conhecido e provido. (RE 109173, Relator(a): Min. CARLOS MADEIRA, Segunda Turma, julgado em 27/02/1987, DJ 27-03-1987 PP-05166 EMENT VOL-01454-02 PP-00406 RTJ VOL-00121-01 PP-00270)

57 From the original in portuguese: "(...) Ao argumento de que não é a União, enquanto ordem jurídica parcial central, que firma o tratado internacional, mas sim a República Federativa do Brasil, enquanto ordem jurídica global (o Estado Brasileiro), contrapomos que, no plano interno, mesmo quando essa pessoa política representa a Federação, não pode conceder isenções heterônomas, com exceção das expressamente autorizadas nos arts. 155, § 2º, XII, 'e', e 156, § 3º, II ambos da CF". RE 229.096/RS, DJE n.º 065, Publicação 11/04/2008, p. 1002.

tariff treatment to imported and national products that are similar. It is, therefore, a norm of general character that governs the way of application of domestic taxes and, on no account, imposes any specific exemption.

Another contradictory issue is the approval of treaties about matters that are reserved for complementary law. The main issue is if an international treaty, which ratification is authorized by simple majority on both houses that form the National Congress, can enter on the field of subjects that, according to the current constitutional regime, are reserved to complementary law, demanding approval of the absolute majority of the two houses.

The issue was submitted to the SFC on the judgement of the Direct Action of Unconstitutionality 1480, which object was the Convention 158 of the ILO - concerning Termination of Employment at the Initiative of the Employer, subject that is reserved to complementary law by article 7º, I, of the CFRB⁵⁸

The SFC pronounced, in this case, an extremely detailed decision, in which it summarized didactically its position at the time about the main controverted issues relative to the relation between domestic law and international law. In particular, it ended the controversy about the possibility of ratification of a treaty about a subject reserved to complementary law.

Hereupon, the SFC understood that the primacy of the constitution prevails before the *pacta sunt servanda* principle, even for the rules about ritual and procedures for the edition of normative acts about certain subjects. Thus, is not possible the celebration of a treaty by Brazil related to a subject that is reserved to complementary law⁵⁹.

58 Art. The following are rights of urban and rural workers, among others that aim to improve their social conditions: I - employment protected against arbitrary dismissal or against dismissal without just cause, in accordance with a supplementary law which shall establish severance-pay, among other rights;

59 E M E N T A: - AÇÃO DIRETA DE INCONSTITUCIONALIDADE - CONVENÇÃO Nº 158/OIT - PROTEÇÃO DO TRABALHADOR CONTRA A DESPEDIDA ARBITRÁRIA OU SEM JUSTA CAUSA - ARGÜIÇÃO DE ILEGITIMIDADE CONSTITUCIONAL DOS ATOS QUE INCORPORARAM ESSA CONVENÇÃO INTERNACIONAL AO DIREITO POSITIVO INTERNO DO BRASIL (DECRETO LEGISLATIVO Nº 68/92 E DECRETO Nº 1.855/96) - POSSIBILIDADE DE CONTROLE ABSTRATO DE CONSTITUCIONALIDADE DE TRATADOS OU CONVENÇÕES INTERNACIONAIS EM FACE DA CONSTITUIÇÃO DA REPÚBLICA - ALEGADA TRANSGRESSÃO AO ART. 7º, I, DA CONSTITUIÇÃO DA REPÚBLICA E AO ART. 10, I DO ADCT/88 - REGULAMENTAÇÃO NORMATIVA DA PROTEÇÃO CONTRA A DESPEDIDA ARBITRÁRIA OU SEM JUSTA CAUSA, POSTA SOB RESERVA CONSTITUCIONAL DE LEI COMPLEMENTAR - CONSEQÜENTE IMPOSSIBILIDADE JURÍDICA DE TRATADO OU CONVENÇÃO INTERNACIONAL ATUAR COMO SUCEDÂNEO DA LEI COMPLEMENTAR EXIGIDA PELA CONSTITUIÇÃO (CF, ART. 7º, I) - CONSAGRAÇÃO CONSTITUCIONAL DA GARANTIA DE INDENIZAÇÃO COMPENSATÓRIA COMO EXPRESSÃO DA REAÇÃO

Established the understanding of the hierarchical inferiority of international treaties before the republic constitution, it proceeds to analyze the issue of the relation between international treaties and domestic law.

The majority of the Brazilian doctrine identified the state as being monist with predominance of international law before infraconstitutional law, given the content of the civil appeals numbers 7.872 and 9.587 judged by the SFC, respectively, in 1943 and 1951, which tended for the impossibility of revocation of treaties by posterior legislation. According to Jacob Dolinger, these decisions, as well as the others identified with the predominance of international law, referred

ESTATAL À DEMISSÃO ARBITRÁRIA DO TRABALHADOR (CF, ART. 7º, I, C/C O ART. 10, I DO ADCT/88) - CONTEÚDO PROGRAMÁTICO DA CONVENÇÃO Nº 158/OIT, CUJA APLICABILIDADE DEPENDE DA AÇÃO NORMATIVA DO LEGISLADOR INTERNO DE CADA PAÍS - POSSIBILIDADE DE ADEQUAÇÃO DAS DIRETRIZES CONSTANTES DA CONVENÇÃO Nº 158/OIT ÀS EXIGÊNCIAS FORMAIS E MATERIAIS DO ESTATUTO CONSTITUCIONAL BRASILEIRO - PEDIDO DE MEDIDA CAUTELAR DEFERIDO, EM PARTE, MEDIANTE INTERPRETAÇÃO CONFORME À CONSTITUIÇÃO. PROCEDIMENTO CONSTITUCIONAL DE INCORPORAÇÃO DOS TRATADOS OU CONVENÇÕES INTERNACIONAIS. (...) TRATADO INTERNACIONAL E RESERVA CONSTITUCIONAL DE LEI COMPLEMENTAR. - O primado da Constituição, no sistema jurídico brasileiro, é oponível ao princípio *pacta sunt servanda*, inexistindo, por isso mesmo, no direito positivo nacional, o problema da concorrência entre tratados internacionais e a Lei Fundamental da República, cuja suprema autoridade normativa deverá sempre prevalecer sobre os atos de direito internacional público. Os tratados internacionais celebrados pelo Brasil - ou aos quais o Brasil venha a aderir - não podem, em consequência, versar matéria posta sob reserva constitucional de lei complementar. É que, em tal situação, a própria Carta Política subordina o tratamento legislativo de determinado tema ao exclusivo domínio normativo da lei complementar, que não pode ser substituída por qualquer outra espécie normativa infraconstitucional, inclusive pelos atos internacionais já incorporados ao direito positivo interno. LEGITIMIDADE CONSTITUCIONAL DA CONVENÇÃO Nº 158/OIT, DESDE QUE OBSERVADA A INTERPRETAÇÃO CONFORME FIXADA PELO SUPREMO TRIBUNAL FEDERAL. - A Convenção nº 158/OIT, além de depender de necessária e ulterior intermediação legislativa para efeito de sua integral aplicabilidade no plano doméstico, configurando, sob tal aspecto, mera proposta de legislação dirigida ao legislador interno, não consagrou, como única consequência derivada da ruptura abusiva ou arbitrária do contrato de trabalho, o dever de os Estados-Partes, como o Brasil, instituírem, em sua legislação nacional, apenas a garantia da reintegração no emprego. Pelo contrário, a Convenção nº 158/OIT expressamente permite a cada Estado-Parte (Artigo 10), que, em função de seu próprio ordenamento positivo interno, opte pela solução normativa que se revelar mais consentânea e compatível com a legislação e a prática nacionais, adotando, em consequência, sempre com estrita observância do estatuto fundamental de cada País (a Constituição brasileira, no caso), a fórmula da reintegração no emprego e/ou da indenização compensatória. Análise de cada um dos Artigos impugnados da Convenção nº 158/OIT (Artigos 4º a 10). (ADI 1480 MC, Relator(a): Min. CELSO DE MELLO, Tribunal Pleno, julgado em 04/09/1997, DJ 18-05-2001 PP-00429 EMENT VOL-02031-02 PP-00213)

solely to contract-treaties, without any type of applicability to the so-called law-treaties, or to conflicts between posterior treaties and previous law⁶⁰.

The main Brazilian judicial paradigm about the subject was the Extraordinary Appeal 80.004⁶¹, sentenced in the 1st of June 1977, and which was about the conflict between the Geneva's Uniform Law For Bills of Exchange and Promissory Notes, which was promulgated into law by the Decreto nº 57.663 on January 24, 1996, and the Decreto-Lei 427 of January 22, 1969, which restricted the execution of promissory notes to its previous registry at Ministério da Fazenda, requirement that did not exist in the Uniform Law.

The judgement of the RE80.004 stretched for 3 years, from 1975 to 1977, prevailing the thesis whereby, happening a conflict between a previous treaty and a posterior law, it shall prevail the posterior law, because it would be the last will of the legislator, without prejudice of the consequences of the noncompliance of the treaty in international level, inasmuch as posterior law is not capable of disoblige the country internationally, for it is not the equivalent of its denouncement. This fact is due to the absence, in Brazil, of a guarantee of hierarchical privilege to international treaties, which receive identical treatment to the one given to an ordinary law⁶².

After the judgement of the RE80.004, it was consolidated in SFC the adoption, by Brazil, of the so-called moderate monism, in which there is no hierarchical distinction between international treaties and ordinary laws, and casual conflicts must be resolved by the traditional rules of antinomy solution – posterior prevail over previous, special

60 DOLINGER, Jacob. *Direito Internacional Privado: parte geral*. 9ª ed, Rio de Janeiro: Renovar, 2008, p. 111.

61 CONVENÇÃO DE GENEBRA, LEI UNIFORME SOBRE LETRAS DE CâMBIO E NOTAS PROMISSÓRIAS - AVAL APOSTO A NOTA PROMISSÓRIA NÃO REGISTRADA NO PRAZO LEGAL - IMPOSSIBILIDADE DE SER O AVALISTA ACIONADO, MESMO PELAS VIAS ORDINÁRIAS. VALIDADE DO DECRETO-LEI Nº 427, DE 22.01.1969. EMBORA A CONVENÇÃO DE GENEBRA QUE PREVIU UMA LEI UNIFORME SOBRE LETRAS DE CâMBIO E NOTAS PROMISSÓRIAS TENHA APLICABILIDADE NO DIREITO INTERNO BRASILEIRO, NÃO SE SOBREPÕE ELA ÀS LEIS DO PAÍS, DISSO DECORRENDO A CONSTITUCIONALIDADE E CONSEQUENTE VALIDADE DO DEC-LEI Nº 427/69, QUE INSTITUI O REGISTRO OBRIGATÓRIO DA NOTA PROMISSÓRIA EM REPARTIÇÃO FAZENDÁRIA, SOB PENA DE NULIDADE DO TÍTULO. SENDO O AVAL UM INSTITUTO DO DIREITO CAMBIÁRIO, INEXISTENTE SERÁ ELE SE RECONHECIDA A NULIDADE DO TÍTULO CAMBIAL A QUE FOI APOSTO. RECURSO EXTRAORDINÁRIO CONHECIDO E PROVIDO.

(RE 80004, Relator(a): Min. XAVIER DE ALBUQUERQUE, Tribunal Pleno, julgado em 01/06/1977, DJ 29-12-1977 PP-09433 EMENT VOL-01083-04 PP-00915 RTJ VOL-00083-03 PP-00809)

62 REZEK, José Francisco. *Direito dos Tratados*. Rio de Janeiro: Forense, 1984, pp.471 – 472.

prevail over general. This is the understanding that prevails in the Brazilian judiciary until now, with some few punctual exceptions.

The first relevant exception is related to tax matter. The National Tax Code ⁶³ establishes, on its article 98, that international treaties and conventions revoke or modify domestic tax law, and shall be governed by the one that comes after it. On the field of tax law, therefore, for the existence of a direct disposition, there is predominance of the international law.

The second exception normally indicated by the doctrine refers to the extradition treaties. The subject is governed by the Foreign Statute ⁶⁴, which is only applicable in cases where there is not an extradition treaty. In this sense, there are many decisions of the SFC, including the Habeas Corpus 58.727⁶⁵. There is not, however, a real choice for the international law in extradition cases, but only application of the classical positioning of the SFC, according to which treaty and ordinary law have the same hierarchical position. In the case of extradition, the treaty is the special rule in relation to the Foreign Statute, and it shall, therefore, prevail ⁶⁶.

The third important exception, that, in a way, covers the two previous exception is related to the so-called contract treaties, which are the opposite of the law making treaties. This classification, developed originally by Charles Rousseau, defends the existence of a special category of treaties, the contract-treaties, whereby its parts realize a juridical operation, while on other treaties there is the adoption of an objectively valid rule of law⁶⁷. In the case of contract treaties, the tendency of the Brazilian judiciary is for the predominance of those over the domestic law, as was decided by the SFC on the Extraordinary Appeals 114.784, 113.156 and 130.765, as well as by the STJ in the judgement of Special Appeal 228.324⁶⁸.

There is a fourth exception, of dubious constitutionality, inscribed

63 Lei nº5.172, de 25 de outubro de 1966.

64 Lei 6.815, de 19 de Agosto de 1980

65 EXTRADIÇÃO. PRAZO DA PRISÃO. CONFLITO ENTRE A LEI E O TRATADO. NA COLISAO ENTRE A LEI E O TRATADO, PREVALECE ESTE, PORQUE CONTEM NORMAS ESPECIFICAS. O PRAZO DE 60 DIAS FIXADO NO TRATADO DE EXTRADIÇÃO BRASIL-ESTADOS UNIDOS, CLÁUSULA VIII, CONTA-SE DO DIA DA PRISÃO PREVENTIVA AO EM QUE FOI APRESENTADO O PEDIDO FORMAL DA EXTRADIÇÃO. A DETENÇÃO ANTERIOR, PARA OUTROS FINS, NÃO É COMPUTADA. (HC 58727, Relator(a): Min. SOARES MUNOZ, Tribunal Pleno, julgado em 18/03/1981, DJ 03-04-1981 PP-02854 EMENT VOL-01206-01 PP-00233 RTJ VOL-00100-03 PP-01030)

66 DOLINGER, Jacob. *Direito Internacional Privado: parte geral*. 9ª ed, Rio de Janeiro: Renovar, 2008, pp. 107-108.

67 REZEK, José Francisco. *Direito dos Tratados*. Rio de Janeiro: Forense, 1984, pp.129-130.

68 DOLINGER, Jacob. *Direito Internacional Privado: parte geral*. 9ª ed, Rio de Janeiro: Renovar, 2008, pp. 110.

in the 2002's Civil Code. Article 732 of the cited text determines that to the transport contracts, in general, are applicable, when fit, provided that it does not contradict the dispositions of this Code, the precepts fixed on special legislation and international treaties and conventions. There is a clear attempt of the ordinary legislator to determine the absolute predominance of the Civil Code above any other normative act, what is an incompatible hypothesis with Brazilian law⁶⁹. There is not, until now, decisions of the SFC or the STJ about the application of this disposition.

The last relevant exception is the treatment given to human rights treaties. The CFRB establishes, in its article 5º, §2º, that the rights and guarantees expressed in this constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party. Based in this disposition appeared a discussion about conflicts, moreover of the Republic Constitution with the Pact of San José of Costa Rica.

While the CFRB establishes in article 5º, LXVII that “*there shall be no civil imprisonment for indebtedness except in the case of a person responsible for voluntary and inexcusable default of alimony obligation and in the case of an unfaithful trustee*”, the Pact of San José of Costa Rica establishes, on article 7º, 7, that “No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support”. To make the conflict even more complex, the ordinary legislator assimilated the fiduciary debtor to the trustee (article 66 of the Law 4.728/1965). There would be, thus, two hypothesis of civil imprisonment in Brazilian law that were incompatible with the Pact of San José of Costa Rica.

The Supreme Federal Court decided repeatedly for the possibility of the imprisonment of the unfaithful trustee⁷⁰, situation that only started to

69 TIBURCIO, Carmen. Temas de Direito Internacional. Rio de Janeiro: Renovar, 2006, p.35.

70 Recurso extraordinário. Alienação fiduciária em garantia. Prisão civil. - Esta Corte, por seu Plenário (HC 72131), firmou o entendimento de que, em face da Carta Magna de 1988, persiste a constitucionalidade da prisão civil do depositário infiel em se tratando de alienação fiduciária, bem como de que o Pacto de São José da Costa Rica, além de não poder contrapor-se à permissão do artigo 5º, LXVII, da mesma Constituição, não derogou, por ser norma infraconstitucional geral, as normas infraconstitucionais especiais sobre prisão civil do depositário infiel. - Esse entendimento voltou a ser reafirmado recentemente, em 27.05.98, também por decisão do Plenário, quando do julgamento do RE 206.482. Dessa orientação divergiu o acórdão recorrido. - Inconstitucionalidade da interpretação dada ao artigo 7º, item 7, do Pacto de São José da Costa Rica no sentido de derogar o Decreto-Lei 911/69 no tocante à admissibilidade da prisão civil por infidelidade do depositário em alienação fiduciária em garantia. - É de observar-se, por fim, que o § 2º do artigo 5º da Constituição não se aplica aos tratados internacionais sobre direitos e garantias fundamentais que ingressaram em nosso ordenamento jurídico após a promulgação da Constituição de 1988, e isso porque ainda não se admite tratado internacional com força de emenda constitucional. Recurso extraordinário conhecido e provido.

be modified with the edition of the Constitutional Amendment 45 of 2004.

The CA45/2004 added paragraph 3 to article 5 of CFRB, determining that “*international human rights treaties and conventions which are approved in each house of the national congress, in two rounds of voting, by three fifths of the votes of the respective members shall be equivalent to constitutional amendments*”⁷¹.

In this new context, in which starts to be possible the existence, in Brazil, of international treaties with the same hierarchy of the constitutional text, ending, at once, with the logic of reception of treaties always with hierarchy of ordinary law. In this frame, the SFC, while judging the HC 87.585/TO⁷² changed its understanding about the cited article 5, §2º of CFRB, affirming that it gives to human rights treaties “a different status, superior to the one granted to the ordinary domestic law, though it does not make them constitutional norms (what would only be possible through the §3º of the same article)”⁷³.

Finally, it is important to highlight the existence of an important doctrinaire positioning, even though it is not accepted by the SFC or the SJC yet, according to which the late ratification by Brazil of the 1969’s Vienna Convention on the Law of Treaties, only ratified by the Law-Decree 7.030 in the 14th of December of 2009, would imply on the adoption of the monism with predominance of international law, in view of the rule of article 27 of the cited convention⁷⁴.

5. CONCLUSION

In Brazil, the omission of the constituent and the ordinary legislator about the law of treaties has occasioned incertitude, making

(RE 253071, Relator(a): Min. MOREIRA ALVES, Primeira Turma, julgado em 29/05/2001, DJ 29-06-2001 PP-00061 EMENT VOL-02037-06 PP-01131)

71 So far, only the Convention on the Rights of Persons with Disabilities and its Additional Protocol were aproved according to this rite (Legislative Decree 186/2008, Presidential Decree 6.949/2009).

72 DEPOSITÁRIO INFIEL - PRISÃO. A subscrição pelo Brasil do Pacto de São José da Costa Rica, limitando a prisão civil por dívida ao descumprimento inescusável de prestação alimentícia, implicou a derrogação das normas estritamente legais referentes à prisão do depositário infiel. (HC 87585, Relator(a): Min. MARCO AURÉLIO, Tribunal Pleno, julgado em 03/12/2008, DJe-118 DIVULG 25-06-2009 PUBLIC 26-06-2009 EMENT VOL-02366-02 PP-00237)

73 From the original in portuguese: “um status diferenciado, superior ao do direito ordinário interno, embora não os eleve ao nível de normas constitucionais (o que somente seria possível pela via do §3º do mesmo artigo”. TIBURCIO, Carmen. Conflito entre fonts: os casos da prisão civil. In: BAPTISTA, Luiz Olavo; MAZZUOLI, Valerio de Oliveira. Doutrinas essenciais: direito internacional. São Paulo: Revista dos Tribunais, 2012, p.101.

74 ACCIOLY, Hildebrando, NASCIMENTO E SILVA, G.E., CASELLA, Paulo Borba. Manual de Direito Internacional Público. 21ªed, São Paulo: Saraiva, 2014, p.236.

indispensable the intervention of the judiciary, also responsible for the consolidation of the current ritual of internalization of treaties, when deciding, for example, that promulgation and publication of the presidential decree are indispensable for the beginning of its domestic continuance in force.

Although the traditional classification between monistic and dualistic states has lost part of its sense because of the difficulty of practical categorization of States, it can be said that Brazil adopts a moderate monist position in general.

Thus, happening a conflict between an international treaty that is not about human rights and an ordinary law, it will be considered that both have the same hierarchy, solving the conflict by the criteria of chronology and specialty.

The treaties about human rights have special treatment. When approved following the constitutional ritual established to the Constitutional Amendment, they will have constitutional hierarchy, integrating even the constitutional block and serving as a paradigm for the concentrated constitutional control of law and other international treaties. If they were not approved following this ritual, they will have a supralegal status, subject to constitutional control, but prevailing above all the infraconstitutional legislation.

With the exception of these cases, there are few cases where it is admitted the absolute predominance of the international law – cases of the tax matters and the extradition and of the so-called contract treaties – and a single case, which constitutionality was not appreciated yet, of absolute predominance of domestic law – cases involving contracts of transport in general, in accordance with article 732 of the Civil Code.

On account of the fast evolution of the treatment given by the SFC to the matter, especially after the promulgation of the Constitutional Amendment 45/2004 and the ratification of the 1969's Vienna Convention on the Law of Treaties in 2009, there is still some legal incertitude on the matter, pending of jurisprudence consolidation.

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ARBITRATION AND PUBLIC POLICY IN BRAZIL: A STUDY BASED ON ‘LULA CASE’

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Abstract: This work examines the subject of jurisdiction and arbitrability of issues related to energy and natural resources in the world, in order to enhance the arbitration institute in Brazil. The study is based on a recent case pending in Brazilian courts, named “Lula case”, which refer to a dispute between the State and concessionaires that grant the right to explore and produce oil and gas in a determined area. The presence of arbitration clauses in the concession contracts for exploration and production of oil and gas in Brazil raises questions related to the disposability of the rights concerned. It is paramount to set benchmarks on arbitral tribunals’ power to decide on these matters and to define to what extent arbitral awards may defy public policy, national sovereignty over natural resources and national courts’ jurisdiction to render decisions in this regard. Otherwise, the randomness of judicial decisions makes the arbitration clause ineffective. Moreover, the Lula case arises substantive issues related to the necessity to protect investors in the oil and gas industry, since acts arguably connect to the State policy power may cause damages to the private parties. The work critically examines the decision given by national courts so far and proposes an international approach to face situations involving the State and the necessity to protect investors in the oil and gas industry.

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

1. INTRODUCTION

Brazilian Arbitration Act¹ (BAA) was enacted over 20 years ago.

¹ Brazilian Law 9,307/96.

National courts were initially reluctant to apply it, because of arguments from part of the legal community² that it was unconstitutional, by allowing parties to waive the inalienable right to seek justice in the courts, protected by the Federal Constitution. This controversy existed until the Federal Supreme Court upheld the constitutionality of key articles of the law in 2001, under the argument that although a law may not prevent parties from accessing the judiciary, parties can contractually waive this right in matters involving disposable pecuniary rights³.

In 2002, Brazil ratified the New York Convention⁴ (NYC) and the procedure for recognizing and enforcing awards has subsequently been expedited by a December 2004 Constitutional amendment that shifted original jurisdiction over recognition of foreign awards (judicial and arbitral) from the Federal Supreme Court to the Superior Tribunal of Justice (STJ)⁵, setting the decision free from the uncertainties associated with constitutional law⁶.

The BAA reflects the influence of the UNCITRAL Model Law on Commercial Arbitration⁷ (UNCITRAL Model Law) and of the NYC. The jurisprudential evolution shows that gradual advances have been occurring in recent years. National courts have increasingly abstained from interfering in the merits of arbitral awards and the STJ has been increasingly supporting the recognition of foreign arbitral awards, as well as the validity of arbitration clauses⁸.

By following the NYC⁹, Article 39 of BAA states that a request for the recognition or enforcement of a foreign arbitral award shall be

2 Marcelo A Muriel, 'A Arbitragem Frente Ao Judiciário Brasileiro' (2004) 1 *Revista Brasileira de Arbitragem* 27, 28.

3 Brazilian Federal Supreme Court, sitting en banc, Regimental Appeal in Contested Foreign Judgment no. 5206, Reporting Justice Sepúlveda Pertence, judged on December 12, 2001, published in the DJ (Court Reporter) of April 30, 2004

4 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958 entered into force 07 June 1959) 330 UNTS 38 (1968)

5 The Superior Tribunal de Justiça (STJ) is the highest court for non-constitutional matters, with responsibility for harmonizing interpretation of federal law by the state and regional federal courts of appeal.

6 Alexis Mourre, 'Perspectives of International Arbitration in Latin America' (2006) 17 *Am. Rev. Int'l Arb.* 597, 4.

7 UNCITRAL Model Law on International Commercial Arbitration 24 ILM 1302 (1985).

8 Superior Tribunal of Justice. Conflict of Competence no. 139.519 - RJ (2015/0076635-2), Reporting Justice Nancy Andrighi, judged on 15 April 2015, published in the DJ (Court Reporter) of April 20, 2015.

9 According to the art. V(2) NYC, the recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award is contrary to the public policy of that country.

denied in Brazil if the STJ ascertains that: I- in accordance with Brazilian law, the subject matter of the dispute is not capable of settlement by arbitration; II-the decision is offensive to public policy¹⁰.

According to Article 1 of the BAA, persons capable of contracting may settle through arbitration disputes related to rights over which they may dispose¹¹. Thus, the STJ may refuse enforcement of arbitral awards related to rights that are not disposable under Brazilian law. Given that the definition of disposable rights is not expressly stated in Brazilian law, it is necessary to define the parameters of what subjects can and cannot be settled by arbitration, especially oriented, in this study, to matters related to energy and natural resources.

The presence of arbitration clauses in the concession contracts for exploration and production of oil and gas in Brazil raises questions related to the disposability of the rights concerned. It is paramount to set benchmarks on arbitral tribunals' power to decide on these matters and to define to what extent arbitral awards may defy public policy, national sovereignty over natural resources and national courts' jurisdiction to render decisions in this regard. Otherwise, the randomness of judicial decisions, allowing or not the arbitration in each case, makes the arbitration clause ineffective. According to Kaplan:

The reality is that, as far as I know, few of the developing countries who have adopted the New York Convention have taken any steps to ensure that they have a judiciary capable of ensuring that the treaty obligations they have assumed are honoured in practice' Fortunately, some steps may be taken to attempt to improve this situation. Court familiarity with the NYC grows naturally with exposure, but seminars and training for the judiciary might help improve familiarity in the short term¹².

In order to deepen this study, I analyze a recent case in the Brazilian oil and gas industry. The conflict arose from a decision made by the National Petroleum, Natural Gas and Biofuels Agency (ANP), contested by the concessionaire. The latter requested arbitration under the ICC, as stipulated in the arbitration clause (clause 31.4) of the concession

10 Article 39, BAA.

11 Article 1, BAA.

12 Neil Kaplan, *Speech to the Franco-British Law Society in Paris in 2001* (19(2)Journal of International Arbitration 2002) 170 (as cited in Quentin Tannock:, 'Judging the Effectiveness of Arbitration through the Assessment of Compliance with and Enforcement of International Arbitration Awards' 21 Arbitration International (2005)76).

agreement¹³. The ANP filed an action with a federal court in Rio de Janeiro (the Agency's headquarters venue) to stop the arbitration, claiming the subject matter was not arbitrable and had to be decided by national courts. The court ruled in favor of the ANP, sent a request to the ICC to stop the arbitration and stated its own jurisdiction to decide the dispute¹⁴.

Based on the described case (henceforth the "Lula case"), this study aims to examine the legal issues involved, especially those related to determination of jurisdiction and to arbitrability of matters concerning energy and natural resources, arguably connected to public policy grounds. The work analyzes how arbitral tribunals, national courts and the legal community have been treating the issues worldwide.

The second part presents briefly the Lula Case and how the Brazilian Judiciary considered the case. The third part address issues of general international commercial arbitration, such as jurisdiction and arbitrability, and it also discusses the consequences of considering a State act as a sovereign act, under the perspective of the international practice in the oil and gas industry and the transnational standards present in *lex petrolea*. It is important to remember that the judicial decision in the Lula case just considered the *act ius imperium* in order to fix the jurisdiction, by saying that, for its nature, the right was not disposable and dispute was not arbitrable¹⁵. The merits of the pleading, about if the act caused damage to investors and whether or not the damages have to be compensated has not been faced yet.

Thus, the fourth part of this article will only theoretically consider the concerns related to the consequences of sovereign acts, especially when they affect investors or private parties in the energy industry, according to international standards. The Lula case raises substantive issues that are often faced in international arbitrations worldwide. Then, the international approach is studied in broad terms, as guidance to future regulatory acts, national court decisions and future arbitrations related to oil and gas in Brazil.

2. THE LULA CASE

Petrobras, BG E&P Brasil Ltda and Petrogal Brasil S.A, in a consortium, signed a concession agreement to explore and produce oil and gas in the area called Block BM-S-11, as a result of the 2nd

13 National Petroleum, Natural Gas and Biofuels Agency (ANP), 2nd Bidding Round Concession Agreement <http://www.brasilrounds.gov.br/round2/arquivos_r2/Edital/Edital_en.pdf> accessed 29 July 2015.

14 1st Federal Court of the Judiciary Section of Rio de Janeiro. Ordinary Action no. 0005966-81.2014.4.02.5101, Justice Mauro Souza Marques da Costa Braga, judged on 15 May 2015, published in the DJ (Court Reporter) of May 26, 2015.

15 Ibid.

Brazilian Concessions Bidding Round in 2000¹⁶.

After the implementation of the minimum work exploration program and carrying out the activities contained in the discovery evaluation plan, the consortium submitted to the National Petroleum, Natural Gas, and Biofuels Agency (ANP) two development plans for the establishment of two oil fields in contiguous areas. The proposal was rejected by the ANP's Board of Directors, which rejected the consortium's request to separate the field into two parts, arguing its uniqueness (the block is hereinafter called "Lula field")¹⁷.

Considering the failure of the Consortium to achieve the division of the Lula field into two oil fields, the Consortium started proceedings to submit the ANP's decision to arbitration, under the auspices of the ICC. The main arbitration claim was to replace the regulatory decision and to allow the establishment of two fields: Lula field and Cernambi field. The mediate claim, or the expectation by dividing the area into two oil fields, was to reduce the amount of the so-called Special Participation, a government take which was estimated by ANP at about thirty billion dollars for the Lula field¹⁸.

The ANP filed for an antiarbitration injunction in the Federal Justice System in Rio de Janeiro, arguing that the contents of the regulatory decision on the development plan could not be settled by arbitration since it is not a disposable right. The ANP argued that when there is a controversy over whether or not the right is disposable, only the judiciary can resolve it, thus preventing continuation of the arbitral proceeding¹⁹.

Hence, the ANP brought an action to suspend the arbitration. The two main issues to be solved in the judicial case were: i) whether the arbitral tribunal has jurisdiction to define its own jurisdiction, even to determine arbitrability, leaving to recalcitrant parties the option to file an annulment action; ii) if the subject of controversy brought to the notice of arbitration is disposable or not²⁰.

About the first issue, related to who has jurisdiction to decide

16 Results of the 2nd Bidding Round <<http://www.anp.gov.br/brasil-rounds/round2/pdocs/Pinicial/Presultados.htm>> accessed 29 July 2015.

17 In the ANP Board Resolution no. 568/2011, Administrative Process N°: 48610.002618/2011, Board Meeting N°: 624, 22 July 2011 was decided: 'I) To reject the concessionaire's request to separate the Lula field into two parts, keeping it unique, which will be hereinafter "Lula field", covering the discovery made by well 1-BRSA-369A- RJS and surrounding areas, including the area of the 4-BRSA-711-RJS well; and

II) To determine that the operator send a single development plan of the Lula field, including the areas mentioned above, in a maximum period of 90 days from the date of this Board Resolution' <<http://www.anp.gov.br/?id=2886>> accessed 20 June 2015.

18 1st Federal Court of the Judiciary Section of Rio de Janeiro (n 14).

19 Ibid.

20 Ibid.

on the jurisdiction, whether the arbitral tribunal or the national court, the judge held that the decision is to be given by a national court. The decision considered that if the parties, or at least one, already know in advance that there is a suspicion that the right at stake is not disposable, the judge has jurisdiction to examine the allegation²¹.

The Article 25 of Brazilian Arbitration Act (BBA) states that ‘if during the course of the proceedings, a dispute arises regarding rights that are not disposable, and once convinced that the final decision may depend thereon, the sole arbitrator or the arbitral tribunal may refer the parties to the State Court having jurisdiction, ordering a stay of the arbitral proceedings’. The judge considered that Article 25 of the BAA is directed towards the arbitral tribunal, not preventing the national courts from assessing the adequacy of the arbitration regarding its legal limits, which in this case involves the provisions of art. 1 of the BAA, that states that only disposable rights can be decided by arbitration. The court held that the legality control of the limits of the arbitration agreement was not to be reviewed solely by the arbitral tribunal and if there were doubts concerning the arbitrability of the dispute, it would be a waste of time to wait for the arbitral tribunal’s decision first in order to file suit to annul it after that²².

On the second question, if the right is disposable or not, the court established that the discussion on the regulatory decision that stated that the block contained in the concession area is to be divided into two fields, is an insurgency against the ANP’s regulatory decision. According to the judge, the complaint is a concessionaire’s attempt to discuss the imperativeness of administrative acts in arbitration, which is not possible²³.

These two issues that arose in the Lula case, on the jurisdiction to decide on arbitrability and on the arbitrability of disputes related to State acts, will be broadly considered next. Due to the absence of consistent jurisprudence from the courts in this regard, this discussion is important to enhance the arbitration institute in Brazil.

3. GENERAL ISSUES OF INTERNATIONAL COMMERCIAL ARBITRATION RELATED TO THE DISPUTE

3.1. Arbitrability

Arbitrability involves the question of what subjects can be submitted to arbitration, placing limits on what may be adjudicated by

²¹ Ibid.

²² National Petroleum, Natural Gas and Biofuels Agency (n 13).

²³ 1st Federal Court of the Judiciary Section of Rio de Janeiro (n 14).

an arbitral tribunal²⁴. According to Lauren Brazier, arbitrability has been concerned with particular 'subject-matters that cannot be decided by arbitration, even if the parties have otherwise validly agreed to arbitrate such matters', because the matters inherently involve some sort of public interest. Instead, these subject-matters belong 'exclusively to the domain of the courts' as protectors of the public interest involved²⁵.

Bernard Hanotiau argues that arbitrability can be challenged in two different ways. The first one is based on the quality of one of the parties, when this party is a State, a public collectivity or entity or a public body, and is named "subjective arbitrability" or "arbitrability *ratione personae*". The second is based on the subject matter of the dispute, which the applicable national law has removed from the domain of arbitrable matters, and is named "objective arbitrability" or "arbitrability *ratione materiae*"²⁶.

3.1.1. Subjective arbitrability

Hanotiau observes that although initially the issue of subjective arbitrability was decided in accordance with the law determined by conflict of law rules, namely the law governing capacity, this method has been progressively abandoned and today the issue is generally determined by the application of a substantive rule of international law²⁷. For the author, there seems to be general agreement that the subjective arbitrability of international disputes to which a State, a public entity or a public body is party is, despite the contents of the domestic law of the State or entity concerned, a principle of international public policy of the law of international arbitration²⁸.

Likewise, Julian D. M. Lew says that the issue of subjective arbitrability is governed by a substantive rule of international arbitration and not by the law of the state party. This rule requires state parties to honour the arbitration agreement, precluding them from relying on national restrictions to avoid the effects of arbitration agreements. This is derived from international arbitration practice and provisions in various laws and conventions²⁹. In particular, the European Convention expressly provides for the subjective arbitrability of state parties and

24 Julian DM Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 187.

25 Lauren Brazier, 'The Arbitrability of Investor-State Taxation Disputes in International Commercial Arbitration' 32 Kluwer Law Online 1, 20.

26 Bernard Hanotiau, 'The Law Applicable to Arbitrability' (2014) 26 Singapore Academy of Law Journal 875.

27 Ibid 876.

28 Ibid 877.

29 Lew, Mistelis and Kröll (n 24) 738.

the ICSID Convention relies on the premise that a state party that has agreed to arbitrate is bound by its commitment³⁰. Likewise, under Article 177(2) PIL³¹, a State, a state-held enterprise or a state-owned organisation, as a party to an arbitration agreement, can neither rely on its own law for the purpose of challenging its own capacity nor can it invoke its own laws to contest the arbitrability of the dispute at hand³².

Since the BAA was enacted in 1996, it had no express restriction for State participation in arbitration. In fact, the Brazilian Concessions' Law³³ and the Public-Private Partnerships Law³⁴ already provided for State participation, and the STJ had recognized the validity of this provision in its decisions³⁵. Recently, Law 13,129/2015 amended the BAA to include an express provision authorizing the direct and indirect public administration to resolve disputes related to disposable pecuniary rights by arbitration³⁶.

Moreover, the Brazilian Law 9,478/97 (hereinafter named 'Brazilian Petroleum Law') states that the solution of disputes involving oil and gas agreements can occur by international arbitration³⁷. Thus, there is no impediment to a public-sector entity being a party to arbitration. In the Lula case, the ANP, as a state entity, has not argued either about contractual or statutory provisions against arbitration for administrative contracts, but about the matter of objective arbitrability.

3.1.2. Objective arbitrability

Arbitrability in essence is a matter of national public policy, which differs from one country to another. According to Patrick Baron and Stefan Liniger, judges of different countries will look at the question of whether a given dispute is arbitrable from different angles and arbitrators will take a yet different approach³⁸. Besides that, State judges tend to decide

30 Ibid.

31 Switzerland's Federal Code on Private International Law (CPIL) 1 of December 18, 19872.

32 Patrick M Baron and Stefan Liniger, 'A Second Look at Arbitrability: Approaches to Arbitration in the United States, Switzerland and Germany' (2003) 19 *Arbitration International* 27.

33 Brazilian Law 8,987/ 1995.

34 Brazilian Law 11,079/2004.

35 Camila Tomimatsu and Mariana Cattell, 'The Recent Amendments to the Brazilian Arbitration Act – One Step Back, Two Steps Forward?' <<http://kluwerarbitrationblog.com/blog/2015/06/30/the-recent-amendments-to-the-brazilian-arbitration-act-one-step-back-two-steps-forward/>> accessed 14 July 2015.

36 Article 1, § 1, Brazilian Law 13,129/ 2015.

37 Article 43, Brazilian Law 9,478/97 states that 'The concession contract shall duly reflect the conditions of the tender announcement and the winning proposal shall have the following essential clauses: X - the rules for the solution of controversies relating the contract and its performance, including by international conciliation and arbitration'.

38 Baron and Liniger (n 32) 27.

according to their national laws and interests and arbitrators seek a balance between the interests of the legal systems concerned in the dispute and the reasonable expectations of the parties of the proceeding³⁹.

The classic examples of subjects considered inarbitrable include certain issues arising in criminal, domestic relations, bankruptcy, real property and governmental sanctions matters⁴⁰. It has been argued that certain types of investment contracts are not arbitrable since they involve aspects of sovereignty over natural resources or other issues of *ius cogens*, so that arbitrators are not authorized to pronounce on the validity of sovereign actions⁴¹. This work will analyse the objective arbitrability, especially related to the public policy objection presented by the ANP to deny the arbitrability of a dispute related to natural resources.

3.2. Law applicable to determine arbitrability

The practice of international arbitration proves that the issue of which law governs arbitrability is not an easy one and that the answer may depend upon the tribunal or court before which it arises. The solution to the issue can vary depending on whether it is decided by an arbitral tribunal, a state court to which one of the parties has concurrently submitted the dispute in the course of a setting-aside or enforcement proceeding⁴².

Brazier argues that a determination of arbitrability may arise at several stages in the arbitral process, and in several different forums. These include (a) before the tribunal at the beginning of the proceeding; (b) before a national court, either as a preliminary matter to be determined before the arbitration can go ahead, or as a question of whether the award should be set aside; and (c) before the court of enforcement⁴³. At each stage, the question arises is what law governs arbitrability.

3.2.1. Different forums and stages where the arbitrability issue can arise

3.2.1.1. In national courts as a preliminary matter or a question of whether the award should be set aside

Suppose one of the parties has commenced the arbitration in compliance with an arbitration clause and the other party considers that the

³⁹ Ibid 28.

⁴⁰ Gary Born, *International Commercial Arbitration* (Second edition, Kluwer Law International 2014) 949.

⁴¹ Lew, Mistelis and Kröll (n 24) 219.

⁴² Hanotiau (n 26) 878.

⁴³ Brazier (n 25) 3.

dispute is not arbitrable and applies to a national court to stop the arbitration. How is the national court going to decide this issue of arbitrability?

According to Hanotiau, it will apply its own national law, and this is the appropriate view even if some authors and various courts hold that the law applicable to the validity of the arbitration clause should determine arbitrability⁴⁴.

Stravos Brekoulakis also believes that the best answer is the *lex fori* and that the provision of art. V(2)(a) of the NYC, although referring to the enforcement stage, has a wider effect than the scope of application, endorsing the *lex fori* even when the issue of arbitrability arises before a national court at other stages than enforcement, especially when national courts review arbitrability at the stage of challenge⁴⁵. According to the author, most national provisions on challenge mirror the NYC art. V, and thus, make express reference to *lex fori*⁴⁶.

According to the tendency, the issue of arbitrability should be decided without reference to a domestic law, through the application of an international rule of substantive law⁴⁷. For example, in the United States District Court decision of 29 March 1991, the Court emphasized that that “courts of NYC signatory countries in which an agreement to arbitrate is sought to be enforced could not decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements.”⁴⁸ According to this view, the principle of *favor arbitrandum* should prevail in case of doubt⁴⁹. Nevertheless, the choice of transnational public policy is not its most conventional one, since the function of public policy is to exclude agreements, rules or decisions that oppose certain fundamental values or interests⁵⁰.

If national statutes provide for the possibility of setting aside an award if it is contrary to public policy or if the dispute is not capable of settlement by arbitration, the national court concerned will normally apply its own national law to decide the issue⁵¹. The UNCITRAL Model Law also provides⁵² that an arbitral award may be set aside by the court

44 Hanotiau (n 26) 883.

45 Stavros Brekoulakis, ‘Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori’ 2 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1414323> accessed 15 July 2015.

46 Ibid.

47 Bernard Hanotiau, ‘La Loi Applicable a L’Arbitrabilite Du Litige’ [1998] Int’l Bus. LJ 755, 402.

48 Ibid.

49 Ibid.

50 Brazier (n 25) 7.

51 Hanotiau (n 26) 883.

52 Article 34(2)(b)(i) (2), UNCITRAL Model Law.

mentioned in Article 6⁵³ only if the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State⁵⁴.

Finally, even applying national law, national courts cannot use public policy arguments broadly, in order to restrain international arbitration or set aside arbitral awards⁵⁵. In Hanotiau's words:

[...] it is certain that the field of arbitrable matters is considerably expanding. On the one hand, the role that public policy plays in the field of arbitrability has been considerably narrowed. On the other hand, material rules specific to international arbitration are emerging in national legal systems, either in the case law, or in newly adopted statutes⁵⁶.

3.2.1.2. In the enforcement stage

When raised at the time of enforcement, the applicable law is the one of the place where it will have to be enforced. The enforcement judge will normally apply art. V(2) of the NYC. Despite the waning role of public policy, the prominence of *lex fori* as the most relevant law to determine arbitrability remains unquestionable, especially when the issue arises before a national court at the enforcement stage, when the express mandate of the NYC leaves very little space, if any, for a different view⁵⁷.

Reference is often made to the decision of the US Second Circuit Court of Appeals in *Parsons and Whittemore Overseas Co Inc v Socit-Gn&ale de L'Industrie du Papier (Rakta)*⁵⁸, in which the Court of Appeals decided that only a violation of the forum State's most basic notions of morality and justice would justify refusal to enforce an arbitral award⁵⁹. The BAA, mirroring the NYC, expressly states that national courts shall deny recognition or enforcement if, in accordance with Brazilian law, the subject matter in dispute is not capable of settlement by arbitration⁶⁰.

53 Article 6, UNCITRAL Model Law.

54 Hanotiau (n 47) 402.

55 Ibid 403.

56 Ibid.

57 Brekoulakis (n 45) 2.

58 *Parsons & Whittemore Overseas Co. Inc. v Socete Generale de l'Industrie du Papier (RAKTA)* 508 F.2d 969 (2nd Cir. 1974).

59 Locknie Hsu, 'Public Policy Considerations in International Arbitration: Costs and Other Issues A View from Singapore' (2009) 26 *Journal of International Arbitration* 101, 884.

60 Article 39, BAA.

3.2.1.3. *By the arbitral tribunal*

If the question arises before the tribunal at the beginning of the proceeding, which law should the arbitrators apply? Should they consider the fact that the award would subsequently have to be enforced in another country?

Hanoutiau says the arbitral tribunal will decide it by application of the law that governs the arbitration agreement, ie, the autonomously chosen law⁶¹. According to him, this is the solution expressly provided by art. II(1) and art. V(1)(a) of the NYC. However, in most cases parties have not provided any express indication in this respect⁶².

Lauren Brazier makes a thorough analysis of the most appropriate law to determine arbitrability. First, she considers the law governing the arbitration agreement, but argues that this approach takes the autonomy justification for using the law governing the arbitration agreement to an extreme, since it is one thing to respect parties' choices as to the applicable law, and quite another for that choice to be allowed to undermine the basis of the doctrine of arbitrability. Thus, the law governing the arbitration agreement would be an unusual starting point for determining arbitrability in the investor-State context⁶³.

Lauren Brazier also wonders if the *lex arbitri* or the law of the seat of arbitration should govern arbitrability, but finds that it is unlikely to have a close connection with the underlying commercial agreement, since the choice of the seat is usually determined by factors such as convenience or neutrality, and not by the law of the specific forum chosen⁶⁴.

Finally, Brazier argues that the most appropriate view is that arbitrability should be determined by a transnational public policy, defined as the set of principles, not pertaining to the law of a particular State and reliant on consensus between States. The transnational approach is appropriate because national public policy rules applying to arbitrability in international arbitration are increasingly less restrictive than those which apply in domestic arbitrations and because transnational public policy is not tied to the law that the parties have selected, separating the law governing arbitrability from issues involving the choice of the parties⁶⁵.

Nevertheless, this view may lead to unwanted practical consequences in cases where the law of the place of arbitration contains a narrower concept of arbitrability than the "genuinely international public

61 Hanotiau (n 26) 879.

62 Ibid.

63 Brazier (n 25) 5.

64 Ibid 6.

65 Ibid 8.

policy”⁶⁶. In these cases, necessary measures of support from the courts of the place of arbitration may not be available, the award may be open to challenge and the unsuccessful party may later attack a genuine matter of international public policy during the enforcement stage⁶⁷.

In most cases, tribunals determine the arbitrability of a dispute based on provisions of the place of arbitration⁶⁸. Although arbitral tribunals have no duty to apply *lex fori*, it is accepted as the safest option for a tribunal, in order to avoid a potential challenge of the award in the national court of the place of arbitration, which in turn would be bound to apply *lex fori*⁶⁹.

3.3. Jurisdiction

The *Kompetenz-Kompetenz* principle refers to the allocation of authority between an arbitral tribunal and a national court over the interpretation and enforceability of arbitration agreements. The principle, developed in Germany, authorizes an arbitral tribunal to determine its own jurisdiction without requesting a judicial decision⁷⁰.

Natasha Wyss⁷¹ says that the right of an arbitral tribunal to rule on its own jurisdiction is generally accepted throughout the world. However, the doctrine has developed into a legal term of art in most countries, such as “*Kompetenz-Kompetenz*” in Germany; “*competence de la competence*” in France, and “*competence of competence*” in England, and legal implications of the doctrine change with its translation. Likewise, William Park says that in commercial arbitration, it depends largely on national law and institutional rules, making it more accurate to speak of *Kompetenz-Kompetenz* doctrines in the plural:

To illustrate, in the United States courts may entertain applications for jurisdictional declarations at any time, and may order full examination of the parties' intent to arbitrate. If German courts are asked to hear a matter which one side asserts must be arbitrated, they decide immediately on the validity and scope of the arbitration agreement. In

⁶⁶ Lew, Mistelis and Kröll (n 24) 197.

⁶⁷ Ibid.

⁶⁸ *Fincantieri- Cantieri Navali Italiani and Oto Melara v. Mvand arbitration tribunal v.* (1995) XX YBCA 766 (with regard to claims arising out of illegal activities)

⁶⁹ Lew, Mistelis and Kröll (n 24) 197.

⁷⁰ Adrianna Dulic, ‘First Options of Chicago, Inc. v. Kaplan and the Kompetenz-Kompetenz Principle’ (2002) 2 Pepp. Disp. Resol. LJ 77, 2.

⁷¹ Natasha Wyss, ‘First Options of Chicago, Inc. v. Kaplan: A Perilous Approach to Kompetenz-Kompetenz’ (1997) 72 Tul. L. Rev. 351, 352.

*neighbouring France, such challenges normally wait until an award has been made. In England, litigants have a right to declaratory decisions on arbitral authority, but only if they take no part in the arbitration*⁷².

About the question of who has jurisdiction to determine arbitrability, the United States has a liberal approach. According to Kenneth R Pierce, the court shall see whether the parties objectively revealed an intent to submit the arbitrability question itself to arbitration, but admits it is hard to say, since parties usually incorporate a standard broad clause into their contracts without thinking about it⁷³.

The timing of judicial review is also an issue. On one hand, going to court at the beginning of the proceeding can save expense for a respondent improperly joined to the arbitration. On the other hand, judicial resources may be preserved by delaying review until the end of the case, by which time the parties might have settled⁷⁴. The French model delays court consideration of jurisdictional matters until the award review stage, which can reduce the chance of dilatory tactics, since a bad-faith respondent will be less able to add the cost of a court challenge while the arbitration is pending⁷⁵.

However, the high costs of arbitration and the principle of legal certainty have even made the courts of Germany, the birthplace of *Kompetenz-Kompetenz*, recognize the possibility of judicial review of the arbitral jurisdiction in the pre-arbitration phase⁷⁶. Under section 1032(2) of the German ZPO, a German court may only decide the arbitrators' jurisdiction if requested to do so before the arbitral tribunal is constituted⁷⁷. Brekoulakis observes that section 1032 now regulates the allocation of tasks between national courts and arbitral tribunals and it is no longer possible for the parties to provide that an arbitral tribunal will have the final and binding say for German courts in relation to the

72 William W Park, 'Arbitral Jurisdiction in the United States: Who Decides What?' (2008) 11 International arbitration law review 33, 38.

73 Kenneth R Pierce, 'Down the Rabbit Hole: Who Decides What's Arbitrable?' (2004) 21 Journal of International Arbitration 289, 292.

74 William W. Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (2006) ICCA Congress, Montreal.13 ICCA Congress Series 55 <http://www.arbitrationicca.org/media/0/12409326410520/jurisdiction_to_determine_jurisdiction_w_w_park.pdf> accessed 29 July, 2015

75 Ibid.

76 Stavros Brekoulakis, 'The Negative Effect of Competence-Competence: The Verdict Has to Be Negative' [2009] Austrian arbitration yearbook 238, 245.

77 John J Barcelo III, 'Who Decides the Arbitrator's Jurisdiction-Separability and Competence-Competence in Transnational Perspective' (2003) 36 Vand. J. Transnat'l L. 1115, 1131.

determination of the validity of an arbitration agreement. In particular, a state court may assume jurisdiction over a claim on the jurisdiction of a tribunal, but only at a stage prior to the constitution of the arbitral tribunal, since after that, an arbitral tribunal acquires the exclusive jurisdiction to decide on the validity of the arbitration agreement⁷⁸.

According to Brekoulakis, the principle of competence-competence asserts that an arbitral tribunal has the jurisdiction to address a claim which undermines the premise of its own authority, providing arbitrators with the power to begin with the question⁷⁹. The competence-competence principle arguably generates two effects. The positive effect means that the arbitral tribunal has jurisdiction to decide on its own jurisdiction⁸⁰ and the negative effect attributes exclusive jurisdiction to arbitral tribunals to examine the validity of an arbitration agreement. National courts have to refrain from reviewing the jurisdiction of a tribunal until the stage of challenge or enforcement of an arbitral award⁸¹.

Brekoulakis says that while the principle of competence-competence started as a legal convention aiming to strengthen the jurisdiction of arbitral tribunals, it has now developed into a legal paradox⁸². For the author, while the positive effect of the competence-competence principle is essential to maintain the autonomy of arbitration, the negative effect undermines legitimacy of arbitration proceedings, leading to an overly expensive pro-arbitration policy that encourages an anti-arbitration reaction⁸³.

According to the competence-competence principle, an arbitral tribunal has authority to decide upon its jurisdiction and, in making such a decision, it will review the respective arbitration agreement, observing general legal principles that affects its jurisdiction. This decision will include an assessment as to whether the dispute is arbitrable, but the determination is not necessarily final⁸⁴. According to Patrick M. Baron and Stefan Liniger, the arbitral tribunal's determination might be subject to judicial review and in a demand to set aside an award or at the recognition and enforcement stage, a court may take a second look at the arbitrability of a particular matter⁸⁵.

The *First Options of Chicago v. Kaplan*⁸⁶ case is often mentioned

78 Brekoulakis (n 76) 245.

79 Ibid 238.

80 Ibid 251.

81 Ibid 239.

82 Ibid 238.

83 Ibid 245.

84 Baron and Liniger (n 32) 27.

85 Ibid.

86 U.S. Supreme Court, *First Options of Chicago, Inc. v. Kaplan* (94-560), 514 U.S. 938 (1995).

on the matter of application of Kompetenz-Kompetenz. In this case, the Court of Appeals disagreed with the arbitral tribunal on the matter of its jurisdiction and determined that the Kaplans were not bound to arbitrate, reversing the lower court confirmation of the award. A unanimous Supreme Court affirmed the Court of Appeals decision, stating that the arbitrability was a question for the courts to decide⁸⁷.

Another theory connected with this approach is called the “second look doctrine”, which although not holding the arbitration agreement to be invalid, preserves the subsequent possibility to annul or refuse recognition and enforcement of arbitral awards that are contrary to the *lex fori*⁸⁸. In the emblematic *Dallah case*⁸⁹ the UK Supreme Court decided to deny recognition of the arbitral award, following what it termed an independent investigation of whether the tribunal had jurisdiction. The Court revisited the arbitral tribunal’s decision on jurisdiction and considered it was not bound or restricted by the tribunal’s conclusions⁹⁰.

According to Gary Bornand, the regrettable course of the *Dallah* case and the conflict between the French and English decisions are pathological, since the most fundamental objectives of the NYC were violated, including ensuring uniform treatment of arbitral awards and facilitating the effective enforcement of such awards in the Convention’s Contracting States⁹¹.

Brazilian courts can analyze the question of arbitrability even during an ongoing arbitration proceeding if the question is raised by an arbitrator, as expressly stated in art. 25 of the BAA. The answer is not so obvious if the jurisdiction issue is brought to national courts during the arbitral proceeding by the party that believes the dispute is not arbitrable. As mentioned before, in the first-instance decision of the *Lula case*⁹², the judge held that the judiciary has the final word on jurisdiction when the question is brought to a national court by one of the parties, even during the arbitral proceeding. The judge decided that the arbitration shall be suspended until the national court decides on the arbitrability issue.

87 William W Park, ‘The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?’ (1996) 12 Arbitration International 137, 140.

88 Alexander J Belohlavek, ‘The Law Applicable to the Arbitration Agreement and the Arbitrability of a Dispute’ [2013] Yearbook of International Arbitration, M. Roth and M. Giestlinger (eds.), Intersentia/DIKE/NWV, Antwerpen-Zurich-Vienna-Graz 27, 9.

89 *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

90 Gary Born and others, ‘Dallah and the New York Convention’ <<http://kluwerarbitrationblog.com/blog/2011/04/07/dallah-and-the-new-york-convention/>> accessed 14 July 2015.

91 *Ibid.*

92 1st Federal Court of the Judiciary Section of Rio de Janeiro (n 14).

3.4. Arbitrability and Public policy

In many countries, arbitration statutes deal only with domestic arbitration, and do not cover all aspects of arbitration⁹³. Most recent statutes do not regulate questions of arbitrability and problems that affect foreign state capacity to arbitrate, including sovereign immunity from suit and from execution of the award⁹⁴.

Although NYC sets forth two bases for non-recognition, the public policy of the enforcement forum (in Article V(2)(b)) and the nonarbitrability rules of the enforcement forum (in Article V(2)(a)), in many respects, the doctrine of public policy parallels the nonarbitrability doctrine⁹⁵. In both, even if parties agree to arbitrate their disputes, their agreements to arbitrate may be unenforceable in some jurisdictions as applied to limited categories of issues. The rationale is the same and bases on the premise that there are unacceptable conflicts between the award or arbitration agreement and basic public policies and legal norms of a particular state, which that state is permitted, exceptionally, to invoke to justify non-recognition of an otherwise valid award or agreement⁹⁶. In Lula case, for instance, public policy grounds were used to support that the right is not disposable because of the public interest involved and, thus, the dispute could not be settled by arbitration according to BAA.

Despite that the limits of arbitrability usually concern public policy grounds, few laws expressly determine what public policy is. The interpretation will depend on the context of each country. In arbitration-friendly countries, not all public policy rules can impair arbitration⁹⁷. Despite a general bias in favour of enforcement⁹⁸, there are substantive and procedural limits beyond which arbitrators may not go. Enforcement may be refused if an award purports to decide allegations involving the enforcing country's fundamental economic policies or if the arbitration proceeding was procedurally deficient in some fundamental aspect⁹⁹.

Hsu says that when international jurists and experts were formulating Article 34 of the Model Law, there was a great deal of discussion as to its scope, but the final interpretation was narrow:

93 Henry P DeVries, 'International Commercial Arbitration: A Contractual Substitute for National Courts' (1982) 57 Tul. L. Rev. 42, 52,

94 Ibid.

95 Born (n 40) 949.

96 Ibid.

97 Lew, Mistelis and Kröll (n 24) 200.

98 Troy L Harris, 'The "Public Policy" Exception to Enforcement of International Arbitration Awards Under the New York Convention—With Particular Reference to Construction Disputes' (2007) 24 Journal of International Arbitration 9, 1.

99 Ibid.

In discussing the term 'public policy', it was understood that it was not equivalent to the political stance or international policies of a State but comprised the fundamental notions and principles of justice. It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside¹⁰⁰.

The differences between the various approaches are diminishing with the gradual enlargement of the scope of arbitration in most countries. There are areas where the issue of arbitrability traditionally arises such as antitrust, securities transactions, insolvency, intellectual property rights, illegality and fraud, bribery and corruption, and investments in natural resources¹⁰¹.

A consensus also seems to exist regarding the existence of two approaches to public policy, depending on whether the arbitration is classified as domestic or international¹⁰². Even some claims that are not arbitrable in domestic arbitration, based on public policy grounds, have been found to be arbitrable, including securities and antitrust claims¹⁰³. Troy L. Harris says that 'while a public policy argument is sometimes dismissed as the last resort of the desperate, public policy is also 'a variable notion' that is 'open-textured and flexible'¹⁰⁴.

In the United States, courts have set forth limitations to the parties' freedom to arbitrate disputes in specific areas of law that were traditionally considered to be within the exclusive domain of state and federal courts, in particular those involving strong public interest¹⁰⁵. Over the last couple of decades, however, U.S. courts have increasingly taken an arbitration-friendly approach and limited public policy considerations to fewer types of controversies¹⁰⁶.

This approach was influenced primarily by the decision in the

100 Hsu (n 59) 109.

101 Lew, Mistelis and Kröll (n 24) 201.

102 Leonardo VP de Oliveira and Isabel Miranda, 'International Public Policy and Recognition and Enforcement of Foreign Arbitral Awards in Brazil' 30 Journal of International Arbitration 2013 49, 51.

103 Harris (n 98) 11.

104 Ibid.

105 Baron and Liniger (n 32) 28.

106 Ibid 29.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc case¹⁰⁷, which is often referred to in connection with the theory that a dispute which is not arbitrable under national law can, nonetheless, be submitted to international arbitration. Accordingly, an arbitration agreement considered invalid under national law can still be a valid basis for the jurisdiction of arbitrators in international arbitration¹⁰⁸. In *Mitsubishi vs Soler*¹⁰⁹, the U.S. Supreme Court held that an automobile dealer's claim under the U.S. antitrust law could be decided in a Japanese arbitration proceeding, by being sensitive to the need for predictability in the resolution of disputes, which requires enforcement of the parties' agreement, even assuming that it would not happen in a domestic context¹¹⁰.

International public policy is no longer the prerogative of arbitral tribunals; courts have started to adhere to it, especially in jurisdictions where arbitration is a traditional method of dispute resolution. In emerging countries like Brazil, the question of whether the international approach will be adopted remains to be answered¹¹¹.

3.4.1. Public policy in Brazil

The reason for limiting arbitrability consists primarily of the desire to protect public policy of countries, which concerns in protecting the public interest and the weaker party in the proceeding¹¹². National public policy is composed of the country's internal and external public policy. The internal policy comprises national policies recognized in customary law and legislation promulgated to regulate certain situations, which cannot be avoided or by-passed by the parties¹¹³. The external policy is part of the country's public policy applied to its external relationships, also called international public policy¹¹⁴. The expression "international public policy" (or in French, "*ordre public international*") also concerns the concept of public policy as applied in private international law, as a barrier to the application of a foreign statute by a state court on its rulings and on recognition of foreign arbitral awards¹¹⁵.

Before the enactment of the BAA, Article 17 of the Introductory Act to the Rules of Brazilian Law¹¹⁶ was the general rule that applied

107 *U.S. Supreme Court, Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985)

108 Belohlavek (n 88) 9.

109 Ibid (n 104)

110 Harris (n 98) 13.

111 Oliveira and Miranda (n 102) 55.

112 Belohlavek (n 88) 10.

113 Oliveira and Miranda (n 102) 51.

114 Ibid.

115 Ibid 52.

116 Brazilian Decree-Law 4,657/ 1942.

to the recognition of all foreign judgments, including foreign arbitral awards, by establishing that ‘the laws, acts and judgments of another country and any declarations of will, shall not have effect in Brazil when they offend national sovereignty, public policy or good conduct’¹¹⁷.

The BAA does not significantly alter Brazil’s practical limitations on arbitrability, which can serve as argument for a reluctant government to refuse arbitration of investment disputes¹¹⁸. The BAA limits the subject matter of arbitration to pecuniary rights of which the parties can freely dispose. This provision leaves open the possibility to frustrate an investment agreement because, under Brazilian law, neither the investor nor the government can “freely dispose” of the rights at issue¹¹⁹.

Brazilian courts have traditionally permitted themselves flexibility in interpreting the public policy defence to arbitration, raising concerns that a foreign investor might have difficulties to compel a Brazil state entity to arbitrate pursuant to an investment contract¹²⁰. Actually, some commentators have already opined that issues of “public rights” and “State sovereignty”, both crucial to investment disputes, are outside the domain of arbitrability under Brazilian law¹²¹.

Brazil has been hesitant to provide broad-based consent to arbitration of international investment disputes through domestic law or treaty¹²². Nowadays, investors can still obtain some protection by including arbitration provisions in their concession or investment agreements with the Brazilian government¹²³. Therefore, investment arbitration agreements and awards involving the Brazilian government remain firmly based on the commercial arbitration regime¹²⁴.

Where arbitration is conducted under the ICSID Rules, all Member States are obliged to automatically treat awards as local judgments, without any defence against enforcement, including public policy grounds¹²⁵. Thus, in many international disputes, arbitration is not just a preferable way to obtain compensation; it is the only viable means of doing so¹²⁶.

Pedro Martini stresses that a fundamental distinction between arbitration against the State in Brazil and investment-treaty-arbitrations

117 Belohlavek (n 88) 55.

118 Noah D Rubins, ‘Investment Arbitration in Brazil’ (2003) 4 J. World Investment 1071, 1086.

119 Ibid.

120 Ibid.

121 Ibid.

122 Rubins (n 118).

123 Ibid 1072.

124 Rubins (n 118).

125 Ibid 1076.

126 Ibid.

is that, while in arbitration against the Brazilian public administration the objective arbitrability refers to the nature of the claim, ie, if it relates to disposable rights, regardless of the context of such claim, in investment-treaty arbitration it is quite the opposite. It is not the nature of the claim itself that determines its capacity to be submitted to arbitration, but the context of the claim and of the activity of the investor in the host state, if there is an investment or not¹²⁷.

The main reasons for Brazil's refusal to sign the ICSID Convention of 1965 were primarily directed at its investor-state arbitration mechanism, which Brazil's delegate believed contradicted the practice of direct state-to-state arbitration to resolve disputes involving treatment of their respective nationals. Brazil's delegate also suggested that investor-state arbitration violated constitutional principles of the Brazilian legal system, such as the principle that the judiciary holds a monopoly on justice. The final criticism was that it favoured foreign investors to the detriment of domestic investors¹²⁸.

More than 50 years later, most Latin America countries have ratified the ICSID and Brazil's own approach to international commercial arbitration has evolved considerably¹²⁹. Brazil has a modern and effective Arbitration Act, a more proarbitration approach by courts and the old view of unconstitutionality was remedied by Brazilian Federal Supreme Court¹³⁰. Thus, most of the old criticisms are no longer tenable.

It is too early to say whether the BAA will satisfactorily compel enforcement of investment arbitration awards against the Brazilian government¹³¹. If Brazil's courts choose to apply the policy-based exceptions to enforcement broadly, investment arbitration effectiveness is likely to fail¹³².

3.4.2. Sovereignty over natural resources

Even a cursory look at the relationship between foreign investors and host States during the twentieth century exposes the uncertainties of this interdependence. The first half of that century saw the creation and then rapid growth of the international energy industry and many governments granted generous concessions to multinational oil corporations, with the title to the oil conveyed to the companies

127 Daniel de Andrade Levy, Ana Gerda de Borja and Adriana Pucci (eds), *Investment Protection in Brazil* (Kluwer Law International 2014) 41.

128 Jean Kalicki and Suzana Medeiros, 'Investment Arbitration in Brazil' (2008) 24 *Arbitration International* 423, 431.

129 *Ibid* 433.

130 Brazilian Federal Supreme Court (n 3).

131 Rubins (n 118) 1087.

132 *Ibid* 1088.

under long-term concessions or leases, with low royalties payable to the government¹³³.

Unsurprisingly, developing nations soon changed this course. Nationalization of the oil industry, termination of those same concession or lease agreements and expropriation of the assets of foreign companies prevailed in the second half of the twentieth century¹³⁴. On December 21, 1952, the United Nations General Assembly issued Resolution 626 (VII), providing for the right of peoples to exploit their natural resources as part of their sovereignty. It was the first General Assembly text to use the notion of ‘permanent sovereignty over natural resources’¹³⁵.

On December 14, 1962, the General Assembly adopted Resolution 1803 (XVII), stating that ‘1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned’¹³⁶. The consequences of this statement increased intervention of governments, both of developed and developing countries, especially during the 1960s and 1970s¹³⁷. However, the same Resolution also provided that nationalization measures should only be implemented for public purposes, security or national interest and that the investor should receive “appropriate compensation” in compliance with domestic and international law¹³⁸.

In the Resolution 3281 (XXIX), dated 26 July 1974, the General Assembly adopted the Charter of Economic Rights and Duties of States. This text enhanced that the right to nationalize foreign-owned property but required appropriate compensation, and admitted that if compensation was not paid, the State’s international obligation would not respect good faith¹³⁹.

In the twentieth century, the growing involvement of States in commercial activities progressively eroded the absolute immunity doctrine¹⁴⁰. Reflecting these changes, the Swiss Federal Supreme Court considered that once a State enters the market place and acts like a

133 B.S. Vasani; D.E. Vielleville, Esq.; ‘Sovereignty Over Natural Resources Versus Rights Under Investment Contracts: Which One Prevails?’ (2008), 2, TDM. < www.transnational-dispute-management.com/article.asp?key=1211 > accessed 23 June 2015.

134 Ibid.

135 Ibid.

136 General Assembly resolution 1803 (XVII) of 14 December 1962, “Permanent sovereignty over natural resources < <http://www.ohchr.org/Documents/ProfessionalInterest/resources.pdf> > accessed 30 July 2015.

137 Hassan Sedigh, ‘What Level of Host State Interference Amounts to a Taking under Contemporary International Law’ (2001) 2 J. World Investment 631, 638.

138 B.S. Vasani; D.E. Vielleville, Esq (n 127).

139 Ibid.

140 Lew, Mistelis and Kröll (n 24) 744.

private party, there is no more justification for allowing that State to avoid the economic consequences of its actions¹⁴¹. The trade-off is properly described by Baade as follows:

The customary international law rule of sovereign immunity illustrates the central importance of state sovereignty in the modern world. The restrictive theory of such immunity, on the other hand, demonstrates the need to accommodate respect for foreign sovereign rights to new circumstances, such as state trading. As there is 'no clear cut dividing line between acts done 'jure imperii' and acts done 'jure gestionis', one must consider what indicators are available as to whether an act is jure imperii or jure gestionis and the focus is on the nature of the act, or by analogy, the dispute¹⁴².

The next section will examine the limits on the use of sovereignty as a justification to deny arbitrability of certain disputes.

3.4.3. *Jure imperii* acts and *jure gestionis* acts

In public international law, the competence of States in respect of their territory is usually described in terms of sovereignty and jurisdiction. While jurisdiction refers to the ability of a State to exercise control over people, sovereign immunity refers to the idea that the actions of a foreign State lie outside the jurisdictional competence of other States¹⁴³. Whilst initially sovereign immunity was much broader, a doctrine of restrictive immunity has developed and distinguishes between *jure imperii* acts (governmental acts) and *jure gestionis* acts (acts relating to the commercial activities of the State)¹⁴⁴.

A State may reasonably expect to be immune from legal proceedings in a foreign court only in relation to its sovereign activities, while no immunity exists for activities of a purely commercial and private nature.¹⁴⁵ Furthermore, under the doctrine of restrictive immunity, the concept of waiver of immunity was extended and it is

141 Ibid.

142 Hans W Baade, *The Operation of Foreign Public Law* (30 Tex Intl LJ.. 1995) 440 (as cited in Brazier (n 25) 17).

143 Ibid 14.

144 Ibid.

145 Mohamed AM Ismail, *Globalization and New International Public Works Agreements in Developing Countries: An Analytical Perspective* (Ashgate Pub 2011) 157.

no longer necessary that a State expressly waive its immunity after the dispute has arisen; waiver can be obtained in advance.¹⁴⁶

In commercial arbitration, the arbitration is endorsed by the State as 'private', based on its determination to respect the autonomous decisions of non-State actors to displace the courts' competence, though a mutually constructed alternative¹⁴⁷. The authority for commercial arbitration and for the power to define *lex mercatoria* as a source of law originates from the State's choice to withdraw a particular dispute or contractual relationship from the primary jurisdiction of the courts and subject it to arbitration¹⁴⁸.

The principle of sovereignty is the cornerstone of the power of the State to enact tax law¹⁴⁹. Conventionally, taxation issues have been viewed as indivisible from State sovereignty, since it directly implies the funding by which governments operate, so it is understandable that national courts seek a monopoly on litigation of such a vital sovereign prerogative¹⁵⁰. This attachment to State sovereignty is also the prevailing view about activities related to natural resources.

Major energy projects typically involve a long-term contract between a host State and an investor, under which the State grants a privilege to conduct an enterprise for a defined period¹⁵¹. The State transfers to the concessionaire or lessee certain powers that normally would belong to the State, but retains ultimate ownership of the right, which makes these contracts partly public and partly private in nature¹⁵². While some acts of a State related to exploration of natural resources may be considered *jure imperii*, States also undertake a variety of commercial activities that do not directly involve their sovereignty. This requires defining the parameters of sovereignty defence, in order to ensure that the scope of arbitrability is not too wide or narrow¹⁵³.

Brazier took the example of investor-State taxation disputes in international commercial arbitration to advocate that sovereignty does not inhibit the arbitrability of all taxation disputes between investors

146 Lew, Mistelis and Kröll (n 24) 745.

147 Gus Van Harten, 'The Public—Private Distinction in the International Arbitration of Individual Claims against the State' (2007) 56 International & Comparative Law Quarterly 372 <http://www.journals.cambridge.org/abstract_S0020589300070159> accessed 14 July 2015.

148 Ibid.

149 Edwin van der Bruggen, 'State Responsibility under Customary International Law in Matters of Taxation and Tax Competition' (2001) 29 Intertax 115, 120.

150 William W Park, 'Arbitrability and Tax' [2009] Arbitrability: International and Comparative Perspectives 19, 180.

151 Brazier (n 25) 5.

152 Ibid.

153 Ibid 17.

and States¹⁵⁴. Rather, there is a distinction to be drawn between taxation disputes that directly imply sovereignty of States and are not arbitrable, and disputes as to taxation that are merely contractual in nature, only indirectly involving sovereignty, and thus are arbitrable¹⁵⁵.

Brazier accentuates the difference between disputes that involve the direct exercise of sovereign authority (e.g., substantive tax law matters), and those that involve the indirect recognition of its effect on private or commercial relationships (e.g., the application of specific contractual standards)¹⁵⁶. She gives the example of a provision stating that a tax payable on income is capped at a certain rate, what may raise substantive tax law issues, such as what constitutes income. This determination would involve a direct exercise of the State's sovereign authority over tax law. However, if the parties agreed as to what constitutes income, compliance with this kind of provision will be arbitrable, since this involves merely the indirect effect of a tax law, in order to assess compliance with the contract. By following this distinction, Brazier supports that stabilization provisions are arbitrable, because they involve questions of compliance with the contractual standard, since a State cannot disregard its promise of a stable framework.¹⁵⁷

This framing is useful to examine contractual problems in disputes involving concession agreements in the oil and gas industry, such as the one that arose in the Lula case. In that case, the discussion hinges on the concept of "oil field" and the consequent amount of government take payable under the category of "special participation". This is owed when there is high volume of hydrocarbons or high profit margin¹⁵⁸, and the rate varies from 10% to 40%, applying on sales revenue adjusted by deductions allowed by law.¹⁵⁹

The rationale in the Lula case is similar to Lauren Brazier's approach to taxation disputes. The concessionaires argued that the ANP breached the contract in order to increase revenues, since the concept of "oil field", in discussion, was incorporated in the concession agreement. Thus, the dispute would be arbitrable, because it is founded on the economic consequences of the State's interpretation of the concession agreement and because the State reneged on its promise of a stable framework.

In opposition, the ANP argued that a provision stating that the

154 Ibid 2.

155 Ibid 16.

156 Ibid 15.

157 Ibid 16.

158 KPMG Auditores Independentes. 'A Guide to Brazilian Oil and Gas Taxation' (2011) <http://www.kpmg.com/br/pt/estudos_analises/artigosepublicacoes/paginas/brazilian-oil-gas-taxation.aspx> accessed 29 July 2015.

159 Law 9,478/97, Decree 2,705/98 and ANP Edicts 10/99 and 102/99.

government take is payable in a certain amount may raise substantive law issues, such as what constitutes an “oil field”. The definition of “oil field” determines the amount of special participation that the concessionaries have to pay, since the bigger the area considered as a field, the bigger the production and higher the rate of special participation due. The ANP contended that the definition of “oil field” in the concession agreement could only be made by the State, because regulation is strictly related to sovereignty. This argument was accepted by the court¹⁶⁰.

Nevertheless, there are decisions in Brazilian courts that clearly recognize the differences between the diverse activities that the State exercises and the public interest involved in each case, conferring distinct treatment to them. For example, in Brazil, the Public Attorney’s Office needs to intervene in cases involving non-disposable rights. There are various decisions, however, holding that for the effect of such intervention, certain interests of governmental entities are not non-disposable, making a distinction between the public interest and pecuniary rights, so that governmental entities may not invoke the public interest to avoid the duty to indemnify damages caused. This was the gist of the decision by the justice Minister Luiz Fux¹⁶¹, which held that the State, when honouring its responsibility, and paying the corresponding indemnification, places itself in the position of serving the ‘public interest’. On the other hand, when it evades its responsibility under concern for minimizing its pecuniary losses, it clearly pursues a secondary interest, subjectively pertaining to the state apparatus, engendering enrichment at the cost of damage to others. Moreover, the doctrine and jurisprudence are settled that the public interest is inalienable, but not the interest of the government and, in this last situation, the intervention of the Public Attorneys Office is not considered necessary.

4. THE DECISION IN LULA CASE: A CRITICAL APPROACH

4.1. The decision on the jurisdiction

Despite the judge’s finding in the Lula case that national courts have jurisdiction to analyse jurisdiction during arbitration proceedings, the topic is controversial in Brazil. In other recent case¹⁶², the ANP also

160 1st Federal Court of the Judiciary Section of Rio de Janeiro (n 14).

161 Superior Tribunal of Justice, Special Appeal no.1153076/GO, 1st Panel, Reporting Justice Luiz Fux, judged on 16 March 2010, published in the DJ of 29 March 2010.

162 5th Federal Court of the Judiciary Section of Rio de Janeiro. Ordinary Action no.0006800-84.2014.4.02.5101, Justice Sergio Bocayuva Tavares de Oliveira Dias, judged on 01.10.2014 published in the DJ (Court Reporter) of October 16, 2014.

rejected concessionaires' development plans, for the same reason of the blurred concept of "oil field", and similar disputes arose.

In the case of the Baleias ("Whales") field¹⁶³, the development plan was denied and the concessionaire started arbitration before the ICC, prompting the ANP to file an injunction action in national courts aiming to stop the arbitration. In this case, however, the decision of another federal court (5th Federal Court of Rio de Janeiro) was completely different from the one given in Lula case.

The judge of the 5th Federal Court decided that art. 25 of the BAA, which ANP invoked to support prior judicial definition of jurisdiction, does not indicate that the judiciary should rule in advance. Instead, the Court decided that there is a first assessment to be made by arbitration. In addition, the judge continued, Article 25 deals with the procedure to be adopted in cases where the inalienable right appears as a prejudicial question, not as the main subject matter. Thus, the situation discussed attracts application of Article 20¹⁶⁴ of the BAA, so the claim of lack of jurisdiction must be addressed to the arbitral tribunal, at the first opportunity, after the commencement of the arbitration. According to paragraph 2 of Article 20, with the rejection of the claim by the arbitral tribunal, the arbitration shall proceed normally, with the possibility of contesting the award in court only by way of an annulment action for setting aside the award¹⁶⁵. Thus, the judge held that rules on the relationship between jurisdiction and arbitration are to be examined by the judiciary only at the end¹⁶⁶, a solution opposed to the one given in Lula case.

The concessionaries then argued that the ANP did not obey the judicial decision related to the Whales field, so they filed an action called "Conflict of Competence"¹⁶⁷, directly to the STJ. The conflict is between the Brazilian state court and the arbitral tribunal constituted under the Rules of the ICC, by deciding on the validity and existence of the arbitration clause inserted on the concession contract signed between the concessionaire and the ANP.

163 Ibid.

164 Article 20, BAA states 'The party wishing to raise issues related to the jurisdiction, suspicion or impediment of an arbitrator or arbitrators, or as to the nullity, invalidity or ineffectiveness of the arbitration agreement, must do so at the first opportunity, after the commencement of the arbitration. § 1 When the challenge is accepted, the arbitrator shall be replaced in accordance with Article 16 of this law; and if the lack of jurisdiction of the arbitrator or of the arbitral tribunal, as well as the nullity, invalidity or ineffectiveness of the arbitration agreement is confirmed, the parties shall revert to the State Court competent to rule on the matter; § 2 – When the challenge is not accepted, the arbitration shall proceed normally, subject however to review of that decision by the competent State Court if an action dealt with in Article 33 of this Law is filed'.

165 Article 33, BAA.

166 5th Federal Court of the Judiciary Section of Rio de Janeiro (n 158).

167 Superior Tribunal of Justice (n 8).

The reporting judge assigned to the conflict of competence case, Judge Nancy Andrichi, noted:

The promulgation of Law 9,307/96 made it necessary to preserve, to the greatest extent possible, the authority of the arbitrator as the de facto and de jure judge for questions linked to the merit of the cause. Rejecting that provision would empty the hollow out the Arbitration Law, permitting the same right to be considered simultaneously, even if in perfunctory form, by the state court and arbitral court, often with serious possibilities of conflicting interpretations of the same facts¹⁶⁸.

The STJ primarily considered itself to be competent to settle conflicts of competence between State courts and arbitral tribunals. It also stressed that it is essential that the powers of the arbitrators be preserved and stated that until a final decision is rendered regarding the dispute, the arbitral tribunal has competence to rule over urgent and provisional measures between the parties, and every administrative or judicial proceeding against the concessionaire, present or future, shall be stayed¹⁶⁹.

Therefore, Brazilian courts have not yet reached a definitive decision on the jurisdiction to determine arbitrability. The pending decision in the conflict of competence action in the case of the Baleias field, despite having its direct effects only on the object in dispute, will provide an important precedent and help to construct jurisprudence in this regard. Meanwhile, one can notice that the first instance decisions in the Lula case and Baleias case, although based on similar facts, were absolutely totally different.

4.2. The decision on arbitrability

The federal court's decision in the case of Lula field took into consideration that the clause 1.26 of the concession agreement¹⁷⁰ expressly states that the legal definition of 'oil and natural gas field' is incorporated into the contract, by stating that 'field' has the same meaning as 'oil and natural gas field', as defined in the Brazilian Petroleum Law. It states that for the purposes of this Law and its regulation, Oil or Natural Gas Field is the area producing oil or natural gas from a continuous reservoir or more than one reservoir at variable

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ National Petroleum, Natural Gas and Biofuels Agency (n 13).

depths, including the facilities and equipment intended for production¹⁷¹.

The concessionaire argued that after exploring the area, two fields were discovered, named “Lula” and “Cernambi”. Given these findings, the operator submitted to two different development plans and two declarations of commerciality to the ANP, since they were separate fields from a geological standpoint¹⁷². The judge of the First Federal Court of Rio de Janeiro¹⁷³ considered that the decision on definition of fields falls under the ANP’s supervisory remit, resulting from the police power, stated in Article 78 of the National Tax Code¹⁷⁴. The judge held that the decision was taken under the discretionary power available to the public administration, so recourse to arbitration encroaches on the imperatives of administrative acts¹⁷⁵.

The question that arises is to what extent a government may affect a private right, even for a legitimate public purpose, by regulation, either general in nature or by specific actions, without having to pay compensation¹⁷⁶. Approving or denying the development plan can be considered an act of state sovereignty. However, there is another view that even being sovereign, the act generates pecuniary damages and frustrates the expectations of the concessionaires. Since the concept of “oil field” was incorporated in the contract, the unpredictability of the interpretation could have caused pecuniary damages to the oil companies, which would be arbitrable.

During the course of the Middle East oil nationalizations, some governments invoked their domestic law to allege that concessions were administrative contracts. In countries inspired by French administrative law, a contract may include exorbitant clauses allowing the government to amend or modify the service provider’s obligations. Accordingly, States argued that concession agreements, as administrative contracts, were subject to the changes and modifications within the State’s policy powers¹⁷⁷.

The arbitral awards issued in the 1970s followed the wave of unilateral government actions and tested the contract-based stability

171 Article 6, Brazilian Petroleum Law.

172 The ANP said there was only one field, since the concept of Oil Field defined in article 6 of the Brazilian Petroleum Law has no geological nature and allows more than one reservoir to be included in a single field. However, the ANP argued that the application of the concept of “oil field” would only be possible in the occurrence of vertically overlapping reservoirs, instead of several reservoirs within a block granted by contract.

173 1st Federal Court of the Judiciary Section of Rio de Janeiro (n 14).

174 Brazilian Law 5,172/1966.

175 1st Federal Court of the Judiciary Section of Rio de Janeiro (n 14).

176 OECD, “‘Indirect Expropriation’ and the ‘Right to Regulate’ in International Investment Law” (2004) OECD Working Papers on International Investment 2004/04 2 <http://www.oecd-ilibrary.org/finance-and-investment/indirect-expropriation-and-the-right-to-regulate-in-international-investment-law_780155872321> accessed 25 July 2015.

177 D.E. Vielleville, Esq. and B.S. Vasani (n 127).

mechanisms developed by investors in the preceding years¹⁷⁸. In *LIAMCO v Libya*¹⁷⁹, the arbitrator decided that both under Libyan law and UN Resolutions, a State possesses, as an attribute of its sovereignty, the right to nationalize all things belonging to any person in its jurisdiction, if such a measure is not discriminatory and is for a legitimate public purpose. In the LIAMCO case, the arbitrator held that although the nationalization was for economic reasons, the right contrasted with the principle of *pacta sunt servanda*, accepted under Libyan law and recognized as an international custom and case law precedent¹⁸⁰.

In the case of *Texaco vs Lybia*¹⁸¹, the sole arbitrator held the Libyan nationalization measures to ineffective with respect to an international contract¹⁸². The award listed three tests of internationalization of investment agreements, any one of which was said to suffice: an agreement to arbitrate; reference to general principles of law or international law as the applicable law; or that the agreement be an economic development agreement¹⁸³.

Published arbitral awards have not tackled the legality and binding nature of stabilization clauses restricting the right to regulate, and the repercussion of regulatory changes not amounting to expropriations¹⁸⁴. Nevertheless, it is certain that states cannot invoke domestic law rules to violate its obligations, and this may include outright expropriation in breach of a clause, or regulatory change in breach of a clause. In the case of economic equilibrium clauses, parties are under an obligation to negotiate in good faith so as to restore the economic equilibrium following regulatory change, and, in this context, payment of compensation emerges as the main legal effect of such breaches¹⁸⁵.

Patrick Wautelet observes that the application of international law does not exclude possibility of a contract also being governed by national law, if the parties expressly indicated their choice for such a law, but the application of national law does not hinder the application of international law¹⁸⁶.

178 Peter D Cameron, *International Energy Investment Law: The Pursuit of Stability* (Oxford University Press 2010) 104.

179 *Libyan American Oil Company (Liamco) v. The Government of the Libyan Arab Republic*, [1977] 62 I.L.R. 140.

180 Cameron (n 178) 119.

181 *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, [1977] 53 I.L.R. 389.

182 DeVries (n 93) 76.

183 Ibid.

184 Organisation for Economic Co-operation and Development, *OECD Investment Policy Perspectives 2008* (OECD 2008) 74 <<http://public.eblib.com/choice/publicfullrecord.aspx?p=432557>> accessed 29 July 2015.

185 Ibid.

186 Patrick Wautelet, 'International Public Contracts: Applicable Law and Dispute Resolution'

The significance of the protection against expropriation is not primarily protection against outright seizure of investments by the host country, but rather the protections against various forms of indirect or creeping expropriation such as regulations or confiscatory taxation that undermine the operation or enjoyment of the investment¹⁸⁷. Indeed, it is accepted as a principle of international law, normally referred to as police power or eminent domain, that a sovereign State has the right to regulate the economic and commercial activities in its territory. However, it is unquestionless this right is not unqualified and State regulation cannot be unlimited¹⁸⁸.

4.3. An international approach to State acts and protection of investors in the oil and gas industry

4.3.1. Substantive considerations on the Lula case

The judicial decision in the Lula case was limited to the ANP's claim to stop the arbitral proceeding based on the arguments that national courts have jurisdiction and that the right in dispute is not disposable¹⁸⁹. Nevertheless, once the jurisdiction to settle the conflict is defined, a decision is to be given on the merits, about whether some kind of damage was caused by the State act and whether any kind of compensation is owed to the concessionaire.

Some issues will be theoretically considered here, by analyzing concerns that arises from the case and the need to manage this kind of dispute. The issues below are considered in order to examine State duties in the oil and gas industry, taking into consideration that it is an international industry.

As set out before, in the Lula case, the denial of the development plan by the ANP resulted from the definition of oil field, since the concessions agreement defines "oil field" as stated in the Brazilian Petroleum Law and the concept provided in the Brazilian Petroleum Law gives certain margin of discretion. However, as already recognized by the ANP, in previous cases¹⁹⁰, a precise definition became necessary to provide transparency for the contract.

[2013] THE INTERNATIONALIZATION OF PUBLIC CONTRACTS 6 <<http://orbi.ulg.ac.be/handle/2268/136404>> accessed 19 July 2015.

187 K Hober, 'Investment Arbitration and the Energy Charter Treaty' (2010) 1 Journal of International Dispute Settlement 153, 161.

188 OECD (n 176) 681.

189 1st Federal Court of the Judiciary Section of Rio de Janeiro (n 14).

190 In the Technical Note n 103/2014/SDP, Administrative Process 48610.003426/2013-96, ANP recognized the necessity to increase the transparency and made a recommendation for the definition the concept of "oil field" <www.anp.gov.br/?dw=71448> accessed 30 July 2015.

Although some acts are considered *jure imperii*, this does not mean they can be arbitrary. The definition needs to be clearly established in advance to provide predictability for the investor. Brazil needs to strengthen transparent regulation of this subject in order to avoid discussions about legal concepts. Otherwise, the changing of interpretation or the failure of the State to provide an unambiguous contract clause can cause damages to private parties, which may require some sort of compensation. As explained before, the concept of field directly influences the amount of the government take, making it an essential concept that must be clearly determined beforehand.

The failure to clarify technical concepts can even prove to be contrary to good faith, since the regulatory agency shall act reasonably and in a prompt and timely manner, based on the efficient and economic conduct of petroleum operations and in accordance with good international oil industry practices¹⁹¹.

Another question to be investigated is whether the governmental measure affects the investor's reasonable expectations. The investor must demonstrate that the investment was based on circumstances that did not include the challenged regulatory regime and the assertion must be objectively reasonable and not based entirely upon the investor's subjective expectations¹⁹².

According to Frederico Favacho, these conflicts must be minimized and resolved by a competent conflict management system, whether in a preventive way, as the search for clear contracts containing transparent, uniform and unambiguous terms, whether by use of an supra state norms, as the principles of UNIDROIT and *Lex petrolea* and with the adoption of arbitration as the best means of solution available to the parties¹⁹³.

Traditionally, private international law includes the law of conflict resolution, by indicating the conflicting rule. However, soft law arose as an attempt to establish a uniform law for substantive rules on certain matters, understood as a complex of rules to justify decisions or to legitimize practices and behaviours typical of a professional nature, in the field of international trade¹⁹⁴. These rules, although not expressly stated in the agreement signed between the parties, identify possible solutions of conflicts in such a way that the contracting parties, in anticipation of the expected result, can previously settle the conflict,

191 Cameron (n 178) 67.

192 OECD (n 176) 19.

193 Frederico Favacho, 'AGESTÃO DE CONFLITOS EM CONTRATOS INTERNACIONAIS DO PETRÓLEO' (2011) 18 Revista Brasileira de Direito Constitucional–RBDC n 243, 243.

194 Clause 31.5 of the concession contract for Lula field (2nd Bidding Round) says that the ANP must, whenever it exercises its discretionary power, act justifiably, while observing applicable legislation, as well as Oil Industry Best Practices.

preventing wear and higher costs¹⁹⁵.

4.3.2. Considering the existence of a *lex petrolea*

The term '*lex petrolea*' entered the legal lexicon and the international oil and gas industry more than a quarter of a century ago. The term first emerged in a landmark international arbitration case in 1982, which concluded in favor of the existence of a "customary rule valid for the oil industry - a *lex petrolea* that was in some sort a particular branch of a general universal *lex mercatoria*." ¹⁹⁶ Tim Martin wrote that:

*This analysis supports the thesis that a lex petrolea has developed over the years, but widens the scope of inquiry to the full range of disputes encountered in the international arbitration and court cases. However, it has also developed in a number of other forums, from government's petroleum legislation and contracts to the industry's business practices, which are found in its model contracts*¹⁹⁷.

Lex petrolea is most often established from decisions arising from disputes within the international oil and gas sector, as this is where the contracts, legislation and treaties that affect the petroleum sector are tested and interpreted¹⁹⁸. Unlike the courts, the world of international arbitration is not bound by precedent, although arbitrators make their decisions in a context. Since counsel use precedents in arguing their cases and arbitrators refer to precedents in writing their awards, a *lex petrolea* has developed accordingly.¹⁹⁹

Although the decisions do not have a unity of opinion in the international community as to create anything like blackletter law rules, immense progress has been made in the past 25 years, so that in some petroleum issues, clear legal rules have evolved, while in others at least the proper range of rules has been identified. The beginnings of a *lex petrolea* serve to instruct, and in a certain sense even regulate, the international petroleum industry²⁰⁰. Then, even when a arbitration agreement chooses to apply the national law in substantive matters, the

195 Favacho (n 193) 259.

196 Tim Martin '*Lex petrol ea* in international law' in Ronnie King, *Dispute Resolution in the Energy Sector: A Practitioner's Handbook* (Globe Law and Business 2012) 95.

197 Ibid 95.

198 Ibid 96.

199 King (n 196). 95.

200 Albert Jan Van den Berg, *Yearbook Commercial Arbitration 1994 Vol. XIX Vol. XIX* (Kluwer Law International 1994).

principles already constructed by *lex petrolea* shall be considered.

4.3.3. Pursuing stability

Legal arrangements are important to protect investors' entitlements and to ensure stability of the regulatory framework governing their activities, since investor is vulnerable to host government action that may undermine the financial viability or even expropriate the investor's assets altogether²⁰¹.

Stabilization clauses aim to stabilize the terms and conditions of an investment project, thereby contributing to the management of non-commercial risk. They involve a commitment by the host government not to alter the regulatory framework governing the project, by legislation or any other means, outside specified circumstances²⁰². More recent stabilization clauses have evolved into various and sophisticated tools to manage non-commercial risk associated with the investment project²⁰³.

Stabilization clauses are particularly common in large natural resource, energy and infrastructure projects, where high fixed costs demand huge capital outlays in the early stages of the project and long timeframes are necessary to reach the breakeven point²⁰⁴. Their scope has tended to broaden, to include stabilization of specific aspects of the project, such as its fiscal regime and other broad commitments to stabilize the regulatory framework governing the investment²⁰⁵.

Economic equilibrium clauses are another type of stabilization mechanism, which link changes of the terms of the contract to renegotiation to restore its original economic equilibrium or payment of compensation. Unlike freezing clauses, economic equilibrium clauses stabilize the economic equilibrium of the contract rather than the regulatory framework itself. Therefore, regulatory changes are possible as long as the economic balance is restored²⁰⁶.

Economic equilibrium clauses protect against less intrusive forms of government action that affect the cost-benefit equilibrium of the investment, which includes legislation, the judicial or administrative interpretation of existing provisions, and other measures that influence

201 Organisation for Economic Co-operation and Development (n 184) 70.

202 Ibid 72.

203 Ibid 8.

204 L. Cotula, 'Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Towards a Rethink of Stabilization Clauses' (2008) 1 *The Journal of World Energy Law & Business* 158, 160.

205 Ibid.

206 Ibid.

the economic balance and would prompt some sort of compensation²⁰⁷.

In addition, the legal value of stabilization clauses may be reinforced by provisions in investment treaties, whereby a State commits itself to honour contractual undertakings of nationals of another state party ("umbrella clause")²⁰⁸. Indeed, the very nature of this kind of investor-State dispute resolution system is a limitation of State sovereignty, as the host government sacrifices some freedom of action in exchange for increased flows of foreign direct investment²⁰⁹.

Unfortunately, Brazil is not signatory to any investment treaty that protects foreign investors and provides broader coverage than an investment agreement²¹⁰. Nevertheless, foreign companies can participate in Brazilian bidding rounds, and acquire the right to explore and produce oil and gas in the tendered areas. The Brazilian Petroleum Law also states that "attracting investments in energy production" and "promoting the growth of the country's competitiveness in the international market", as objectives of the "national policies for the rational utilization of the energy sources"²¹¹.

The contract may also require the parties to perform it consistently in good faith, since this duty is itself a general principle of law as well as a basis for a prohibition of unjust enrichment and of the rule that a State entity cannot rely upon a change of law to excuse a breach of contract. It can act as a way of bringing international law principles, based upon reason and the practice of civilized countries²¹².

When applying the principle of fair and equitable treatment, tribunals consider other principles such as the protection of legitimate investor expectations with respect to the maintenance of a stable and predictable legal environment by the host government, the principle of transparency, good faith, due process, proportionality and the prohibition on arbitrariness²¹³. Not only tribunals, but also courts and authorities of the host State must observe prohibition of arbitrariness and requirements of transparency, which fall under the general framework of due process²¹⁴.

Therefore, State activities related to the oil and gas industry in Brazil should offer guarantees to investors and pursue a stable scenario for investments, both national and international ones, such since these principles of protection are already instituted in international practice.

207 Ibid 167.

208 Ibid 163.

209 Rubins (n 118) 1087.

210 Ibid 1088.

211 Article 1, Law 9,478/97.

212 Cameron (n 178) 67.

213 Hober (n 187).

214 Ibid 158.

5. CONCLUSION

Important issues were discussed related to jurisdiction, applicable law and arbitrability, in order to clarify the functioning of arbitration. For matters related to arbitrability and public policy, the main difficulty arises in cases where the State presents a public policy argument as an objection against jurisdiction of arbitral tribunals, by saying the right is not disposable. The BAA contains important exceptions to enforcement of foreign arbitral awards, similar to the grounds for non-enforcement of arbitration agreements. In particular, Brazilian courts are authorized to refuse recognition and enforcement to any award that violates Brazilian sovereignty, public morals, or policy²¹⁵.

Regarding exploration and production of oil and other natural resources, the major issues involving the State and investors took into consideration the issues that arose in the Lula case. Although some regulatory acts have sovereign nature, the oil and gas industry is an international one, and some international standards need to be considered in order to protect investors and guarantee a predictable and level playing field.

Because the investor does not have the benefit of Article 26 of the Washington Convention, which established the ICSID, it may be difficult to compel Brazil to participate in arbitration proceedings and to keep the government from suing the investor on the same dispute in Brazilian courts²¹⁶. It is still unpredictable how Brazilian courts will deal with arbitrations involving the State, especially agencies of the direct administration, considering the issues of politics and national sovereignty involved, although as explained in chapter 7.2, there is a conflict of competence case pending decision by the STJ that will serve as a guide to decide cases similar cases.

It is necessary to provide a proper environment for investment and to balance public and private interests. State's concerns with collecting higher revenues cannot override the security of investors. The main concerns and challenges are improving legislation and contracts and giving effectiveness to arbitration clauses, through judicial and administrative measures.

To conclude, it is worth citing Mauricio Gonn, a student in the LL.M. course at Queen Mary and Westfield College (University of London). He told that in his personal presentation on his first day of class (12 October 1992), Professor Julian D.M. Lew kindly asked him, "Are you sure you are in the right classroom?", surprised that the School of International Commercial Arbitration was receiving a Brazilian student for the first time. The professor asked: "Is this a sign that things

215 Rubins (n 118).

216 Ibid.

are changing in Brazil?²¹⁷”

The answer is yes, many things have changed in Brazil since then. In 1992, the year that Mauricio attended Queen Mary and Westfield College, exploration and production of oil and gas were still a State monopoly, exercised exclusively by Petrobras. In 1997, the Brazilian Petroleum Law ended the monopoly, enabling the participation of foreign companies in biddings of the tendered areas, and created the ANP. The first concession agreement was signed before the so-called Round Zero, in 1997, and since then the standard contract has contained an arbitration clause²¹⁸, maintained in all the following bidding rounds until now. Due to all these changes, in 2015 many Brazilian students could attend arbitration classes at Queen Mary University, not only Commercial Arbitration classes, but also Energy Arbitration ones. Nevertheless, 23 years later, we still have many doubts about the way changes have been and should be applied in Brazil.

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THE QUEST FOR DYNAMISM IN CONTEMPORARY LAW: MULTIPLE DIMENSIONS OF LEGAL CERTAINTY

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Abstract: The legal principles' evolution towards a post-positivist conception has led to the acknowledgement of their normative power. Although such movement has made legal systems better suited in reaching decisions adapted to contemporary societies, it has casted uncertainty upon allowing the vague use of abstract expressions, which the concrete meaning is difficult to understand. In this sense, it is necessary that the possible meanings of each legal principle be narrowed down and that a proper method be coined for weighting legal principles that eventually collide. The scope of this academic paper is to address legal certainty in its multiple dimensions, in the attempt to unveil its essential meanings.

Keywords: Postpositivism - Legal certainty - Weighting of legal principles

1. INTRODUCTION

The acknowledgment of the normative content of legal principles represented a remarkable progress¹. For being little rigid, legal principles

¹ "The appreciation of legal principles, its explicit or implicit incorporation by the constitutional texts, and its normative power as admitted by the legal systems are part of such environment of rapprochement between Law and ethics. [...] Following the track to the core of legal systems, legal principles had to conquer the status of legal provisions, overcoming the belief that they would have a purely axiological, ethical, dimension – deprived from legal effectiveness or direct and immediate applicability." BARROSO, Luís Roberto. *O Começo da História - A Nova Interpretação Constitucional e o Papel dos Princípios no Direito Brasileiro*. Revista da

are well fit to accommodate the contemporary dynamism, allowing the molding of reality to the law.

Indeed, it is through a legal system which prescriptions rely, not only on objective requirements (rules), but also on legal principles, that more balanced decisions can be reached.²

As per Alexy, legal principles are optimization commands³. They admit a progressive scale of compliance, in accordance to each case. In other words, legal principles allow that a legal provision be complied with at the largest extent possible within the constrictions of legal and factual circumstances.⁴

Different from antagonist rules which result on the effectiveness of one and on the full detriment of the other rule, Alexy sustains that the adherence to one legal principle does not lead to the preclusion of another colliding legal principle.⁵

In this sense, the elucidation of the meaning of each legal principle is the work of a new hermeneutic, which task remains challenging: the high degree of abstraction often leads to an overly indeterminate application, contributing to a pernicious use. Not rarely, interpreters who wish to achieve a preconceived solution make use of different principles without drawing a clear content, but only to legitimate a decision reached beforehand.⁶

EMERJ, v. 6, n. 23, 2003. p. 32.

2 “As most authors sustain, legal systems are composed by legal provisions divided in two types: rules and legal principles. The latter, as traditionally understood, constitute the core provisions of legal systems, radiating its effects and serving as a beacon for the interpretation and integration of the entire society. Legal principles are much broader and more abstract than rules, and for that they have a more indeterminate application range. [...] they tend to depict more properly the legal and political values in a given society.” ALEXY, Robert. *Teoria dos Direitos Fundamentais*. Trad. A. DA SILVA, Virgilio. São Paulo: Malheiros. p. 50.

3 “Legal principles are provisions that enforce something to be realized to the greatest extent possible within the legal and factual possibilities. Legal principles are, therefore, optimization commands, which are characterized for being complied with to varying degrees and for the fact that the proper measure of their satisfaction relies not only on the factual possibilities, but also on the legal possibilities.” *Idem*. p. 86.

4 *Idem*. pp. 103 and 104.

5 DWORKIN, Ronald. *Levando os Direitos a Sério*. Trad. BOEIRA, N. São Paulo: Martins Fontes. p. 72.

6 About the difficulty on defining the content of certain legal principles: “Human’s dignity became, during the last decades, one of the large ethical consensus in the western world, as consubstantiated in countless international documents, constitutions, laws and case law. In an abstract plan, few ideas have matched it in seducing spirits and earning unanimous adhesion. Such fact, however, does not minimize – rather aggravates – the difficulties in its use as a relevant instrument for legal interpretation. Frequently, it operates as a mirror, in which each one projects its own image of dignity. Not by accident, all around the world, it has been invoked for both sides of disputes, in issues such as pregnancy interruption, euthanasia, assisted suicide,

When carelessly employed or deprived from a proper method, legal principles denature. They cease to function as a mean for achieving justice and become a source of so many evils, including the inability to subject judicial decisions to control and the spreading of legal uncertainty.

The very absence of a strict hierarchy - since any legal principle may give way to another, depending on the circumstances - serves at the implementation of justice, so that all legal principles are at hand and available to be made use of.

Consequently, it is not enough that legal principles have normative power. In fact, it is mandatory that the concrete dimension of each legal principle (i.e. its possible meanings) is identifiable and recognizable. Accordingly, interpreters must clarify what human dignity, freedom, legal certainty and other legal principles that may collide do mean and why one should have greater weight in relation to others in a case.

On that context, the Brazilian legal system has evolved. Now, it enforces that the interpreter must go beyond appointing legal principles as the basis of a ruling. For example, the Civil Procedure Code, enacted on 2015, requires not only the identification of the applicable legal principles but also its concrete meaning on each case and in accordance to an empirical density (weighting in relation to other principles that are applicable on that same case).⁷ Hence the importance of weighting⁸ as a method - or as a principle of legitimizing other principles. It is due to the weighting, that one can draw logical reasoning and assign different

same-sex marriage, hate speech, holocaust denial, cloning, genetic engineer, post mortem artificial insemination, sex-change surgery, prostitution, drugs decriminalization, shoot-down of kidnapped planes, protection against auto-incrimination, death sentence, life sentence, use of lie detectors, hunger strikes, social rights enforceability. It is a long list". BARROSO, Luís Roberto. *A Dignidade da Pessoa Humana no Direito Constitucional Contemporâneo: Natureza Jurídica, Conteúdos Mínimos e Critérios de Aplicação*. Provisory version for public debate. Mimeographed, December 2010. p. 321.

7 "The modern constitutional interpretation involves choices of its interpreter, as well as the subjective integration of principles, open standards and undetermined concepts. A considerable part of scientific production nowadays have been dedicated, precisely, to prevent judicial discretion, by delimiting parameters for values and interests weighting and by the duty to provide sound demonstration of the rationality and the correctness of its options". BARROSO, Luís Roberto. *O Começo da História - A Nova Interpretação Constitucional e o Papel dos Princípios no Direito Brasileiro*. Revista da EMERJ, v. 6, No. 23, 2003. pp. 29 and 30.

8 Concerning the limits to the application of conflict of laws traditional methods to legal principles, Sarmiento asserts: "[...] it can be observed that the chronological, specialization and hierarchy criteria have limited use for overcoming tensions between constitutional principles. Such questions demand the use of a more dynamic and flexible method, which can handle infinite fact variables that the traditional method fail to encompass." SARMENTO. *Os Princípios Constitucionais e a Ponderação de Bens*. In Melo, Celso de Albuquerque e TORRES, Ricardo Lobo. *Teoria dos Direitos Fundamentais*. Rio de Janeiro: Renovar, 2 ed. p. 49.

levels of relevance to each colliding principle.⁹

The conception that the righteous man must be guided by a sense of proportion is not new at all. It goes back as much as the Greeks. In the essay *Nicomachean Ethics*, dedicated to his son fallen in battle, Aristotle proposed equity as the corrective measure of justice. Mindful of the inability of an abstract command to sufficiently solve all conflicts, Aristotle emphasized the importance that each case be resolved primarily by principles of justice.¹⁰ However, such encumbrance would not be solely attributed to judges.

This constant and widespread fairness manifested by a personal disposition of selflessness towards the others and to demand less than what one would be reserved by the law is the cornerstone of a fair society. Fairness would be far more than a merely formal justice, it would function as a corrective measure in order to restore the balance destabilized by an unfair act. That is why - before perishing in a distorted sense of its original meaning - jurisprudence was used to designate a cautious sense of proportion by which all should be guided.¹¹

Rawls, in the introductory chapter of his *Theory of Justice*, presents justice as fairness and takes up the Aristotelian concept of distributive justice, which is articulated between self- investiture of

9 "Legal principles, on its turn, contain facts that demand a higher degree of abstraction, but do not specify the conduct to be followed. They are applied to a broad group, sometimes undetermined, of situations. In a democratic system, principles often reach a dialectical tension, pointing to different directions. For such reasons, its application rely on weighting: in view of the case, the interpreter will determine the weight that each principle has in the case, by means of reciprocal concessions, and preserving the most of each principle to the extent of factual possibilities. Its application, therefore, will not be all or nothing, but measured in accordance with the circumstances represented by other legal provisions or facts." BARROSO, Luís Roberto. *O Começo da História - A Nova Interpretação Constitucional e o Papel dos Princípios no Direito Brasileiro*. Revista da EMERJ, v. 6, n. 23, 2003. p. 34.

10 According to Aristotle, even if, sometimes, the formal and material justice coincide, remitting to the legal text as the best solution; not rarely, legal principles must be weighted and waive, somehow, the unjust rule, in a way that material justice can be reached. The need to apply equity would be triggered by the fact that laws provide a generic content, referring indistinctly to all, with no differentiation of potential nuances and fact variables. However, there are cases in which should the law be applied - law being understood as a normative command - injustice would be caused. It is to overcome the limitations of the abstract act, which is unable to exhaust the details of all possible situations and anticipate future situations, that equity must be used. The legal justice is impervious, while the reality is, by essence, mutant. For both situations, equity must be used, which means account for the legislator's intention, and not the law literally. It is the qualified justice that, proportional and coherent with the case, is defined as equity. Equity would then avers as the corrective measure when formal justice engines injustice by means of the generality of its normative precepts." ARISTÓTELES. *Ética A Nicômaco*. pp. 124 to 125.

11 REALE, Miguel. *Lições Preliminares de Direito*. 26. ed. São Paulo: Saraiva, 2002. p. 62.

rights and obligations by individuals at an original state of ignorance (veil of ignorance).

One feature of justice as fairness is to think of the parties in the initial situation as rational and mutually disinterested. This does not mean that the parties are egoists, that is, individuals with only certain kinds of interests, say in wealth, prestige, and domination. But they are conceived as not taking an interest in one another's interests. [...] The initial situation must be characterized by stipulations that are widely accepted. [...] I have said that the original position is the appropriate initial status quo which insures that the fundamental agreements reached in it are fair. This fact yields the name 'justice as fairness'. It is clear, then, that I want to say that one conception of justice is more reasonable than another, or justifiable with respect to it, if rational persons in the initial situation would choose its principles over those of the other for the role of justice. Conceptions of justice are to be ranked by their acceptability to persons so circumstanced. [...] It seems reasonable to suppose that the parties in the original position are equal. [...] Obviously the purpose of these conditions is to represent equality between human beings as moral persons, as creatures having a conception of their good and capable of a sense of justice. The basis of equality is taken to be similarly in these two respects. [...] each man is presumed to have the ability to understand and to act upon whatever principles are adopted. Together with the veil of ignorance, these conditions define the principles of justice as those which rational persons concerned to advance their interests would consent to as equals when none are known to be advantaged or disadvantaged by social and natural contingencies.¹²

In short, Rawls claims a strictly hypothetical agreement, according to which the people - at their corresponding original position - cannot foresee the situation that they would enjoy in future society.¹³

12 RAWLS, John. *Uma Teoria da Justiça*. Trad. SIMÕES, Jussara e DE VITA, ALVARO. São Paulo: Martins Fontes, 3 ed, 2010. pp. 12 to 15.

13 TORRES, Ricardo Lobo. *Tratado de Direito Constitucional Financeiro e Tributário*, Vol. II

Kelsen incisively criticizes the work of Aristotle, but not before making a direct parallel between the axiological conception of legal principles (values) and the moral application of the mesotes as an attempt to harmonize conflicting virtues. As appointed by Kelsen, the mesotes is proposed as the result of a quasi- mathematical operation, the objective mid-term.¹⁴

As the standards of a given moral system are often in conflict with each other; in order to act morally, it is necessary to restrict the sphere of validity of the rules. Being morally right would, thus, correspond to act in the middle between two vices. That means that the only possible righteous conduct is the one that – at the same time – abides to one conflicting rule, without, however, breaching the other. The real problem is to demonstrate how that is possible. For example, how one man's action can conform simultaneously to the standards of courage and to the standards of prudence. At this point the doctrine of mesotes offers no answer nor to any question relating to moral assessment.¹⁵

Alexy's weighting, as a method, escapes that chimerical aim. Unlike the mesotes, the weighting does not seek to force a middle line between two mobile and inaccurate extremes. On the contrary, it represents the very recognition of the subjectivity of legal principles and its inherent fluidity that make so complex any attempt to attribute concrete relevance whenever there are more than one legal principle applicable.

- Valores e Princípios Constitucionais Tributários. São Paulo: Renovar, 2005. p. 137.

14 "Aristotle intends to present his method of determining the moral good or virtue as an almost mathematical or geometric formula, as shown when he says that although it is possible to find out what is morally good or a virtue, it is not easy. For him, being good it is a tough task, because finding out the midpoint of anything is difficult. For example, not everyone is able to find the center of a circle, only those who know geometry. Determining what is the moral act or the good has, in principle, the same problem as to determine the midpoint of a straight line or center of a circle. [...] The quantification of moral values; the tripartite scheme divided in much, medium and little; the essential presupposition of a mathematical or geometric method to determine the moral good are, however, a fallacy. In the field of morals and virtues, there are no measurable amounts as in the field of reality as an object of natural science". KELSEN, Hans. *O Que É Justiça?* 3. ed. São Paulo: Martins Fontes, 2010. pp. 117 to 121.

15 Idem. p. 121.

Sarmiento claims that the starting point of consideration is to check whether the case effectively falls under more than one legal principle's sphere of influence. If it is found that the case is actually tutored by multiple legal principles, the interpreter will go on to the next stage, the weighting itself, which is based on the verification of a cost-benefit ratio. Such proportion will be met through an analysis of suitability of the principles' concrete meaning directed towards the preservation of conflicting provisions, to the extent such preservation is possible.¹⁶

So as to reach the desired rationality, the method for the application of legal principles bolsters on a logical path that must be retraced and reproduced, running along the following considerations: (i) adequacy – the identification of the measures that enable a legal principle to achieve the legislator's goal on a particular case; (ii) necessity - the verification of the various legal principles suitable to the achievement of the envisioned purposes and the choosing of the least restrictive one; and (iii) proportionality - the balance between the result produced by granting more weight to one legal principle and the burden derived therefrom¹⁷.

In summary, a ruling achieved by the weighting method should be, at the same time, the least burdensome one, inasmuch as suitable for its intended purposes and capable of causing more benefits than disadvantages.¹⁸

As briefly presented, the analysis of a legal principle goes beyond the principle itself. It is only by the empirical assessment of the

16 SARMENTO. Os Princípios Constitucionais e a Ponderação de Bens. In Melo, Celso de Albuquerque e TORRES, Ricardo Lobo. Teoria dos Direitos Fundamentais. Rio de Janeiro: Renovar, 2 ed. p. 57.

17 *Idem*. p. 58.

18 Similarly, Naranjo De La Cruz states that: "Adequacy consists in measuring whether the chosen means are suitable and necessary to obtain the envisaged result. Such measure is instrumental and not evaluative. It is worth to say, the adequacy is, actually, an examination of the formal suitability of the restrictive measure. Need or enforceability constitutes, according to Alexy, the so called 'postulado do meio mais benigno', comprehending an analysis of the means-end relation, under the evaluative prism. It imposes the adoption of a less burdensome position among the existing options, preferably an option that will not reduce the efficiency of the fundamental right and, when lacking such option, the one that will impose a softer reductive impact. Finally, proportionality *stricto sensu*, is a sub-principle that presupposes the conjunction of the two previous sub-principles, once the restrictive measure must, simultaneously, be suitable to the ends it seeks and be the less burdensome to achieve such ends in order to shape into the proportionality principle. From such sub-principle, it can also be extracted that the burden caused by the restrictive option shall be minor when compared to the benefit provided by its safeguard concerning other rights constitutionally protected. To that sense, the principle of proportionality *stricto sensu* requires that the sacrifice of one individual right is reasonable when related to the end sought." NARANJO DE LA CRUZ, Rafael. Los límites de los derechos fundamentales. Madrid: Centro de Estudios Constitucionales, 2000. p. 36.

colliding principles, that one may truly reach a balanced and stabilizing solution to the conflict, therefore avoiding to promote an even greater imbalance than the one that it aims to correct. However, before seeking to resolve conflicts among legal principles, it is paramount to reduce their polysemy, systematizing them and delimiting the possible meanings that each legal principle may have.

2. THE PRINCIPLE OF LEGAL CERTAINTY

Humberto Avila presents the multiple dimensions of legal certainty, such as: (i) a defining element of law; (ii) a fact; (iii) a value; and (iv) a legal principle. The author also points out that these different dimensions are not mutually exclusive, but cumulative.¹⁹

In the first sense, legal certainty would be an intrinsic element of the law, intended to suppress casuistry. On that regard, one could not even conceive a legal system deprived from minimum legal certainty: “[...] legal certainty is a quality, without which there could be no legal system, neither good nor bad, nor of any kind”.²⁰ Legal certainty is, thus, a structural element of legal systems.

In fact, the deterrent capacity of the law to prohibit intolerable conducts would be little worth if there were no legal stability nor a projection that the legal framework would continue in time.²¹ As a result, should a legal system change so rapidly and deeply – to the extent its agents become unable to anticipate if some action or omission would remain restrained on a near future - the law would turn into a disruptive element, rather than a social link.

Raz faces that dilemma in a didactic way. For him, the characterization of legal certainty as a defining element of legal systems may be compared to a knife. In his metaphor, Raz argues that a knife is defined as such (a type of sharp instrument), for its ability to cut. Consequently, to be sharp is inherent for the purpose of a good knife, inasmuch as to be minimally sharp is inherent to any knife at all.²² Similarly, it is the essence of legal provisions to frame human behavior and to delimit conducts. As a result, a legal system will be better organized and more able to fulfill its purpose (namely, social stabilization), the more clear and stable its provisions are.

¹⁹ ÁVILA, Humberto. *Segurança Jurídica – Entre Permanência, Mudança e Realização no Direito Tributário*. São Paulo: Malheiros, 2011.

²⁰ *Idem*. p.107.

²¹ Among others, Avila makes reference to Rawls, Bobbio, Coing and Sichés. ÁVILA, Humberto *Segurança Jurídica – Entre Permanência, Mudança e Realização no Direito Tributário*. São Paulo: Malheiros, 2011.

²² RAZ, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford: Oxford University Press. 2nd Ed. pp. 225 and 226.

This structural perspective²³ inexorably leads to the second dimension of legal certainty, which corresponds to an objective reality. It means the possibility that one anticipates the legal consequences of their conduct and, before acting, evaluate it in light of the law.

The third dimension, legal certainty as a value, is very close to the previous ones, because it denotes a state of desirable things, which gives stability to the social fabric. In that sense, legal certainty, together with justice and social peace, inspires the legal system as a whole. Again, more than a value consubstantiated in express legal provisions, legal certainty can be seen as a concept inherent to the legal system.

In search of an ideal stability, Jerome Frank points a mythical quality, due to the childish desire of mankind to replace the lost paternal authority²⁴ by an institution that awakens a similar nurturing and assuring feeling.²⁵

Avila also maintains that legal certainty may be considered as an aspiration to a paroxysm of legal stability or full predictability. For obvious reasons, this ideal should not function as an asphyxiating metaphor, otherwise the law would be incapable of evolving and shaping up to the ever-changing reality. In a different sense, this archetype of stability should be interpreted as a command of immutability for certain behaviors, which are utterly irreconcilable with a particular legal system. In other words, an insurmountable legislative ban regarding a number of subjects.²⁶

23 In English, authors tend to adopt more than one expression to refer to *segurança jurídica*. For a more precise comparison with similar concepts of the Brazilian legal system, the author has opted to use on this academic paper the expression legal certainty. There are, however, English and North-American authors that make use of the expression rule of law. In fact, the large frequency that rule of law is used as a substitute of legal certainty manifests a structuring conception that is hold dear to Anglo-Saxon scholars: “[...] in connection with protection of fundamental constitutional rights, the rule of law stands on behalf of the citizens against the State, to the extent that constitutional law can be invoked by citizens against laws and policies of the State”. ROSENFELD, Michael. *The Rule of Law, and the Legitimacy of Constitutional Democracy*. Cardozo Law School Jacob/ Burns Institute for Advanced Legal Studies, March 2001, Working Paper Series No. 36. p. 5.

24 That is evidently a psychoanalytic interpretation. Freud used to defend that institutions such as religion and the State itself would play the role of a substitute to the mythological father killed by mankind, in a substitutive relation that Jerome Frank extends to the law itself and, more specifically, to the rule of law. FREUD, Sigmund. Trad. DE SOUZA, Paulo César. *Totem e Tabu*. São Paulo: Ed Schwarcz, 2013.

25 “Why do men seek for an unachievable certainty in Law? Because, as we say, they have still not abandoned the childish desire of a father with authority, and unconsciously have tried to find in Law the substitute with those attributes of strictness, certainty, infallibility assigned to fathers during childhood.” ÁVILA, Humberto. *Segurança Jurídica – Entre Permanência, Mudança e Realização no Direito Tributário*. São Paulo: Malheiros, 2011. p. 116.

26 Idem. p. 117.

Thus, Ávila reconciles the thoughts of Jerome Frank and Bobbio²⁷, the latter an advocate that legal certainty be interpreted as a mean to relative certainty, capable of undergoing changes, provided that such changes are soft and abide to legitimate expectations.

Following this axiological prism, one could say that legal certainty is a value in itself, so that - regardless of the normative content of a given legal system - the more it is predictable and stable, the less it would be abusive. Opposite to those who argue that legal certainty may induce inequities, once it crystalizes unfair provisions, Avila claims that legal certainty would always prevent greater injustices, which would be the offshoot of casuistry.²⁸ One could even say that, if there were two legal systems with identical arbitrary normative content, the one system endowed with greater stability would be intrinsically less abusive than the other.²⁹

Raz also argues that the stabilizing function of legal certainty - although it may not be sufficient to ensure proper justice - asserts a minimum frame of integration to social relationships, avoiding erratic behaviors.³⁰ Legal certainty is, therefore, one of the most relevant elements that hold the social fabric together. Ultimately, a legal system deprived from minimum legal certainty would fail to allow its agents to consistently articulate themselves.³¹

Legal certainty also plays a role as instrumental value, allowing the exercise of other rights. Once more, legal certainty remits to its first dimension, as structural element and as a mean to the achievement of justice. Surely, without knowledge of the law, individuals would be incapable of planning and designing the future, having their margin of action decisively constricted.³² Therefore, in addition to an end in itself,

27 Idem. p. 117.

28 Idem. p. 176.

29 Idem. p. 119.

30 "A government subjected to the rule of law is prevented from changing the law retroactively or abruptly or secretly or whenever it suits its purposes. [...] The law can help to secure such fixed points of reference in two ways: (1) by stabilizing social relationships which but for the law may disintegrate or develop in erratic and unpredictable ways; (2) by a policy of self-restraint designed to make the law itself a stable and safe basis for individual planning." RAZ, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford: Oxford University Press. 2nd Ed. pp. 219 and 220.

31 "[...] in heterogeneous societies with various competing conceptions of the good, constitutional democracy and adherence to the rule of law may well be indispensable for purposes of achieving political cohesion with a minimum of oppression." ROSENFELD, Michael. *The Rule of Law, and the Legitimacy of Constitutional Democracy*. Cardozo Law School Jacob/ Burns Institute for Advanced Legal Studies, March 2001, Working Paper Series No. 36. p. 7.

32 Raz claims that legal certainty (or, as he prefers, rule of law) is just one of the virtues that a legal system must possess, and such virtue should not be confused with democracy, equality or human dignity. This statement, despite seeming trivial, is important because the expression

legal certainty is embodied as a tool for achieving other virtues, being construed as a scope-value.³³

In short, the axiological dimension of legal certainty would encompass the following characteristics: (i) a guiding legal principle, once it constrains and/or directs the interpretation of other legal principles; and (ii) an instrumental legal principle, setting up the law as a shaping tool of reality.

Moving forward, it is relevant to break down the legal certainty under a positivist light, according to which it constitutes a normative prescription designed to regulate actions, framing human behavior as permitted, prohibited or mandatory. As a result, legal certainty aims to lead society towards a state of reliability, based on the calculability of behavior and its legal consequences. As such, legal certainty depends on a chain of elements: it requires conditions to make the law known and assurances that the legal provisions are stable, so as to allow individuals to effectively anticipate the legal consequences of their conducts.³⁴

Richard Fallon Jr also addresses these forming elements and goes even further, by claiming that it is inherent to the legal certainty – or as he prefers, the rule of law – a legal supremacy, limiting not only individuals but also the empowered authorities.

[...] leading modern accounts generally emphasize five elements that constitute the Rule of Law. To the extent these elements exist, the Rule of Law is realized.

(1) The first element is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it.

(2) The second element of the Rule of Law is efficacy. The law should actually guide people, at least for

rule of law is interchangeably used in English to define effectiveness of the law (a circumstance in which there are effective laws to which the people abide) and not only legal certainty. Raz also claims that legal certainty should be understood as a negative value, comparable to health, which can be identified only as the absence of disease. Similarly, we should consider legal certainty by the absence of phenomena such as arbitrary and abrupt changes, disregard of vested rights, among other tangible manifestations (or symptoms, to stay true to the same metaphor). RAZ, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford: Oxford University Press. 2nd Ed. pp. 211 to 224.

33 ÁVILA, Humberto. *Segurança Jurídica – Entre Permanência, Mudança e Realização no Direito Tributário*. São Paulo: Malheiros, 2011. p. 178.

34 Idem. p. 125.

the most part. In Joseph Raz's phrase people should be ruled by law and obey it.

(3) The third element is stability. The law should be reasonably stable, in order to facilitate planning and coordinated action over time.

(4) The fourth element of the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens.

(5) The final element involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedure.³⁵

Raz's view is similar. To him, legal certainty should be understood, cumulatively, as: (i) individuals being governed by the law and obeying it; and (ii) the law being able to guide people.

For these purposes: (a) legal provisions should be relatively stable, clear and public, since an ambiguous, vague, inaccurate or unknown law will not be able to lead human behavior; and (b) individuals must be granted wide access to courts, so that they may seek due protection, including as a remedy against unfair changes to the law.³⁶

3. NARROWING THE POLYSEMY

In order to assert the semantic scope³⁷ of legal certainty, it is

35 FALLON JR, Richard. The Rule of Law as a Concept in Constitutional Discourse. Columbia Law Review. Vol. 97, No. 1, 1997. The Rule of Law as a Concept in Constitutional Discourse. pp. 8 and 9.

36 RAZ, Joseph. The Authority of Law: Essays on Law and Morality. Oxford: Oxford University Press. 2nd Ed. pp. 213 to 218.

37 For a historical approach over the concept of legal certainty, it is worth reading Ricardo Lobo Torres : "After Liberalism initial phase, which claimed to legitimize the state by limiting individual will [...], we are witnessing a long disbelief because of contradictions to that same values. Positivism whetted the identification between freedom and law, only briefly presented in the work of Kant, and ultimately transformed legitimacy into legality, by misconstruing legality and rule of formal law. The legal certainty derailed up to becoming security of individual rights, therefore losing its credibility at the rise of the welfare state [...]. With the dawn of positivism and the reaffirmation of liberalism after the Second World War, new ways to resume the study of legitimacy were sought. At first, the revival of natural law and the legitimation by a system composed of values. After the Kantian turn (virada kantiana), on the 70's, the social contract conception was recovered together with the reaffirmation of values such as freedom, justice and security, which are realized through the intermediation of legal principles. [...] In

necessary to analyze the meaning of each of its composing words.³⁸

Certainty refers to the ability of the addressee to unveil the legal provision's precise content. On a public perspective, being public authorities the issuers of legal provisions, they are bound by the duty to determine unequivocally all elements that constitute the legal provision.³⁹

As per an intertemporal perspective, such certainty is articulated from the interaction between two axles: the first axle is the immutability, which corresponds to the search for an ideal of intangibility of certain standards.⁴⁰ In this sense, it binds the future to the past, limiting the possibilities of change. The second axle goes towards promoting stability within changes. It aims at safeguarding subjective rights that have been vested to each individual and the existence of transitional rules. It does not function as immutability, but as a relative stability that proscribes abrupt changes.⁴¹ The movement is thereby understood as an inseparable condition of stability. If there is no change, the legal structures harden, tending to rot and ultimately be broken out from an institutional model, leading to shifts outside the law.⁴² The construction of a dynamic balance (stability within movement) is understandable by the

Germany, immediately after the end of the Second World War, it took place the so called rebirth of natural law (*Naturrechtsrenaissance*), with the return to values. [...] In the United States, a similar idea was developed. At the height of the welfare state, some jurists and even the Supreme Court came to defend the thesis that there are non-written values that, although not formally expressed by the Constitution, could be inferred or unveiled by the interpreter. [...] security, previously identified as safekeeping of individual rights, gained in the welfare state the meaning of social cohesion. [...] The present-day order, from 1989 on, following the fall of the Berlin Wall, which symbolized the change of political and legal paradigms, is a democratic state (as Riscosou defined, a society's state; or, as preferred by Habermas, a security state), which is structured in accordance with the purpose of prevention (*Prävention*), celling against the risks posed by science and technique. This state is legitimized by the implementation of the ethical and legal values of security, which also postulates the intermediation of legal principles and reasonableness. On that sense, individual security connects and lives together with social security and international security." TORRES, Ricardo Lobo. *Legitimação dos Direitos Humanos*. Rio de Janeiro: Renovar, 2002. pp. 414 to 417 and pp. 439 to 440.

38 "Although agreement on these elements establishes the Rule of Law a shared concept, many of the operative terms are vague. Understanding the vagueness of particular shared assumptions helps clarify possible bases for disagreement. And disagreement is common". FALLON JR, Richard. *The Rule of Law as a Concept in Constitutional Discourse*. *Columbia Law Review*. Vol. 97, No. 1, 1997. pp. 5 and 6.

39 ÁVILA, Humberto. Incluir nome artigo do Ávila. p. 124 and 125.

40 Idem. p. 125.

41 Idem 139.

42 "Conformity to the rule of law is a good instrument for achieving certain goals, but conformity to the rule of law is not itself an ultimate goal. [...] if the pursuit of certain goals is entirely incompatible with the rule of law, then these goals should not be pursued by legal means". RAZ, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford: Oxford University Press. 2nd Ed. p. 229.

use of metaphors such as cycling, an activity that depends on continuity.⁴³

As a projection into the future, legal certainty sets forth the need to anticipate the legal consequences of human conduct. Before acting, one must be able to reasonably foresee the law that will be enforceable and picture the legal outline that will frame an act committed in the past.⁴⁴

However, how could one qualify that certainty? What sense may be drawn from its nature? The answers to these questions surely are not easy and rely on proper systematization.

(i) the certainty of the law

The certainty of the law refers to its clarity and determination. Just like other reasoned, understandable and rational constructions, the knowledge of the law should not be measured in relation to experts, but in relation to common people, after all they are the addressees of general legal provisions. A society where people deprived from legal training are unable to understand basic legal formulations is doomed to be erratic. That means that, except for specific provisions which the addressees are a limited group of individuals or economic segment, all individuals should be able to locate the applicable provisions and to understand its meaning without the assistance of a lawyer.

Taking into account (i) Brazilian federation system in which all federative entities may legislate (Central Government, states and municipalities); and (ii) the checks-and-balance regime, pursuant which all three Branches of Power exercise atypical attributions, resulting on the fact that even the Judiciary and the Executive Branches are empowered to enact rules equivalent to legal provisions, Brazilian legal system is indeed complex. Consequently, it is ever more important that such a myriad of legal provisions are organized in a logical manner, allowing individuals to access the law and decode the meaning envisioned by legislators.⁴⁵

43 ÁVILA, Humberto. *Segurança Jurídica – Entre Permanência, Mudança e Realização no Direito Tributário*. São Paulo: Malheiros, 2011. pp. 138 to 141.

44 “[...] it does not concern to the anticipation of events, but, rather, the ability to anticipate, in reasonable measure of depth and breadth, the legal consequences. One does not anticipate the future, but the normative sense of the present action or inaction in view of a future ruling. [...] The requirement of knowledge relates to the people having access to the relevant legal provision and its content being sufficiently accurate; the requirement of reliability makes reference to the inviolability of subjective situations that are not subject to retroactive effects; and the requirement of calculability means to impose transitional rules or equity clauses to safeguard the reliability of administrative understanding in general and abstract level”. *Idem*. p. 141.

45 Mauro Cappelletti and Bryant Garth analyze the problem of access to justice. They focus on procedural instruments, which must be understandable to the general population, as well as quickly and affordable. Procedural rules, as a type of legal provision, must be clear and objective. For the effectiveness of rights and the erection of a fair society, access to justice

An important initiative is, for example, the Central Government's website⁴⁶, which discloses the latest updated rules, its final wording and amendments thereto. However, many states and municipalities do not follow that praised example, turning simple researches into an insurmountable task. It is also difficult to locate administrative rules, since the vast majority of regulatory agencies, secretariats and administrative bodies that have overlapping competencies fail to properly organize their normative acts. Unfortunately, it is common to find websites of official agencies merely listing ordinance acts without cross references to supervening amendments or later revocation, therefore subjecting the people to the unreasonable burden of reading all acts enacted by that administrative agency in the attempt to identify the rule in force.

The meaning of legal certainty could, thus, be firstly interpreted as the knowledge of the law, i.e. to access the relevant provision and to understand its content.⁴⁷

(ii) law with certainty

Since legal systems must be minimally flexible so as to accommodate changes in society, the process of amending legal provisions should be objective and guided by impersonal rules, thus leading to changes within a frame of stability⁴⁸.

Regarding the Judiciary Branch, it is recommended that court precedents are duly regarded and the coining of a different understanding, apart from the consolidated one, relies on rigorous reasoning so as to demonstrate the inapplicability of the previous precedent on that case. Uniformity of precedents among different district courts is also important, in order to prevent forum shopping⁴⁹. This concern is more justifiable on a civil law system, such as the Brazilian, in which the law is fundamentally written down in codes and it does not rely as much in court precedent as in common law systems.⁵⁰

In relation to the Legislative Branch, law with certainty

shall be made through the access to the law and access to legal remedies of protection and effectiveness. CAPPELLETTI, Mauro; GARTH Bryant. Trad. NORTHFLEET, Ellen Gracie. *Acesso à Justiça*. Porto Alegre: Sergio Antonio Fabris Editor, 1988.

46 <http://www4.planalto.gov.br/legislacao>

47 RAZ, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford: Oxford University Press. 2nd Ed. p. 213.

48 ÁVILA, Humberto. *Segurança Jurídica – Entre Permanência, Mudança e Realização no Direito Tributário*. São Paulo: Malheiros, 2011. pp. 128, 129 and 160.

49 *Idem*. 171.

50 In other words, common law systems tend to enact court decisions that are uniform and/or more coherent as a whole, for court precedents are such a major tool to create the law.

encompasses a negative obligation of self-constrain from issuing provisions that may cause drastic changes or are incompatible with the legal system in its entirety.⁵¹

That aspect of the law with certainty also affects the Executive Branch, imposing the duty to maintain a consistent enforcement of the law and to exercise its regulatory attributions within the legal framework.⁵² Public authorities are also constricted, once they cannot modify acts that may impact negatively in vested rights.⁵³

Ultimately, as an agent that induces expectations in a given society, the Government undertakes yet another burden, namely, to preserve its own unlawful acts and personal rights vested therefrom, should the people acted in good faith upon relying on a legitimate expectation that such Government's act was licit.

*Acts issued by competent authorities serve as guidelines for the people who, believing in the validity and correctness of these acts, follow the path indicated by such authorities. Genuine rule of law determines that authorities refrain from indulging in contradictory behavior and that the people's legit expectations are not betrayed. This immunizing task is fulfilled by the legal principle of protection of legitimate expectations. If an authority has led a person to trust their conduct, provided that such trustworthiness was justifiable, it is incumbent to that authority, prima facie, to act in order to safeguard that trust. [...] The protection of legitimate expectations corresponds to the subjective perspective of legal certainty, dialoguing with the principle of objective good faith.*⁵⁴

In summary, the protection of legitimate expectations binds (i) the Judiciary Branch, by preventing courts to rule differently over similar matters; (ii) the Legislative Branch, by enforcing clarity and consistency in enacting legal provisions; and (iii) the Executive Branch, by limiting its ability to review its own acts.⁵⁵

Surely, to be worthy of protection, the expectation must be

51 Idem. p. 158.

52 Idem. p. 159.

53 Constituição da República Federativa do Brasil / 1988, art. 5o, XXXVI.

54 CAMPOS, Carlos Alexandre de Azevedo. Proteção da Confiança Legítima na Jurisprudência do Supremo Tribunal Federal. Revista de Direito Administrativo Contemporâneo, 2014. pp. 12 and 13.

55 Idem. p. 14.

legitimate and justifiable. The mere inertia of the authority in reverting its illicit act does not suffice to crystallize such act over time, nor to vest one in any right. It is also necessary that other elements are in place, such as: (i) an objective situation (an act) by a competent authority, leading a person to legitimate expectation; (ii) that person's subjective state of mind (a state of consciousness) that consists in the confidence inspired by the authority's act; (iii) a conduct carried out by the person upon relying on such confidence; and (iv) a new objective situation of the relevant authority (another act), contradicting its first act and in breach of the person's legitimate expectation.⁵⁶

4. CONCLUSION

The scope of this academic paper was to outline the elements of a new hermeneutic, based on the recognition of the legal principles' normative power. On the one hand, this new hermeneutic expands the possibilities for justice and brakes away from a strictly positivist tradition⁵⁷. On the other, it imposes the challenge of electing a method for the implementation of legal principles, in order to curb excessive polysemy – so typically associated with abstract concepts. In such regard, the method of weighting was briefly addressed, giving concreteness to legal principles.⁵⁸

Then, a parallel was depicted between the thought of Alexy, to whom legal principles are defined as optimization commands to be performed at the greatest extent possible within the legal and factual conditions⁵⁹; and the thought of Ávila, dedicated to present legal certainty in its multiple dimensions (as a rule, a legal principle, a value, a fact and an element inherent to the law)⁶⁰.

In its essence of a structuring element, legal certainty was presented as an inseparable and inherent part of the law. It is no coincidence, therefore, that many Anglo-Saxon authors use the concept of legal certainty in strict correspondence to the concept of rule of law, which - in the English language – equals to what is deemed as the legal system itself.⁶¹

56 Idem. p. 15.

57 TORRES, Ricardo Lobo. *Legitimação dos Direitos Humanos*”. Rio de Janeiro: Renovar, 2002. pp. 414 a 417.

58 ALEXY, Robert. *Teoria dos Direitos Fundamentais*. Trad. A. DA SILVA, Virgílio. São Paulo: Malheiros. p. 95.

59 Idem. p. 90.

60 ÁVILA, Humberto. *Segurança Jurídica – Entre Permanência, Mudança e Realização no Direito Tributário*. São Paulo: Malheiros, 2011. p. 178.

61 FALLON JR, Richard. *The Rule of Law as a Concept in Constitutional Discourse*. Columbia Law Review. Vol. 97, No. 1, 1997. *The Rule of Law as a Concept in Constitutional Discourse*. pp. 8 e 9.

The author has also portrayed how legal certainty projects an expectation of stability in the future and remits to the crystallization of the past, imposing a wide spectrum of obligations to social agents, including public authorities.⁶²

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62 RAZ, Joseph. The Authority of Law: Essays on Law and Morality. Oxford: Oxford University Press. 2nd Ed. p. 229.

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CORPORATE SUSTAINABILITY: A COMPARATIVE ANALYSIS OF THE LEGAL DISCIPLINE OF THE NON-FINANCIAL INFORMS (BRAZIL AND EUROPEAN UNION)

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Abstract: From the theoretical reference of the sustainability, the article analyses the question of the incorporation of both social and environmental order considerations to the business and operations carried out by the companies, through the public dissemination of the performances in such areas. The research, focused on the quality, under a exploratory profile, and based in the bibliographic and documental review techniques, such as the data collection, is herein developed with the goal of identifying and analyzing, comparatively, the normative treatment applied to the scope of the public divulging of non-financial reports (the so called sustainability informs or reports), accordingly to both the Brazilian and European perspectives. As noted, in Brazil, there is no legal obligation to publish the sustainability reports, although the publishing is recommended to the companies by BM&FBOVESPA (administrative institution of the capital market), since December of 2011, through an instrument that characterizes a “soft” Law. On the other hand, in the European Union (EU) scope, there has been a recognition of the necessity to increase the transparency of social and environmental information by certain corporate societies and groups of companies, which is considered an imperative element for their social

responsibility. Therefore, both the European Parliament and the European Union Council edited directives (2013/2014), regarding the subject of the publishing of non-financial information. The legislative acts in question are destined to all the members of the EU, compelling them to intervene in the national legal structures (“hard” Law) in order to transpose, to the respective structures, under mandatory character and established deadline, the general norms that consecrate certain common parameters regarding the subject.

Keywords: Sustainability - Company - Sustainability Reports (non-financial) - Brazil - European Union

1. INTRODUCTION

In the final quarter of the twentieth century, the sustainability is elevated to the stage of structuring element of the Constitutional State, presented by some as the new paradigm of the post modernity¹ right. As such, it becomes the background of the debates that impact the comprehension of the social, economic and legal realities. No longer restricted to the environmental or ecological aspects, such discussion currently also contains other perspectives such as the economic and social. Consequently, it imposes challenges to the governance of the public and private actors, from whom was now expected a larger commitment to the social and environmental responsibility.

The central focus of such discussions seems to be the company and the enterprise². Once the new perspectives concerning the sustainability matter are applied, the company is found before the necessity of enhancement of the social responsibilities and of the redefinition of missions and roles in the society, which imposes a broader view to its relations, in the meaning of embody considerations of social and environmental orders to the business and operations therein developed. Therefore, it is discussed if the demonstration of the behavior of the

1 Paulo Márcio Cruz e Zenildo Bodnar (2011, p. 78) emphasize that the term “paradigm” does not have only one conception and suffers, in the fields of social science, ideological and sociocultural influences. For the purpose of this present work, the concept formulated by the authors will be adopted, which is: “the criteria of reflexive epistemological rationality that prevails, informs, guides and directs the resolution of problems, challenges, conflicts and the own functioning of society. It is a reference to be followed and that enlightens the production and application of law”.

2 The notion of enterprise adopted by the Brazilian Civil Code of 2002 will not be used (enterprise = organized economic activity), due to its restricted consideration in face of its polysemic view. The enterprise is understood as a human construction, and economic and social institution, and not as a mere expression of an economic activity.

companies before the public and all society encompasses the necessity, or not, of the public disclosure of non-financial reports or informs that prove their social and environmental performances, as well as the impact of their activities and eventual risk assessment measures.

Facing this specific research problem, the present work takes on the purpose of investigate the matter of the public disclosure of the economic, social and environmental performances of the companies as social actors, the so called sustainability reports (or non-financial reports), with a specific cut in the presentation and comparative analysis of the different perspectives in the treatment of the matter, accordingly to the current realities in Brazil and in the European Union scope.

The applied methodology, in the first part of the research, is comprised of the analysis of the literature concerning the subject of sustainability and its repercussions in the resizing of the roles of companies. For the development of the second part of the research, a international-levelled data collection was carried out, especially in the United Nations scope, concerning the relations between the company, the sustainability and the transparency, followed by the investigation in both the internal and international legislative fields, seeking the identification, in Brazil and in the European Union, of the existence or not of the legal obligation towards the disclosure of reports or informs about sustainability. In the end, the description and comparison of a specific institute – the non-financial report/inform about sustainability - were carried out in distinct legal frameworks (the Brazilian rights and the institutional rights of the European Union). The main characteristics concerning the treatment of the matter in these two realities were comparatively observed, with focus on their differences.

2. THE SUSTAINABILITY IN ITS BROADER PERSPECTIVE AND THE IMPACT IN THE REDEFINITION OF THE ROLES OF THE SOCIAL ACTORS

The idea of the sustainability “grows in body and in expression politically as the term “development” is characterized, as a fruit of the perception of a globally environmental crisis” (NASCIMENTO, 2012, p. 52). The first references to the development appeared in the fifties, through the perception, by humanity, of the existence of a common risk due to a process of environmental degradation (CHAVES; FLORES, 2015, p. 3). As of that moment, both subjects became topics of discussions in the political and academic scopes.

At that moment, the notion of sustainability was anchored solely to its environmental aspect, referred to as *ecodevelopment*³. Such

3 Regarding the *ecodevelopment*, it is important to point out the lesson of Gilberto MontibellerFilho (1993, p. 133): “The *ecodevelopment* presupposes, thus, a synchroni solidarity with the current generation, as it dislocates the logic of production to the prism of the

perspective, considered limited nowadays, was justified in face of the impacts caused by the studies and conclusions of the Club of Rome – in the meaning of recognition of the necessity of imposition of limits to the growth considering the already established environmental degradation and the scarcity of natural resources⁴ – and, especially in recognition of the concern towards the performance of numerous nuclear tests between the years of 1945 and 1962, which culminated in radioactive rains over the Nordic countries and caused Sweden, in 1968, to propose to the United Nations the gathering of a world-level conference, to discuss the reductions of the emissions of the elements considered responsible for the acid rains. (NASCIMENTO, 2012, p. 53).

Such conference took place in 1972, in Stockholm, as the 1st United Nations Conference on the Human Environment. The final document of the Conference, the Stockholm Declaration, in its Principles, imposed to men the “[...] solemn obligation to protect and enhance the environment for the present and future generations”, simultaneously recognizing that “in the developing countries, most of the environmental issues arise out of the underdevelopment” and that, thus, “millions of people continue living below the minimum necessary levels for a dignified human existence [...]”. Therefore, stated that the developing countries must drive their efforts towards the development, having their priorities and the necessity to safeguard and improve the environment”.

With time, the comprehension of sustainability anchored solely in its environmental indicator was dislocated also to other more extensive axes. As pointed out by Maria Luiza Feitosa (2009, p. 33-34), the sustainability is no longer based solely in a restricted or ecological meaning, and that the “mark of such comprehension is the report of the United Nations Committee for Environment and Development (UNCED), of 1987, entitled ‘Our Common Future’⁵. In that very moment, the broadening of perspectives around the concept of development⁶ could be noticed through the bonding of the term to

fundamental needs of the majority of the population; and a diachronic solidarity, expressed in the economy of natural resources and in the ecological perspective to ensure the possibility of development to the future generations”.

4 The works and conclusions of The Club of Rome triggered the publication of the work *Limits to Growth*. MEADOWS, D. H. et al. *The limits to growth*. New York: Universe Books, 1972.

5 Also known as “Brundtland Report”, in tribute to the then Prime Minister of Norway, Gro Harlem Brundtland, responsible for presiding the Commission, created in 1983.

6 Even though there are not few authors that recognize the sustainability and sustainable development as synonyms, for Emanuela Cristina A. Lacerda, Alexandre Morais da Rosa e Gabriel Real Ferrer (201, p. 1204) sustainability and sustainable development are terms that no longer confused, although the sustainability has been gaining a ascending space in the speeches about development. According to the authors (p. 1213-1214), only through the assumption and substitution of the still prevailing paradigm, of the ascension, the adjective sustainable incorporates the goal of growth and may be treated as sustainable development.

the idea of satisfaction of current necessities without compromising the guarantee of the same possibilities to the future generations, indicating also the perspective of a intergenerational view, an aspect of the solidarity that comprehends an ethical dimension.

After the Brundtland report, the concept of sustainable development was put in the center of the international debates especially by occurrence of the “Earth Summit”, the United Nations Conference on Environment and Development. The meeting took place in Rio de Janeiro, in 1992, and gathered a total of 178 nations. In its final part, a global action plan, known as Agenda 21 was created, outlining a common program around a few foundations of the sustainable development, “in order to equally attend the necessities, in terms of development and of environment, of both present and future generations”.

Another marking worldwide event was the World Summit on Sustainable Development, occurred in Johannesburg, in 2002, in which the commitments made towards the sustainable development were again confirmed, including the creation of a global, humanitarian, equal and solidary society, through the ratification of the goals previously established for the protection of the environment and of the goals assumed in Agenda 21 (MARIANO, 2012, p. 29). All these historical marks were important to make the idea of sustainability become comprised of three indicators: economic activity, environment and social well-being⁷.

Through the abovementioned expanded conception, the sustainability starts to be pointed out as a “new century paradigm, in the gender of the ones that succeeded the genesis and the development of constitucionalism itself”, such as humanism, the social matter and the social democracy, respectively in the 18th, 19th and 20th centuries (CANOTILHO, 2010, p. 8). This new paradigm of Law – fomentor of axiological agendas in different levels⁸ – doted with multiple faces⁹,

7 There are authors that reference other dimensions, such as Ignacy Sachs (1993), who points out five: i) Social Sustainability; ii) Economic Sustainability; iii) Ecological Sustainability; iv) Spatial Sustainability; and v) Cultural Sustainability. Gabriel Real Ferrer, Maikon Cristiano Glasenapp and Paulo Márcio Cruz (2014, p. 1456), on the other hand, point out that sustainability may be understood in two meanings – restricted and broad -, and into this last would exist six dimensions: i) Ecological; ii) Economic; iii) Social; iv) Cultural; v) Political-legal; and vi) Technological. In this present work the tridimensional concept will be applied, due to the belief that each of the three elements may comprehend the others, without the necessity of increase of such configuration.

8 Gabriel Real Ferrer, Maikon Cristiano Glasenapp e Paulo Márcio Cruz (2014) correctly point out the sustainability as a new paradigm for the Law.

9 The sustainability, multifaceted phenomenon, was correctly approached, this way, in the work “A Sustentabilidade Ambiental e suas Múltiplas Faces” (FLORES, 2012). Some of the multiple faces of sustainability were discussed in innumerable chapters that affect the governance of public and private actors.

imposes complex challenges to the public and private governance, with direct reflexes in the necessity of redefinition of the roles for the social actors in face of a new broader set of perspectives and expectations.

3. THE SUSTAINABILITY AND THE COMPANY: THE INCORPORATION OF SOCIAL AND ENVIRONMENTAL ORDERS CONSIDERATIONS (BEYOND THE ECONOMIC AND FINANCIAL)

“Profit and respect for the law count, but are only part of the history”. Ricardo Abramovay

In face of this expanded conception around the notion of sustainability, the necessity of a new worldwide economy has been aired, once the the current manner of resources organization, although favorable for a growing material prosperity, does not attend to its greater goal of contributing to the enhancement of substantial liberties for humanity as a whole, thus, threatening – destroying or seriously challenging – nothing less than 16 of the 24 services performed by the ecosystems (ABRAMOVAY, 2012, p. 15). One of the biggest challenges in this reflection “is that formulate goals for the economic system that do not fundamentally depend of its expansion also means formulate goals for the firms that alter the direction of the corporate action and the measures of its efficiency” (ABRAMOVAY, 2012, p. 17). In other words, the emerging of this new economy brings with itself the equally necessary redefinition of the roles played by social agents, amongst which are the companies, in the meaning of adoption of the so called sustainable behaviors, oriented to the harmonization between economic, social and environmental aspects, and not only by the scope of short term profit. Therein, the inclusion of private actors in the search of the sustainable development is performed.

Actually, given the presence – mostly global – economic power, mobility and the inclusion of companies as promoting agents of the sustainable development constitute a natural and inexorable way (PINHEIRO, 2012, p. 25). In the specific case of the company, there is a broader view of the corporate relationships, in the meaning of incorporation of considerations of social and environmental orders in the business and operations carried out therein, with its ethical aspect centering the decisions and strategies. The referred foundations indicate that the mission of the company should ally ecological, economic and social engagements, that consider not only the meaning of their existence, their reasons to be and their legitimacy, but also their finality (LAVILLE, 2009, p. 160).

The company plays a central role in society, once its decisions impact the lives of people, families, ecosystems and entire countries (MACKEY; SISODIA, p. 283). It is natural, therefore, that a set of expectations is directed to it, considering its positive or negative contributive ability for the sustainable development. Although there is a current consolidation of the idea that such expectations cannot be ignored, the excessive focus on the maximization of short term economic results to the shareholders (partners/quota holders) generated a crisis context in the relationships between the companies and society. Such conception, as stated by Ana Bárbara Teixeira (2010, p. 226), chained the referred institute to the epistemological crisis of the development model used in the twentieth century, then marked by a solely quantitative and accumulative founded economic growth. According to the author, the model in question arised out of the dissociation between humanity (society), its organizations and the environment and caused reflexes in the misalignment between the interests of society and if its institutions, especially the State and the companies (those focused solely in short term economic results).

Given such scenario, the necessity of harmonization of the private interests with the social commitments became sustained, considering the consolidation of the idea that the companies do not carry out their activities in a social vacuum, but in face of fundamental matters such as expectations, values, social matrixes and broader communication processes with society. Thus, as described by Amartya Sen and Bernardo Kliksberg (2010, p. 362-264), the ideas around the role to be played by private companies in the contemporary society have been quickly modified in the past years, coming from a profit generator to owners point of view – to solely whom they should answer to – as their only responsibility, to a much broader perspective, promoting a paradigm rupture concerning the prior conceptions, in the meaning of consider them as a high social responsibility¹⁰. Therefore the necessity to increase the social responsibilities and redefine the role and mission of the companies in the society (ARNOLDI; MICHELAN, 2000, p. 159).

The creation of the concept of the stakeholders¹¹ has been fundamental for the arising of a new view for the roles of companies.

10 It is important to point out that the matter of social responsibility is related to the idea of “voluntary integration of social and environmental concerns by the companies in their operations and in their interaction with the community” (TOMASEVICIUS FILHO, 2003, p. 46), distancing from the notion of social function.

11 The concept of stakeholder was approached in the Article Stockholders and Stakeholder: A New Perspective on Corporate Governance published in 1983 by the California Management Review. According to the authors, R. Edward Freeman itself, in co-authorship David L. Reed, the term was veiculatedbedore, in 1963, in an internal memo of Stanford Research Institute, as a reference to, “those groups without whose support the organization would not exist”.

In a non-literal translation, the term has been used to define a set of “interested parties” directly or indirectly affected by the economic activities performed by the company, such as: employees, consumers, community, environment, amongst others. Such view is based upon the understanding that the companies should create the highest possible value to each “interested party”. As taught by Freeman (2010, p. 24-26), the premise that the maximization of profit to partners and shareholders would be its sole finality is contested, passing on to the notion that the companies should create the highest possible value to such entire enhanced set.

The increase and development of studies regarding the stakeholders theory brought together the contesting of the doctrine of the creation of values solely to the shareholders or stockholders (partners/shareholders) – which sees the company as an instrument whose only purpose is the pursuit of economic results, moved exclusively by the interests of rational agents that maximize utilities – which comes to be considered as a myth (STOUT, 2012).

From there rises the notion of the creation of shared value (PORTER; KRAMER, 2011): the action of the companies cannot be turned solely for the economic and financial performances, especially the short term. The rights of all the other interested parties must also be contemplated, as a redefinition of its finalities that allows a higher contribution to the performance of the development and for the sustainability. The company, therefore, is conceived as “much more than an entity simply economic, transformed into an institution with high weight in social level” (ANDRÉS; PIMENTEL, 2005, p. 37).

4. THE SUSTAINABILITY AND THE COMPANY: TRANSPARENCY RELATED TO THE ENVIRONMENTAL AND SOCIAL PERFORMANCES (BEYOND THE ECONOMIC AND FINANCIAL)

From the context of changes related to the notions of accommodation of particular interests and social commitments, imperatives such as transparency emerge, thus, “the idea that the company not only commits, but also accepts to be accountable for the manner in which honor its commitments” (LAVILLE, 2009, p. 27-28).

Therefore, the demonstration of the behavior of the company before its set of public and all society comprehends the question of the public disclosure of reports that prove its economic, social and environmental performances, as well as the impact of its activities and eventual risk assessment measures. In other words, its non-financial informs or sustainability reports, documental proofs of a set of corporate practices, that publicly disclose the economic, environmental and social

performance of the reporter.

In worldwide level, the “Global Reporting Initiative” (GRI) is an international organization that promotes a series of guidelines and parameters for the elaboration of sustainability reports, establishing principles and indicators for the measurement and communication of the behavior and performance of organizations. Currently, the structure of GRI is used by organizations from all over the world as a reference for the elaboration of the sustainability informs. As for the content of such reports, besides the economic, environmental and social performances, matters such as labor practices and decent work, human rights, society (focusing on the impact that the organizations create on the communities in which are inserted and how the risks of their interaction with other institutions are managed and mediated) and responsibility for the product are also proved¹².

In the United Nations scope, there is also a concern about the incorporation of the idea of a sustainable action plan inside the performance of the companies, which comprehends the matter of presentation of informs about sustainability as well as the necessity of production of good practices models. Therefore, the final document of the United Nations Conference on Sustainable Development, in its Paragraph 47, points out the importance of the presentation of the informs about sustainability by the companies, especially the larger companies whose securities are traded in the market¹³.

In the same document (Paragraph 13), the institution also recognizes the main participation of the private sector and of the companies in the sustainable development, which would depend on an broad alliance that involves also the people, government and civil society, under the purpose of achieving the desired future for both the present and the future generations¹⁴. Accordingly to such conception, the company is understood as an indispensable social actor for the accomplishment of the development with sustainability.

5. THE CURRENT WAYS OF THE PUBLIC DISCLOSING OF NON-FINANCIAL INFORMS OR INFORMS (OR REPORTS) ABOUT SUSTAINABILITY

The coherence and the compatibility between corporate

12 Available in: <<http://www.globalreporting.org/resource/library/Brazil-Portuguese-G3-Reporting-Guidelines.pdf>>. Access in: Sep. 23rd, 2015.

13 Integral text of the final document of the Conference Available in: <<http://www.daccess-dds-y.un.org/doc/UNDOC/GEN/N11/476/13/PDF/N1147613.pdf?OpenElement>>. Access in: Sep. 23rd, 2015.

14 United Nations. United Nations Conference on Sustainable Development. Paragraph 13. Available in: <<http://www.daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/476/13/PDF/N1147613.pdf?OpenElement>>. Access in: Sep. 28th, 2015.

discourse and practice meets an affective instrument in the non-financial informs or reports about sustainability. It is an important mechanism to communicate the economic, social and environmental behavior of the companies, in attention to the ideals of responsibility and social function, as well as measure the impacts of the performed activity, permitting the evaluation of both the positive and negative effects of these behaviors, considering each reporting company and their respective adequacy to the imperatives related to the aspects and dimensions of sustainability.

Amongst other matters, the content of the reports may identify characteristics such as: i) personnel policies that respect the rights of the collaborators of the companies and that favor their development as human beings, through the offering of dignified conditions for the work and remuneration, possibility of progress in the career and capacitating programs for continuous training; ii) transparency and good governance, guaranteed in internal scope, to the shareholders, especially the minority, possibility of active participation in the business guidelines, with directive instances that seek to abolish/diminish the conflict of corporate interests; iii) fair play and transparency towards the consumers of products or services, with offering of products and services of good quality and reasonable prices; iv) environmental protection policies and engagement to the world agenda of the area, contributing locally, regionally, nationally or even internationally.

The observance, in the routine of the companies, of determined models of better practices, which incorporate matters as the ones abovementioned undoubtedly constitutes a relevant instrument for the consolidation of the notion of performance of the development with sustainability.

5.1. Informs about sustainability in the Brazilian law

Considering the necessity of consolidation of a system able to accommodate the economic activity, environment and social aspects, in a national scope there is no legal obligation towards the disclosure of informs or reports about sustainability¹⁵. On the other hand, there is a recommendation of BMF&BOVESPA – administrating institution of the Brazilian securities exchange – concerning that obligation.

The recommendation is restricted to the publicly traded companies listed in BMF&BOVESPA, thus, the companies whose securities are admitted for trading in the capital market¹⁶. The publicly traded company is considered one of the fundamental institutions of the

¹⁵ The legal obligation concerns solely the elaboration and disclosure of the consolidated financial balances.

¹⁶ It is not, therefore, destined to the other corporate types existent in the Brazilian Law, such as the private equity companies and limited liability companies, amongst others.

market economy, considering the quantity of interests – both general and particular – that require protection and composition (PEDREIRA, 2002, p. 7-8). Therefore, it must be based on the notion of transparency, focusing on the development together with its various publics, of a honest and transparent dialogue (LAVILLE, 2009, p. 28-29).

This primary formal initiative in the means of public disclosure of informs was carried out through the external communication 017 2011-DP, of December, 23rd, 2011, through which BMF&BOVESPA proposed to all the publicly traded companies listed therein the adoption of the report or explain model, to sustainability reports or similar. The document pointed out to a recommendation in the means that the publicly traded companies indicate, as of 2012, if they disclosed any kind of reports about sustainability or similar, and that disclosed where such information was available and, in the event of default of such responsibility, to explain the reason.

After the external communication 017 2011-DP. Through which BMF&BOVESPA proposed to the stock companies listed therein the adoption of the report or explain model, the administrating institution of the Brazilian capital market began to follow the adhesion of the companies to the policy of public disclosure of information. The data contained in the BMF&BOVESPA portal shows as evolution in the amount of companies that effectively disclosed informs about sustainability or similar. The current partials, measured as of the issuing of the external communication (December of 2011), indicate 96 (ninety-six) disclosures in June of 2012, 157 (One hundred and fifty-seven) in June of 2013 and 163 (One hundred and sixty-two) in June of 2014; there was also an evolution in the amount of companies that did not disclose, but presented explanations, being 107 (One hundred and seven) in June of 2012, 136 (One hundred and thirty-six) in June of 2013 and 149 (One hundred and forty-nine) in June of 2014.

Considering its nature of mere recommendation issued by the administrating institute of the market, the listed companies, in Brazil, the disclosure of informs about sustainability is characterized eminently as a non-prescribing right, therefore, a recommendation arising out of the mechanisms of soft law, also known as soft norm or *droit doux*. It should be pointed out that such recommendations do not constitute a legal command, the referred texts do nor establish positive right obligations and provisions are not cogent. As emphasized by Jacques Chevalier (2009, p. 166-169), such instruments “indicate the goals” that are desirable to achieve, establish “guidelines” that are desired to be followed, formulate “recommendations” that are desirable to be respected, with its application depending not on the coercive element but on the voluntary adhesion of the recipients, consisting, therefore in a “brand right” – soft law - , that imposes in background the notion

of command and thus represent a more flexible conception of legal normativity

It is noticed that, although it does not constitute a legal obligation due to the lack of a coercive state dimension, the voluntary adhesion to the report or explain model, for sustainability reports or similar, has grown percentually in connection to the disclose and also to the presentation of explanations concerning the reasons for not previously disclosing. Amongst the 149 (One hundred and forty-nine) non-disclosing companies, but explained; 33 (Thirty-three) disclosed only papers in the same area; 27 (Twenty-seven) do not consider necessary the disclosure or do not have it as a priority; 23 (Twenty-three) are analyzing the possibility of disclosure; 17 (Seventeen) did not present an explanation; 19 (Seventeen) state that their reports are being elaborated; 12 (Twelve) explained that they do not disclose due to the nature of their operations or to the current moment; 10 (Ten) are developing a disclosing structure; 9 (Nine) alleged a misunderstanding of the report; 1 (One) stated that its report is comprehended into the report disclosed by its holding.

5.2. Sustainability reports in the scope of the institutional right of the European Union

The legal order of the European Union (EU) is considered as its own, in connection to its State-members, integrating and imposing such order to their respective legal systems (LOBO, 2005), through the establishment of a right constituted by a set of rules and principles intended to ensure the goals defined in the treaties (CEREXHE, 1985)¹⁷.

In the scope of the aforementioned own legal system, with autonomy in face of the systems of the State-members, which was referred to as European union right, the treatment of a series of matters understood as key-variables to the achievement of the finalities intended with the economic and politic integration of the current 28 (Twenty-eight) countries composing the UE has been given great relevance. To such set of rules that, in certain events, are elaborated towards the achievement of the goals of the integration, the name derived law is lent.

Amongst the innumerable themes that constitute concerns to the right of the European Union, the matter of the non-financial reports of the companies can be found, especially regarding those with securities traded in the market¹⁸. Actually, such idea surrounding the social

17 The main ones are: i) The Treaty that institutes the Coal and Steel European Community (CSEC); ii) The Treaties of Rome, CEE and EURATOM; iii) The Fusion Treaty – Treaty of Brussels; iv) The Single European Act; v) the European Union Treaty – Treaty of Maastricht; vi) Treaty of Amsterdam; vii) The Treaty of Nice; viii) The Treaty of Lisbon.

18 As examples of securities, the shares and debentures may be cited (respectively, participation

responsibility of the companies is largely consolidated in the level of the EU rights. Therefore, particularly in the last decade, a series of legislative and non-legislative actions have given treatment to the matter, for example, the European Parliament Resolution – a legislative body doted with law creation powers, as well as monitoring and budget powers – of March, 13th, 2007, entitled “Social Responsibility of Companies: a partnership”, in which was expressly showed the “conviction that the increase of the social and environmental responsibilities of the companies, in connection to the principle of the corporate responsibility, represents a key element to the European Social Model [...]” and, even, an “European strategy towards the sustainable development [...]”¹⁹.

The point of view regarding the importance of the companies for the achievement of the goals of EU was affirmed in the Communication of the Commission entitled “Social Responsibility of companies: a new strategy of EU for the period of 2011-2014”, adopted in October 25th, 2011. Such perspective led the European Parliament (2013) to edit new resolutions, such as the “Social Responsibility of companies: responsible and transparent behavior and sustainable growth” and the “Social Responsibility of companies: the promotion of corporate interests and a way to a sustainable and inclusive recovery”, in which the necessity of improvement of the transparency of both social and environmental information, an element deemed essential for the social responsibility of companies, was recognized²⁰.

In the sequence of the abovementioned resolutions, the matter received a normative treatment and was object of directives from both the European Parliament and the European Union Counsel – a body that shares the legislative power with the Parliament and in which discussions, amendments and approvals of laws in Europe are carried out -, specially the Directives 2013/34/EU (first regarding the subject) and 2014/95/EU (which amended it). Therefore, opportune is the analysis: i) of the nature of the directive and its impacts in thee legal system of the State-members; ii) of the specific content of the normative treatment conferred to the non-financial reports.

The directive is one of the legislative acts subject to adoption in the EU. It concerns the most important instrument of action of EU, through which it seeks to harmonize the necessity to concede certain unity to the European Law, with the consideration and maintenance of the peculiarities of the national legal systems. It is not intended, with the directive, the full unification of laws, but to consolidate an approach

and debt titles).

19 Available in: <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2007-0062&language=PT>>. Access in: Oct. 15th, 2015.

20 Available in: <[http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2013/0207/CO_M_COM\(2013\)0207_PT.pdf](http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2013/0207/CO_M_COM(2013)0207_PT.pdf)>. Access in: Oct. 15th, 2015.

of the legislations of the State-members, in the meaning of elimination of normative contradictions (BORCHARDT, 2011).

This legislative act bounds the recipient State-member as to the results to achieve, but leaves to its own criteria the manner and the means (CEREXHE, 1985). It obliges the State-member to intervene in the internal legal (and administrative) structure in order to surpass, to its respective legal system, under a mandatory character and a established deadline, the general norms that consecrate certain common parameters, associated to the goals proposed in the content of each directive. It sets, as noted by CAMPOS (1983, p. 98), “a result that in the common interest should be reached”.

Currently, the most important legislative act regarding the subject of this present analysis is the Directive 2014/95/EU, which amended the Directive 2013/34/EU in its dispositions concerning the disclosure of non-financial information by certain large corporations and groups. The legislative act in question has as recipient all the 28 (Twenty-eight) State-members.

The Directive 2013/34/EU, recognized that the policy of disclosure of the non-financial information is of vital importance to the management of the shift to a sustainable global economy, based upon the notion of the necessity of harmonization of the long-term profitability with the ideal of social justice and with the protection of the environment. The disclosure of such information allows a better supervision of the corporate management and of the impacts of the actions of companies in society.

The Directive 2014/95/EU, which amended the aforementioned Directive, on the other hand, had as a foundation, amongst others, the Communication entitled “Act for the Unified Market – Twelve levers to stimulate the growth and reinforce the mutual trust – Together for a new growth”, adopted by the Commission in 2011, based on the necessity of improvement of the transparency of information related to companies, expanding it (to beyond the financial aspects) also to the social and environmental scopes and in order to reach a comparable level in all the State-members, regardless if they demand additional improvements in the transparency of information inside their legal systems.

The most relevant point of the Directive 2014 /95/EU may be found in its Article 19-A, which concerns the financial reports. It predicts that the large companies that are public interest entities and that, as of the closing balance sheet date, must include in their management reports a non-financial report that contains enough information to a comprehension of the evolution, development, position and impact of their activities. In the segment therein, the companies that exceed the average of 500 employees per financial year are included.

The information, that should concern, at least: i) the environmental

and social matters related to the employees; ii) the respect for the human rights; iii) the combat of corruption and the attempts of bribery; iv) the indication of the corporate model of the company; v) the description of the policies adopted in connection to such matters, as well as the obtained results; vi) the indication of the associated risks related to the company activities, their potential negative impact in products or services and their means of management; vii) the appointment of the key-indicators of development for the specific activity carried out therein; and viii) if adequate, a reference to the amounts contained in the annual financial reports and additional explanations regarding such amounts.

Concerning the methodology of the reports, developed to furnish such non-financial information, the directive indicates that the companies covered by it may resort to a series of platforms, all considered apt to the exercise of communication to the public, such as: i) national systems; ii) Union systems, such as the Communal System of Ecomanagement and Audit (CSEA); iii) international systems, such as the United Nations Global Pact, the guiding principles concerning companies and human rights applicable to the United Nations “Protect, Respect and Repair” framework, the guidelines of the Organization for the Economic Co-operation and Development (OECD) for the multinational companies, the ISO 26000 norm of the International Organization for the Normalization, the Tripartite Declaration of Principles of the International Labor Organization about the multinational companies and the social policy, and the Global Initiative about the elaboration of reports or other re-known international frameworks.

Until December 6th, 2016, the Commission should elaborate a set of guidelines (non-mandatory) regarding the methodology for the reporting of non-financial information by the companies, referencing certain key-indicators of non-financial, general and sectorial performances, in order to facilitate the policy of disclosure of non-financial information and contribute to make such information pertinent, useful and comparable by the companies. Interesting is that, in this point, the content of the directive prescribes that the Commission has to consult the interested parties.

Regarding the transposition of the content of the directive into the national legal systems, the Article 4 prescribes that: i) the State-members shall make effective the necessary legislative, regulatory and administrative dispositions in order to fulfill the provisions therein until December 6th, 2016; ii) the State-members establish that the dispositions referred to in the first paragraph are applicable to all the companies comprehended by Article 1 as of the financial year beginning in January 1st, 2017 or during the civil year of 2017, considering that, once they adopt such dispositions, the State-members have to include a reference to the directive or make the official disclosure be

accompanied by such reference.

Although the established deadlines have not expired yet, the eventual non-compliance to the policies related to one or various of these questions shall imply in the presentation of an clear and reasoned explanation of the reasons for not applying such policies.

6. THE NORMATIVE POLICY RELATED TO THE NON-FINANCIAL REPORTS IN A COMPARING PERSPECTIVE

The method of analysis and interpretation applied in this present investigation is limited to the comparison of the regulation of a specific institute – the non-financial report/inform or sustainability report – in different legal systems, i.e.: the Brazilian Law and the Institutional Law of the European Union²¹.

It regards, hereunder, not an activity of comparison between legal systems globally considered, even less between the characteristics of the big families of law²², but solely a “microcomparison” (OVIDIO, 1984, p. 166) concerning the normativeness surrounding the specific institute, through the identification and analysis of the differences between the normative treatment attributed to the object of study by each of the pre-determined legal systems.

In Brazil, disregard the increase of the voluntary adhesions to the model in question, it may be noted that the absence of state coercitivity maintain a flexibility to the normative content of the recommendations, making more uncertain the achievement of an effective dialogue between the companies and the society, and the consequent consolidation of the transparency around their non-financial performances, once its application depends on the voluntary adhesion of the recipients of the brand right, disregarding its submission to the model.

The normativity sorrounds a soft law instrument, not cogent, that simply recommends the disclosure (important to note) by the companies listed in BM&FBOVESPA, of the sustainability reports or informs, for the general public, concerning the environmental, social and economic-financial performances. Such “weak” regulation, excludes from its incidence the other corporate types prescribed in the Brazilian legal system, such as, the private equity companies and limited liability companies. Many of these are big companies, even though they do not trade securities in the Brazilian capital market (therefore, not recipient

21 As noted by Francisco Ovidio (1984), the nature of the compared law is very contentious, being possible to find in the doctrine those who defend that it concerns science (as the own author emphasizes) and, on the other hand, those who advocate the thesis that it concerns, in fact, a method. For the purpose of the present work, the notion of method will be adopted.

22 Regarding the studies of the big families of Law, it is opportune to remit the reader to the works of René David (2002) and Mario G. Losano (2007).

of the weak normativity of the “report or explain” model), in accordance to their size and activity, equally impact society as a whole.

In the other hand, in the EU, the next resolution in the timeline is the one entitled “Social Responsibility of Companies: responsible and transparent behavior and sustainable growth” and “Social Responsibility of Companies: promotion of the interests of society and a way to a including and sustainable recovery”, the directives of the Parliament and of the Counsel, specially the Directive 2014/95/EU, which amended the Directive 2013/34/EU, regarding the subject of the disclosure of non-financial information by certain big corporate societies and groups, constitute legislative acts that have all the 28 (Twenty-eight) State-members as recipients.

The directives, as legislative acts in the scope of the institutional law of the European Union, turn to the idea of conceding a larger unification of the normative treatment of certain sensitive questions. In such context, the content of such legislative acts shall be transposed, by the State-members, to their respective internal legal systems, increasing the transparency of the information related to the companies, amplifying it (to beyond the financial aspects) also to the social and environmental scopes, and in order to achieve an equitable level in all of them, in the different identified dimensions.

The countries, therefore, are obliged to intervene in their respective internal legal structures in order to transpose, in a mandatory character and under a specific deadline, the general rules that consecrate certain common parameters regarding the matter of the necessity of disclosure, by certain companies, of the non-financial information in connection with the achievement of the goals proposed in the content of each directive. And, as the transposition of such contents is internalized to the national legal systems, the relevant subject of the non-financial information disclosure, strictly connected to the notion of sustainable development, is incorporated under the condition of prescribing content, of cogent. In other words, hard law, a “strong” right.

7. CONCLUSION

Through the present research, the recognition of the sustainability as a structuring element of the Constitutional State was possible, framing it as a new paradigm which inducts axiological guidelines in different levels. Such phenomenon, multi-faced, leads to the necessity of continuous enhancement and adjustment in the roles of the different social actors, both public and private. Also, it should impact the role of the companies, understood as a social actor directly connected to the responsibility of accommodation of private interests with social agendas, and not as a mere expression of an economic activity.

In such context, the transparency adopts an imperative condition and demands from the companies the commitment to the public disclosure of their economic, social and environmental performances, by the means of the sustainability reports. Through such documents it is possible to evaluate the coherence and compatibility between corporate speech and practice, incorporating to the companies the idea of creation and preservation of values shared amongst all their stakeholders, under the prism of sustainability.

As for the research problem referred to in the introduction, which involves the question regarding the necessity, or not, of a public disclosure of the reports that prove the social and environmental performances of the companies (beyond the financial), as well as the impact of their activities and eventual prevention measures, it is concluded that, even though the transparency and necessity of disclosure have been representing a larger concern in the scope of international institutions such as UN, and also in a doctrinal level, the normative treatment of the subject constitutes a political option, varying in the different legal systems.

In the specific case of Brazil, as aforementioned, there is no legal obligation to disclose such reports, although there is a recommendation from BM&FBOVESPA addressed to all publicly traded companies listed therein, the document known as report or explain. On the other hand, in the scope of the European Union, a larger culture related to the transparency and disclosure of non-financial reports has been developed, with the edition, by the European Parliament and Council of directives regarding the subject, which implicates to the State-members the obligation of transposition of such commands to their internal legal systems.

In such context, it is believed that disregard the relative efficiency of the Brazilian soft law instrument (indicated by the analysis of the results in the periods since the implementation of the initiative, with an evolution in the voluntary adhesion), the European experience may be considered a parameter for the construction of a new model of normative treatment of the subject, with the transformation of the recommendation (with no cogent force) into a legal obligation arising out of state formal law, representing a mandatory prescription addressed to the companies, which must also ensure a larger certainty as to the normative framing of such relevant matter for the means of the sustainable development. Therefore, it is not a defense of the legal transplants – mere legal transplant of an already existent institute from a certain legal system into another.

Particularly, it is believed that the new perspectives and demands surrounding the adequacy of the corporate role to the sustainability imposes the participation of the law – of a prescribing law and not a mild, flexible law – in the means of creation and integration, to the legal

system, of the prescriptive legal contents aligned to the drafting of a better future, in which the companies are part not only of the way, but also of the final result.

Such conception of right, more prescribing, less flexible or mild, wagers on the premise that certain matters, such as the public disclosure of the economic, social and environmental performances of the companies, by its importance, should be observed more from the point of view of what is correct – and, consequently, of what is coercible demandable – and less under the scope of the costs to its implementation.

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THE INTRODUCTION OF ARBITRATION WITHIN THE BRAZILIAN LEGAL CONTEXT

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Abstract: The present article analyzes the introduction of arbitration as an alternative method of conflict resolution within the Brazilian legal context. In this sense, after a preliminary remark on the origins and concept of arbitration, this text focuses on the construction of the institute of arbitration within Brazilian legal framework. Thus, the aspects regarding the enactment of Law No. 9.307/96 are examined, especially concerning the requisites for the establishment of an effective arbitral convention. Finally, the structure of the law in regard to pre-arbitration facts, such as parties' autonomy and the choice of applicable laws, and the arbitration per se as to the execution of the clause and the aspects concerning the delivery of the award are studied. As a result, the importance of the introduction of such Law it is noticed, as it deeply changed Brazil's legal framework regarding the arbitral convention, making a more palpable and viable method of solving disputes nowadays.

Keywords: Arbitration - Law No. 9.307/96 - Arbitration Clause - Arbitration Convention

1. INTRODUCTION

Brazilian judiciary power is known for its delay regarding the resolution of disputes. Many causes can be listed in order to justify such slowness. For instance, a decade after promulgating its most recent constitution, Brazil had one judge for every 23,090 inhabitants – 6,5 times more than Germany and 4,1 times more than the United States for the same period.¹ Yet, in 2010, that number did not change as the number of suits has been rapidly increasing.² If in 2007 there were about 70,1 million suits pending at the judiciary; in 2013 that number reached the mark of 95,1 million.³

In this context, arbitration emerges as a reasonable alternative, especially for the settlement of disputes concerning international trade and other commercial issues. After all, it aims at reaching a fast outcome to a problem, avoiding the need of turning to the judiciary.⁴ Not only that, there are a number of other advantages: variety of places/institutions accredited, nonalignment, confidentiality, expertise of arbitrators, trustworthiness, equity and the choice of the laws and rules applicable.⁵

Thus, regarding the abovementioned, for a better understanding of the application of arbitration in Brazil, this work attempts to elucidate how the introduction of arbitration happened in the Brazilian legal context, underlining key aspects of Law No. 9.307/96 regarding

1 COSTA, Sílvio Nazareno. *Súmula vinculante e reforma do judiciário*. Rio de Janeiro: Ed. Forense, 2002, p. 53.

2 CONJUR. Mapa do Judiciário: Brasil tem oito juizes para cada cem mil habitantes. *Revista Consultor Jurídico*. São Paulo, Feb. 12. 2011. Available at: <www.conjur.com.br/2011-fev-12/media-brasil-oito-juizes-cada-cem-mil-habitantes>. Accessed in 11 dec. 2015.

3 GONÇALVES, Guilherme. Processos judiciais crescem mais do que a população brasileira. *Gazeta do Povo*. Pub in Feb. 2, 2009. Available at: <www.gazetadopovo.com.br/vida-publica/processos-judiciais-crescem-mais-do-que-a-populacao-brasileira-blq5wwwvk97lw6smnz9m1gqj2> Accessed in 11 dec. 2015; BASTOS, Aurélio W.; CARNEVALE, Marcos. O Poder Judiciário e a Justiça em Números. *Revista JC*. Rio de Janeiro, n. 173, jan.2015. Available at: <www.editorajc.com.br/2015/01/o-poder-judiciario-e-justica-em-numeros/>. Accessed in 11 dec. 2015.

4 Arbitral awards are normally delivered between 6 months to one year after the tribunal has been constituted, whereas in the Brazilian judiciary, it normally takes up to 12 years to reach a final sentence. MAGRO, Máira; BAETA, Zínia. *Guia Valor Econômico de Arbitragem*. Rio de Janeiro: ed. Globo, 2004, p. 45; VAZ, Tatiana. Mais Rápido e mais barato. *Revista Exame*. Pub. Jul. 6, 2006. Available at: <www.exame.abril.com.br/revista-exame/edicoes/871/noticias/mais-rapido-e-mais-barato-m0083051>. Accessed in 11 dec. 2015.

5 MUNIZ, Tânia Lobo, *Arbitragem no Brasil e a lei 9.307/96*. Curitiba: Juruá, 2002, p. 12.

the choice for arbitration as a way to settle disputes. Therefore, the first part will generally debate the historical and conceptual aspects of arbitration, so that its role as an *optional* way for settling disputes is established. Subsequently, it will be demonstrated that the development of arbitration culminated in the enactment of the Law No. 9.307, on 23rd of September of 1996.

Consequently, the following topic will explore the structure of arbitration in Brazil, focusing on describing the two existing options for establishing an arbitral convention – the ‘Arbitration Clause’ and ‘Arbitration Agreement’. Finally, the last part of the paper will address the two main phases of arbitration, highlighting specific aspects of pre-arbitration procedures and rules, and the arbitration *per se*, what includes the formal aspects of the award.

In this sense, it should be noted that this paper does not intend to exhaust the matter; on the contrary, its purpose is to stress how arbitration was inserted in the Brazilian legal context, noting the fundamental importance of Law No. 9.307/96 to the sedimentation of this dispute settlement model within the country. For this reason, a descriptive research will be made by reviewing specific Brazilian literature on arbitration and on the Law No. 9.307/96. To develop this study both historic and monographic procedures will be implemented, so that one may, respectively, understand the basis for the development of arbitration in Brazil, and obtain generalizations through analyzing the Law itself. Thus, as to the techniques, doctrinal and documental research will be applied.

2. PRELIMINARY REMARKS ON THE ORIGINS AND DEFINITION OF ARBITRATION

Arbitration dates from the early organized societies, being one of the most ancient judicial alternatives for disputes resolution in the history of Law⁶. From time to time, arbitration has suffered moments of recognition and underestimation. The first evidence of its use is dated back to 3000 years B.C., more specifically in Babylon, Greece and Rome, as ancient civilization have trusted arbitral tribunals as a viable solution to Private Law disputes.⁷

The development of arbitration gain an improvement as societies, costumes and laws developed, being it a viable institute for conflict settlement and even preventing wars.⁸ After all, the methods

6 MARCO, Carla Fernanda de, *Arbitragem internacional no Brasil*. São Paulo: RCS., 2005, p.11.

7 PINTO, Luiz Roberto Nogueira, *Arbitragem: a alternativa premente para descongestionar o poder judiciário*. São Paulo: Arte&Ciência, 2002, p.19.

8 MUNIZ, *op. cit.*, p.21; PINTO, *op. cit.*, p.19.

of redeeming differences based on physical force, as self-defense or preemptive behavior, have been gradually replaced by the presence of an arbitrator appointed, especially in the Middle Ages with the ascension of the Catholic Church.⁹

The proliferation of treaties enabling the Pope and its representatives to act as arbitrators brought to the developing societies of the time the legitimacy to resolve matters of sovereignty, successions, family relations, territory, among others¹⁰. However, with the creation of sovereign states based on the king's will, there was no room for the strengthening of the arbitration, as states Carla Fernanda de Marco:

[t]he absolutism of the governments, which followed the feudalism, has not favored the institute, at least until around the midst of the 18th century. With the French Revolution, the arbitration starts to be considered as an ideal instrument against the Royal Justice System, composed by magistrates still connected to the old regime.¹¹

From that period on, arbitration has suffered moments of recognition and underestimation since “[t]he creation of the Napoleonic Civil Code, adopted as the basis of almost all European laws, as well as the evolution the Justice administration by the States, has left aside, again, arbitration to a secondary level. It is a must to highlight that also in this period the arbitration tribunals found themselves very procedure oriented”.¹² By the 19th century, on the other hand, arbitration:

[...] gradually, reacquired its relevance as a legal expression of justice making, in issues of litigation for States, individuals and institutions, through the adoption of specific rules in various legal systems, being them private or public, domestic or international, reaching to the conflict resolution of interests through the application of justice in an agile and less procedural matter.¹³

In addition, the institute of arbitration had also its importance diminished by the continental European Legal System, as known as the

9 MARCO, *op.cit.*, p. 13.

10 GAILLARD, Emmanuel, *Aspects philosophiques du droit de l'arbitrage international*. Leiden: Martinus Nijhoff, 2008, p. 58.

11 MARCO, *op. cit.*, p. 21.

12 PINTO, *op. cit.*, p. 25.

13 *Ibidem*, p. 24.

Civil Law ascension, giving State intervention a most relevant importance on conflict solving.¹⁴ It was only after 1950, with “the movement of commerce expansion and the tendency to the opening of markets and internationalization of the economies”, that arbitration “reaffirmed itself not only amongst private citizens, but also between States, as an essential institute for the developing international commerce”.¹⁵

In this sense, bearing in mind arbitration is now considered an efficient mechanism for a balanced development of national and international disputes, it is imperative to address the attempt of scholars and jurists to define arbitration, in order to give perspective to the legal operator when dealing with arbitration. The concept and definition of arbitration found in the doctrine introduces some of the most important features of the institute, that is, not only regarding its legal definition, but also by its judicial nature, fundamentally based on its contractual agreement and jurisdictional competence. In that venue, Professor Guido Soares defined:

*[a]rbitration is an institute based on the intervention of a third party individual, or individuals, by express request of the litigators, with powers to adjudge a dispute between them, related to facts and rights, in a terminative form. Differently from the national judges, for whom the jurisdiction and competence are defined by an impersonal law, independently of the will of the litigators, the powers of the arbitrator(s) are found determined by the will of such litigators, who, by electing such arbitrators, determine to them, limits, procedures, including deadlines for the exercise of such powers.*¹⁶

From another perspective, Irineu Strenger defined the institute as the “jurisdictional instance, practiced in function of an established contractual regime, to resolve controversies between persons of private and/or public law, with its own procedures, and enforceable before State courts”.¹⁷ Professor Nádia de Araújo has also defined the institute as:

[...] a legal form of controversy resolution, present and future, based on the will of the parties involved, who elect by themselves and directly, or through

14 MARCO, *op. cit.*, p. 14.

15 MUNIZ, *op. cit.*, p.25-26.

16 SOARES, Guido F. S. A arbitragem e sua conaturalidade com o comércio internacional. In: PUCCI, Adriana Noemi (coord.) Aspectos atuais da arbitragem. Rio de Janeiro: Forense, 2001, p. 121.

17 STRENGER, Irineu. Contratos Internacionais do Comércio. 3ª ed. São Paulo: RT, 1998, p. 111.

the mechanisms by them determined, arbitrators to adjudge the dispute, trusting in them the mission to decide on a mandatory way the litigations by the production of an arbitral award. By the end of the arbitration, ideally, it is expected the award to be executed spontaneously. Its nature in nothing is modified in virtue of it being a domestic or international arbitration.¹⁸

In this sense, the broad understanding of Brazilian scholars and jurists regarding the institute of arbitration define it as a reliable legal mechanism, based on the manifestation of the litigators will, not bringing the principles and the basis for arbitration on a national or international scenario. However, historically, as previously demonstrated, the institute has presented relative appreciation throughout time, finding its role in the legal setting of the States more strongly in the present, as Modern Statehood has been developed.

Notwithstanding, the Brazilian Legal System has long recognized its role and, analogously, has finally incorporated it by virtue of the Law No. 9.307 of September 23rd of 1996 (hereinafter ‘Law No. 9.307/96’). In this venue, it is imperative to address how arbitration came to Brazil and what based the development made by Law No. 9.307/96 much relevant.

3. THE RECEPTION OF ARBITRATION BY THE BRAZILIAN LEGAL SYSTEM

Arbitration in Brazil has been recognized since the times of the Portuguese colonization, more precisely it finds its roots based on the Philippine Legal Codes of 1603.¹⁹ After the Independence, the institute of arbitration in Brazil received various approaches permeated by loopholes and demands suffering a true historic resistance by the legislations that furnished the Brazilian legal system.²⁰

The first Brazilian constitution – the Empire Constitution of 1824 – Included arbitration “advancing the theoretical construction that would follow the 20th century to come”.²¹ It prescribed that civil disputes, of civil or criminal nature, could be settled by arbitrators nominated by the parties involved, and its award could be carried out

18 ARAUJO, Nádia de. A nova lei de arbitragem brasileira e os princípios uniformes dos contratos comerciais internacionais elaborados pelo UNIDROIT. In: CASELLA, Paulo Borba (coord.) **Arbitragem**: a nova lei brasileira (9.307/96) e a praxe internacional. São Paulo: LTr, 1997, p.90.

19 PINTO, *op. cit.*, p.25.

20 CARMONA, Carlos Alberto. Arbitragem e processo: um comentário à lei 9.307/96. São Paulo: Atlas, 2009, p. 22.

21 MUNIZ, *op. cit.*, p. 42.

with no possibility of appeal, if so established.²² Moreover, it rapidly disseminated such prescriptions to Brazilian statutes, such as in 1831 establishing its possible use to solve renting services, and in 1850 to mandatorily disentangle conflicts within local trade among partners and maritime trade regarding salvation and damages.²³

Despite being initially in the vanguard, the Republican Constitution, issued in 1891, left the private arbitration out of its prescription, foreseeing it only in cases that could prevent war, as it was similarly established in the Constitutions of 1934 and 1946. The specific prevision of arbitration as an institute available only for preventing war was not maintained under the 1967 Brazilian Constitution. It, however, included that international disputes could find resort to resolving in arbitration.²⁴

The Brazilian Civil Code, according to Carlos Alberto Carmona, mined the arbitration settlement clause at first, and the Code of Civil Procedure of 1939 did not advance as much in terms of arbitral tribunal accreditation. Such approach to the institute has been repeated by the legislators when arbitration found its space in the Code of Civil Procedure of 1973.²⁵ Even the acclaimed jurist Pontes de Miranda, one of the greatest in history, understood arbitration as “primitive, regressive”, and an attempt to circumvent State power, being it, according to him, “an efficient weapon to a late capitalism”.²⁶

It has not taken long, according to Carmona, for all the “negative noise” to settle down in virtue of reality: arbitration “has not reveal itself as a savage and abused form of resolving disputes” and “the alternative means for dispute resolution flourish in Brazil, Latin America and throughout the planet”.²⁷

It is imperative to note that even though arbitration has not been well received by past Brazilian legislation, it has yet been used as conflict resolution in many circumstances, such as territorial disputes between Argentina and Brazil in 1900 (favorable to Brazil), the United States shipwreck patrimonial dispute against Brazil of 1879 (favorable to USA) and the dispute against Great Britain, regarding the arrest of English officers in 1863 (favorable to Brazil) to quote a few. Not to mention famous historical figures such as Barão do Rio Branco,

22 PINTO op. cit, p.27.

23 MARTINS, Pedro A. Batista. Arbitragem Através dos Tempos. Obstáculos e Preconceitos à sua Implementação no Brasil. In: GARCEZ, e José Maria Rossini. A arbitragem na Era da Globalização. Rio de Janeiro: Forense, 2003, p. 43.

24 MUNIZ, op. cit, p. 42.

25 CARMONA, op. cit, p. 26.

26 PONTES DE MIRANDA, Francisco C., Comentários ao Código Civil. Tomo XV. Rio de Janeiro: Forense, 1977, p. 344.

27 CARMONA, op. cit, p. 26-27.

Barão de Arinos e Visconde de Itajubá, all involved in arbitrations and enthusiasts of the institute.²⁸

It was only with the establishment of the Law No. 9.307/96 that arbitration took a definite step for permanent placing in the Brazilian Legal System. The bill that resulted in such contemporary law has been instituted under the supervision of highly recognized experts on the matter: Selma M. Ferreira Lemes, an expert on international law, Pedro A. Batista Martins, an attorney in Rio de Janeiro and Carlos Alberto Carmona, professor at São Paulo Law School.²⁹ And through the hands of Senator Marco Maciel, the bill received the necessary attention of Brazilian legislators, starting its processes of maturation in 1992.

Although arbitration had been incorporated throughout recent legislation, gaining more and more space, it had always a set back position that actually did not make the full use of the institute available. It is the case of Law No. 9.099 of September 26th of 1995, regarding the Small Claims Court Regulation of civil and criminal nature, which recognized the possibility of choosing an arbitrator for the dispute an year before the advent of Law No. 9.307/96; however, the resulting decision had to expressly be confirmed by a State Legal Authority.³⁰

According to Carmona, in his analysis after ten years the Law entered into force and six after he wrote the first edition of *Arbitragem e Processo, um Comentário à Lei N.º 9.307/96* – considered an outstanding doctrine on the matter in Brazil – arbitration is now a case of great success. In his words:

[t]he undeniable success of arbitration in Brazil takes me, though, to present the third edition of Comentários which I submitted to the legal community in 1998. Much have changed since then: what was pure theory became practice and everyday routine; what was an impression became a fact; what was speculation entered in the world of facts. [...] I considered myself fully satisfied, since everything that was foreseen has actually happened accordingly to what was expected: fear has been overcome (normal reaction to the unknown), the arbitration has been rediscovered.³¹

28 PINTO, op. cit, p.26-27.

29 DELGADO, José Augusto. A arbitragem no Brasil: evolução histórica e conceitual. Revista Jurídica Consulex. Brasília, v.1, n.11, pp.5-9, nov. 1997, p. 7 (footnote n. 14).

30 PINTO op. cit, p. 29.

31 CARMONA, op. cit, p. 27.

In this venue, it is possible to state that the “expression of arbitration’ was complete with the adoption of Law No. 9.703/96, as it meant to totally replace the outdated arbitral system accepted in Brazil until 1996.³² It came to overcome all major obstacles that have turned the previous regulations ineffective, perpetrating the century-long practice within Brazil and modernizing its Legal System, as to align it with the most developed countries methods’ of solving disputes – what is even seen as a requirement for the expansion of Brazil’s insertion in the international economic order. After all, as Rodrigo Bernardes Braga highlights about the usage of arbitration by/in Brazil: “[i]t is natural that the institute, as a general system of dispute resolution, [should be] treated in a harmoniously way by the other countries aiming to avoid setbacks and useless efforts”.³³

The new structure set out by Law No. 9.703/96, thus, enabled the arbitral jurisdiction, strengthening the application of the arbitration clause, which by itself, became capable of refraining State judge competence. It also regulated the enforceability of the arbitral award, which have found fierce resistance, suffering challenges of all sorts, such allegations of being unconstitutional, or loopholes on the civil legislation, and, now, has the same force as a State judge ruling.

As a result, it is clear that not only it guaranteed the full application of the institute, but also facilitated the execution of international arbitral awards in Brazil – another good practice brought by it since arbitration can be seen a clear movement toward the relaxation of the case overload that the Brazilian Judiciary Power is currently subjected to. Thus, there is a need to closely analyze the new structure set out by Law No. 9.703/96 so that one may understand the basic issues regarding arbitration in Brazil, what is subsequently exposed.

4. THE STRUCTURE OF ARBITRATION IN ACCORDANCE TO LAW NO. 9.307/96

Law No. 9.307/96 is divided in seven chapters and 44 articles, and is not part of the Code of Civil Procedure of Brazil. In accordance to Carlos Alberto Carmona it would be preferable that the law had followed the standards of incorporation in the legal system present in countries like Italy and France, which had inserted the institute within their Civil Procedure Codes, avoiding the displacement of procedural principals in accessory laws.³⁴

On the other hand, the fact the Law No. 9.307/96 does not only regulates procedural rules, the choice of the legislator in setting the

32 PINTO, op. cit, p.29.

33 BRAGA, Rodrigo Bernardes. *Teoria e Prática da Arbitragem*. Belo Horizonte: Del Rey, 2009, p. 56.

34 CARMONA, op. cit, p.14.

rules apart from the Code of Civil Procedure, left room for a better and broader approach in order to overcome previous obstacles. In those measures adopted it is included the revocation of conflicting articles from the Civil Code and the previous arbitration regulations, which have held back the full application of the institute in the Brazilian context.

Notwithstanding, it is imperative to understand that national law will always have an impact in the exercise of arbitration. It is to be noted that, under sovereignty, it is the State's prerogative to enforce the law, and, as a consequence, it is the same State that shall recognize the international arbitral award and provide a legal environment to execute such award, if not spontaneously fulfilled.

Not only in such cases where the foreign award needs to be executed in Brazil, the 'Arbitration Convention' also has to be recognized (if no restraints are found³⁵) by the judicial system whenever prearranged, each and every time a party tries to argue its non-applicability so as to use the judiciary system of a State. After all, previous legislations which have kept arbitration in Brazil much of problem than a respectful institute to solve disputes, despite of recognizing arbitration from time to time, regarding its effects, they were repeatedly overruled by the State-judges bringing the competence back to the jurisdiction of the State.

Moreover, the judiciary may be currently used as well in order to reinforce the choice for arbitration made by the parties. That is to say, if any of the parties expresses resistance to follow through with the arbitration agreement, the new law foresees a fast and efficient way to enforce it, as it now has a "mandatory and binding character, obliging the parties to institute the arbitration"³⁶, which may be executed by the State to establish the arbitration agreement at once.

Thus, the new legislation corrected the legal flaws of the previous ones by establishing the 'Arbitral Convention', which consists of an 'Arbitration Clause' or an 'Arbitration Agreement'. In other words, in the current Brazilian Legal System, very much alike the French Legal System, the arbitration convention is bipartite, understanding the institute as divided in an 'Agreement' and in a 'Clause'.³⁷

35 Law No. 9.307/96 precludes certain issues to be subject of arbitration. The issues that are of exclusive competence of the State are questions regarding State matters, personal family rights (especially involving minors), and any other issues that are not strictly of patrimonial matter. In Carlos Alberto Carmona words: "[i]n general, are not within the available right questions relating to family law - and in particular the status of persons (membership, paternal power, marriage, food) - those relating to the right of succession, those that aim at things out of the trade, the natural obligations, relating to criminal law, among many others, since these matters are all outside the boundaries that can act freedom of choice of contenders" (CARMONA, op. cit, p. 56).

36 MUNIZ, op. cit, p.88.

37 GUERRERO, Luis Fernando, *Convenção de arbitragem e processo arbitral*. São Paulo:

An ‘Arbitral Agreement’ may be understood as the one where the parties “obliged themselves to utilize the [arbitration] means for conflict resolution” in a formal contract.³⁸ The Law in question defines ‘Arbitral Agreement’ as it follows:

Article 9. The arbitral agreement is a convention through which the parties submit its quarrels to the arbitration of one or more people, being it judicial or extrajudicial. §1º The judicial arbitral agreement shall be concluded by term in the records before the Court or Tribunal where the suit is being processed. §2º The extrajudicial arbitral agreement shall be celebrated in private by writing, signed by two witnesses, or by public act.³⁹

However, it should be noted that the agreement may be signed either in an ongoing quarrel⁴⁰ or previously to a dispute.⁴¹ On this matter Luís Fernando Guerreiro clearly explains that:

[t]he arbitration agreement is the way to institute the arbitration traditionally utilized when the dispute already exists, which is, existing the dispute between the parties they can define the arbitration as a form of solution. Nothing prevents, however, that before the dispute arises, but during the legal relationship between the parties, they sign an arbitration agreement foreseeing issues that shall be dealt through the means of arbitration, even though such situation is not common.⁴²

On the other hand, the ‘Arbitration Clause’ is a mere clause of a contract, which establishes the choice of dispute resolution by

Atlas, 2009, p. 6.

38 MUNIZ, *op. cit.*, p. 85.

39 BRASIL. Lei da Arbitragem – Lei Federal 9.307. Brasília: Senado Federal, 1996. Art. 9.

40 For parties reviewing contracts already in force, this possibility can serve to better commercial relations. According to Carlos Alberto Carmona, in case of late inclusion of the arbitration clause, such clause “shall be agreed through the exchange of correspondence, telegrams, telex, or even facsimiles that report to a legal business, foreseen the solution to eventual and future disputes through arbitration”(CARMONA, *op. cit.*, p. 17).

41 BRAGA, *op. cit.*, p. 49.

42 GUERRERO, *op. cit.*, p. 7-8.

the parties in the case of a misunderstanding.⁴³ In other words, the ‘Arbitration Clause’ is the agreement regarding future disputes, where the parties agree to undertake any disputes arisen from the contract to arbitration, and they do so by inserting a clause to the contract. Luís Fernando Guerreiro elucidates this issue:

[...] the arbitration clause is typically inserted in legal agreements between parties and, because of that, it is characterized as the convention of arbitration prior to the dispute. It is foreseen at the moment that the parties sign the contract which its enforcement is expected to happen without any setbacks, being latent the clause until the occurrence of a dispute to be solved.⁴⁴

It should be noted that the Brazilian legal system had never *formally* recognized nor inserted the ‘Arbitration Clause’ until the advent of Law No. 9.307/96, which brought the following arrangement:

Article 4. The arbitration clause is a convention through which the parties in a contract agree to submit to arbitration the disputes that may surface, related to such contract. §1º The arbitration clause must be stipulated in writing, being it included within the contract or in an separate document which refer to it. §2º In the adhesion contracts, the arbitration clause shall only have effect if the party takes the initiative to institute arbitration or if the party agrees, expressly, to its institution, provided that is in writing in the attached document or in bold, with the signature or acknowledgment especially to this clause.⁴⁵

As a consequence, currently, either if the arbitration is foreseen in a “mere” clause within a contract or if a full arbitral settlement is properly established, the State’s participation in the private matter limits itself to the execution of the ‘Arbitral Convention’ or to compel the resistant party to the arbitral procedure whenever an ‘Arbitration Agreement’ has been established.

43 It should be noted that both of them “includes the choice of norms that shall govern the arbitral tribunal, the definition of the conflict and the choice of arbitrators” (MUNIZ, op. cit, p. 85).

44 GUERRERO, op. cit, p. 6-7.

45 BRASIL. Lei da Arbitragem – Lei Federal 9.307. Brasília: Senado Federal, 1996. Art. 4.

Considering that both options are prescribed by Law No. 9.307/96, it is deemed important to draw the similitudes and differences between the ‘Arbitration Clause’ and the ‘Arbitration Agreement’, in order to make it easier for one to consider while drafting or analyzing the arbitral convention. Hence, it should be stated both clauses are similar as they (a) need to be in writing; (b) attain to general rules of contract validity; (c) are independent from the contract where they are inserted in; (d) enable the person of the arbitrator the power to adjudge regarding the validity and enforceability of itself and the contract where they are inserted or are part of; and (e) refrain the State intervention forcing the parties to resolve the matters through arbitration.⁴⁶

On the other hand, the differences between them encompass relevant facts. The first, would be the mandatory formal aspect in the case of the ‘Arbitration Agreement’, which is the indispensability of nominating, in writing, the arbitrators, parties and dispute matters – as Article 10 prescribes – and the requirement of two signing witnesses; whether on regard of the ‘Arbitration Clause’, no extraordinary requisites are necessary, being sufficient its establishment in one clause within a contract, in a separate document, in the duration of the contract or after its term.

Another great difference, according to Tânia Lobo Muniz, is the time aspect, as she explains:

*[w]hilst the ‘Arbitration Clause’ is conditional, generic and a future one, creating an obligational chain, it is established by the will of the parties by signing the agreement. Such agreement aims to resolve an undefined number of disputes. The ‘Arbitration Agreement’ is definite, specific and a present one, aiming to resolve disputes already existent and defined, through the institution of the arbitral court.*⁴⁷

In that sense it is possible to infer that even though differences are evident regarding the clause and the agreement, Law No. 9307/96 properly kept the jurisdiction of the State excluded, “proportionating more legal certainty, and consequently more development for the utilization of the arbitral via in Brazil”.⁴⁸ Noting the existence of both possibilities and its punctual changes to the country’s dispute solution mechanism, it is also necessary to address the phases and requisites that arbitration in Brazil encompasses.

46 CARMONA, op. cit, p.101-107.

47 MUNIZ, op. cit, p.97.

48 MUNIZ, op. cit, p.97.

5. THE PHASES OF ARBITRATION IN BRAZIL

In order to set out significant parameters for perfectly adopting the institute, the arbitral procedure in Brazil consists in two phases: the first known as the contractual phase, i.e., the establishment of an ‘Arbitration Agreement’ or the drafting of an ‘Arbitration Clause’; and the second called the execution phase, where the arbitral procedure *per se* takes place.⁴⁹ Brazilian legislation foresees these two stages of arbitration in Article 3 of the Law No. 9307/96, establishing that the parties may submit its disputes to arbitration (initiating the second step) whenever they have convened to do so through either of those clauses.⁵⁰

The first requisite that must be present in the *contractual phase* is the willingness of the parties to freely agree to the clause or to the agreement. In other words, Law No. 9.307/96 has established that arbitration is once contracted *if* agreed by the parties. However, in order for the parties to contract a legal ‘Arbitral Agreement’ or agree to an ‘Arbitration Clause’, it is a must that each contracting individual is considered capable of exercising its civil rights in accordance to the laws where they permanently live, due to the *lex domicilii* rule. The capacity of a person within Brazil falls under the laws and regulations of one’s residency, a known technique of Private International Law that may be seen as the most appropriate one regarding capacity issues.⁵¹

Not only that, Brazilian law expressly authorizes the parties to freely establish the clauses that will govern such choice in Article 2 of Law No. 9.307/96.⁵² That is to say that the parties may choose not only on what grounds the arbitrators will be chosen, but also the law that the arbitrator shall apply in case of a dispute.⁵³ In this venue, it channels special importance to the parties’ autonomy, being the observance of the ‘Autonomy at Will Principle’ imperative for this phase. According to Irineu Strenger, such principle corresponds to

[...] the option given to individuals to exercise their will, given the choice and determination of applicable law and certain legal relations in international relations, deriving from the confidence that the international community gives

49 Ibidem, p.99.

50 BRASIL. Lei da Arbitragem – Lei Federal 9.307. Brasília: Senado Federal, 1996. Art. 3.

51 Cf. UNICITRAL. Lei Modelo da UNCITRAL sobre Arbitragem Comercial Internacional. 1985. Art. 28(2); BRASIL. Lei de Introdução as Normas do Direito Brasileiro – Decreto 4.657. Brasília: Senado Federal, 1942. Art. 7; MERCOSUL. Protocolo de Buenos Aires sobre Arbitragem Comercial Internacional. 1998. Art. 7(1).

52 BRASIL. Lei da Arbitragem – Lei Federal 9.307. Brasília: Senado Federal, 1996.. Art. 2(§1).

53 MARCO, op. cit, p.27.

*to the individual in the interest of society, and being exercised within the state boundaries.*⁵⁴

Such autonomy given is broad and intends to repel doubt regarding the choices. As Rodrigo Bernardes Braga explains, “the Brazilian arbitration law allows the use of national rules, non-national rules, general principals of law, uses and customs, and international rules of commerce for resolving the dispute”.⁵⁵ Therefore, the attorney points out that such broadening approach could bring the parties to opt, even, for a set of customary rules arising from international trade over the years (*lex mercatoria*)⁵⁶, a practice whose “origin goes back in the time of the great overseas conquests, based on the commerce polices of goods exchange performed between the civilizations”.⁵⁷

Actually, this is one of the few possibilities for one to choose the law that will govern a dispute in Brazil, as in regular contracts not foreseeing arbitration it is not deemed possible⁵⁸ and the other possibility is only valid within commercial arbitrations among parties belonging to Mercosur.^{59,60} The only limitation it may encounter is Brazil’s Public Order, National Sovereignty or Local Customs as stipulated by the ‘Introductory Rules of Brazilian Law Code’ and Law No. 9.307/96, which shall be followed by the Brazilian judiciary whenever intending

54 STRENGER, op. cit, p. 114.

55 BRAGA, op. cit, p.17.

56 Such practice has started whilst the great commerce fairs were booming in England. It indicated that the close community of businesspeople had already prepared an arbitration tribunal within the fairs to solve eventual disputes among the commerce owners, stating a clear sign that such disputes “could not be solved under the light of the English laws”. As a conclusion, in virtue of such practice, the domestic law gave space to the application of other rules, external norms, exception granted to the international commerce within national borders (BRAGA, op. cit, p. 19).

57 Ibidem, p.17.

58 Art. 9 of the Introductory Norms of Brazilian Law foresees that the law applicable to a dispute will depend on the locus regit actum technique, that is, to the place where the contract has been signed – except in labor-related contracts (BRASIL. Lei de Introdução as Normas do Direito Brasileiro – Decreto 4.657. Brasília: Senado Federal, 1942. Art. 9).

59 Art. 10 of Buenos Aires Protocol (internalized by Brazil under Decree No. 4.719/03, thus, being it legally applicable throughout Brazilian territory) allows the parties to ‘chose the applicable law to their disputes based on private international law and its principles, or in the commercial arbitration law’ (MERCOSUL. Protocolo de Buenos Aires sobre Arbitragem Comercial Internacional. 1998. Art. 10).

60 Note that the Interamerican Convention of Applicable Law to International Contracts, erected in 1994 under the auspices of the Organization of American States – OAS, and which foresees the ‘Autonomy at Will’ principle in Art. 7, although signed by Brazil, is not yet into force within its territory as it was not yet promulgated by the Brazilian president (OEA. Convenção Interamericana sobre Direito Aplicável aos Contratos Internacionais. 1994. Art. 7).

to recognize an arbitral award⁶¹, i.e., when attributing efficacy to it.⁶² After all, “in case of any qualification conflict between an imperative system and an elective system on a certain legal matter, the issue would be outside the frame of autonomy, as it only becomes effective if it could be [locally] enforced”.⁶³

Thus, this restriction regards “the impossibility of affronting state rules, perfectly emanated from the Legislative Power and that prescribe for the maintenance of the Democratic State of Law”.⁶⁴ Nonetheless, if the foreign arbitral award is not intended to be enforced in Brazil, there is no need for observing such rules, as the validity of the chosen law rests under the auspices of the abovementioned principle – and not in the statutory norms and customary rules of a given legal system.

Another issue that is stipulated in this phase is the choice of the arbitrators by the parties. It should be noted that in the arbitral procedure, the arbitrator is the most important figure since it is a third party to the dispute, neutral, apart from the conflict, to whom it is trusted the solution for the problem.⁶⁵ In consonance with the words of Article 13 of the Law No. 9.307/96 the arbitrator can be “any person capable and which has the trust of the parties”⁶⁶, and are appointed by the ones in disagreement. In this venue, Cristina Schwansee Romano summarizes:

61 It should be stated that arbitral awards are only forcible in Brazil with the Brazilian judiciary authorization, which shall be granted by the ‘Superior Tribunal de Justiça’ (the Brazilian Superior Court of Justice), in accordance to the the Constitutional Amendment no. 45 of 2004, which removed the attribution to recognize arbitral awards from the Federal Supreme Court. Besides, it should be stressed that because of Law No. 9.307/96, the procedure to confirm the awards has changed. Before there was a ‘dual procedure’ according to which the award should be sanctioned by the judiciary power of its home country (i.e. country that delivered the arbitral award), and then by the Brazilian courts, causing enormous trouble to the application of arbitration in Brazil, as some nations did not see the confirmation by their judiciary power needed what consequently led to the non-recognition of the foreign awards by Brazilian courts. Nowadays, in accordance to Law No. 9.307/96, there is no need for the award to be previously recognized by the country where the arbitration procedure has taken place (MARCO, op. cit, p. 28; SOARES, Guido Fernando Silva. O Supremo Tribunal Federal e as arbitragens comerciais internacionais: de lege ferenda. Revista dos Tribunais. São Paulo, a.78., v. 642, pp. 38-71, abr. 1989, p. 65; BRASIL. Lei da Arbitragem – Lei Federal 9.307. Brasília: Senado Federal, 1996. Arts. 34 through 37).

62 BRASIL. Lei de Introdução as Normas do Direito Brasileiro – Decreto 4.657. Brasília: Senado Federal, 1942. Art. 17; BRASIL. Lei da Arbitragem – Lei Federal 9.307. Brasília: Senado Federal, 1996. Art. 2(§1) and 39(I)(II).

63 STRENGER, op. cit, p. 114.

64 AZEVEDO, Pedro Pontes. A Lex Mercatória e a sua aplicação no ordenamento jurídico brasileiro. Revista Prima Facie. João Pessoa, a. 5, n. 9, pp. 93-105, jul./dez. 2006, p. 100.

65 PINTO, op. cit, p. 92.

66 BRASIL. Lei da Arbitragem – Lei Federal 9.307. Brasília: Senado Federal, 1996. Art. 13.

[a]n arbitrator is any capable person who has the trust of both parties can be an arbitrator. The choice of the arbitrator is made by the parties, or by the procedure stipulated by them. The selection of arbitrators must result in an odd number. If the parties appoint an even number of arbitrators, the selected arbitrators will appoint one more arbitrator.⁶⁷

Besides such important issues, there are other imperative requisites that are specific to each type of the arbitration convention. Regarding the ‘Arbitration Clause’, it is essential that it stipulated in writing, being it wither inserted within the contract or in a different document related to the main agreement.⁶⁸ In the case of an ‘Arbitration Agreement’, there are other indispensable elements that must be present in order for it to be considered valid.

In accordance to Article 10 of the Law No. 9.307/96, as prescribed by Cristina Schwansee Romano, the requisites include:

(1) the name, profession, marital status and domicile of the parties; (2) the name, profession and domicile of the arbitrator(s), as the case may be, the particulars of the entity to which the parties have delegated the appointment of the arbitrators; (3) the matter referred to arbitration; (4) the place where the arbitration award will be issued. [Not only that, the] arbitration agreement may also include: (1) the place where arbitration is to be conducted; (2) any authorization for the arbitrator(s) to decide on equity; (3) the deadline for submission of an arbitration award; (4) the citation of the laws or statutes applicable to the arbitration; (5) the declaration of liability for payment of arbitration fees and charges; and (6) the setting of arbitration fees.⁶⁹

On the requisite regarding the authorization for the arbitrator to decide on equity, that is, the possibility of the arbitrators to judge based on legal principles that supplement strict rules or norms of law, it should be noted that it does not allow arbitrators to abandon

67 ROMANO, Cristina Schwansee. The 1996 Brazilian Commercial Arbitration Law. Annual Survey of International & Comparative Law. San Francisco, v. 5, n.1, pp. 27-47, 1999, p. 36.

68 BRASIL. Lei da Arbitragem – Lei Federal 9.307. Brasília: Senado Federal, 1996. Art. 4(§1).

69 ROMANO, op. cit, 38.

the observance of legal norms of law.⁷⁰ Furthermore, on the matter of deadline fixation, Carmona brings an important guideline stating that it is “convenient” that the parties to establish a deadline for the issuing of the arbitral award. If the parties do not fixate the deadline, Article 23 of Law No. 9.307/96 prescribes that such deadline is to be no longer than six months.⁷¹

Regarding the setting of fees, it is understood that an arbitrator is to be rewarded monetarily for its services, and since it is optional to foresee this requisite, in case of non-definition of such fees the arbitrator could seek for payment through the State’s competent legal court. Nonetheless once such fees are properly established in the arbitration agreement, they are to be considered an extrajudicial executable title.⁷²

After such agreement or clause is set, the parties may force its application whenever discrepancies to what has been established in the contract arise. In such scenario, instead of seeking justice through the judiciary of the state, one may invoke arbitration, and call upon the other party to execute either the agreement or the clause, initiating the arbitration *per se* – the second stage of the arbitration.

The arbitration is deemed initiated by the acceptance of the appointed arbitrator(s) of the proceedings. Then, the arbitrator(s) will analyze all the information and requisites prescribed in the clause or in the agreement in order to verify any inconsistency so that the missing provisions may be set out in an additional term, agreed upon all parties, in accordance to Law No. 9.307/96, Article 19 and its paragraphs.⁷³

The procedure just ends when the arbitrator(s) release an arbitral award, which shall be express and in writing⁷⁴, containing a report summarizing the dispute, the legal reasoning explaining the outcome, and the decision itself along with its compliance methods.⁷⁵ It will be issued either on a specific date set by the parties or in six months from the date the arbitration *per se* has initiated – being it extendable by the arbitrator(s) will.⁷⁶ Besides, whenever the arbitration consists of more than just one arbitrator and there are divergent positions, the opposing arbitrators may also deliver their own separate awards within such period, even though the decision of the arbitral tribunal president is the

70 CARMONA, op. cit, p.20.

71 Ibidem, p.21

72 Ibidem, p. 21-22.

73 BRASIL. Lei da Arbitragem – Lei Federal 9.307. Brasília: Senado Federal, 1996. Art. 19(§1)(§2).

74 BRASIL. Lei da Arbitragem – Lei Federal 9.307. Brasília: Senado Federal, 1996. Art. 24.

75 BRASIL. Lei da Arbitragem – Lei Federal 9.307. Brasília: Senado Federal, 1996. Art. 26.

76 BRASIL. Lei da Arbitragem – Lei Federal 9.307. Brasília: Senado Federal, 1996. Art. 23(§1)(§2).

one prevailing if there is no majority award.⁷⁷

Such award is, thus, final. However, there is a possibility to appeal the decision within 05 (five) days of the notification of the award, if no other date has been stipulated by the parties.⁷⁸ The appeal prescribed by Law No. 9.307/96 allows the interested party to request the arbitrator or the tribunal to correct any material inconsistency of the award, or even to clarify any obscurity, doubt, contradiction or eventual omission of the award.⁷⁹ Such appeal should normally be delivered in no more than 10 days.⁸⁰

After that, the arbitral award becomes an enforceable executive title.⁸¹ As expressed above, under the Brazilian Legal System, the award delivered by foreign arbitral tribunals are deemed valid, only lacking efficacy in the Brazilian territory, which shall be granted by the judiciary. Yet, regarding the arbitral awards produced in national territory, there is no need for approvals, confirmations or sanctions in view of the Law No. 9.307/96, as the awards nationally delivered currently have the same status as sentences, rulings or court orders delivered by the Brazilian Judiciary Power.⁸²

6. CONCLUDING REMARKS

It is reasonable to conclude that much have changed in the arbitration scenario in Brazil since the enactment of Law No. 9.307/96. Such movement acts in consonance with the international tendency of law renovation regarding the current stage arbitration worldwide. Now it is safe to say that arbitration became a reliable tool for the development of legal affairs in national territory.

The fact that important scholars and jurists have dedicated their efforts to study the development of arbitration worldwide reflected in abundant material for the formulation of the bill that based the issuing of the new law. After all, the retrospect of arbitration under the Brazilian history, and especially the multiple flaws the previous law presented, had arbitration held back within Brazil. And due to the profound studies made capturing the loopholes of the previous laws and preparing the legislators with a solid base for the change, it became evident that a series of flaws present in the previous legislation was left behind with

77 BRASIL. Lei da Arbitragem – Lei Federal 9.307. Brasília: Senado Federal, 1996. Art. 24(§1)(§2).

78 BRASIL. Lei da Arbitragem – Lei Federal 9.307. Brasília: Senado Federal, 1996. Art. 30.

79 Ibidem.

80 Ibidem.

81 BRASIL. Novo Código de Processo Civil – Lei Federal 13.105. Brasília: Senado Federal, 2015. Art. 515(VII).

82 CARMONA, op. cit, p. 346.

the new legislation in force.

Key aspects such of Law No. 9.307/96 were truly innovative within the national legal framework. First, the differentiation of an ‘Arbitration Clause’ and ‘Arbitration Agreement’ was very important for the consolidation of arbitral conventions in Brazil, leaving both, clause and agreement, independent from each other, but individually enforceable. That is because they both represent the main aspect of arbitration, which is the acceptance of the party to this alternative method of dispute resolution – the “consummation” of arbitration. On the same token, regarding the matter of the arbitration clause, the minimum requirements that a party should observe in order to avoid state intervention, are a guarantee that arbitration, whenever chosen as the method for conflict resolution by the parties, will take place.

Moreover, the fact that the parties under Law No. 9.307/96 enjoy the autonomy of will to choose the applicable substantive law that they understand fit to their reality is another positive aspect introduced, as this was the first step Brazil ever took towards the acceptance of the ‘Autonomy at Will Principle’. Even though Brazil has not internalized yet the OAS Interamerican Convention of Applicable Law to International Contracts, it would not be much forceful to say the new law encouraged the acceptance of Buenos Aires Protocol signed under the auspices of Mercosur, which predicts the same principle.

Furthermore, by establishing the main aspects of the award, the Brazilian law enacted in 1996 made it clear that its intention was to make arbitration a reliable way of solving disputes in Brazil. By holding such aspects, the (national) arbitral award becomes a valid executive title, which is to be enforced between the parties, based on the territorial approach. And on the matter of foreign ones, Law No. 9.307/96 also positively innovated as it does not prescribe for the a dual procedure system anymore, just requiring the alien award to be confirmed by the competent Brazilian court, which, after the 2004 constitutional alterations, is the Superior Court of Justice, making it not only more attractive to the interested parties, but also more coherent and similar to other national rules worldwide.

As a result, this paper meant to promote arbitration as suitable form of resolving disputes in Brazil, demonstrating the great advances granted by the enactment of Law No. 9.307/96 in order to preserve the right of parties to seek justice more rapidly, apart from the power given to the State to solve potential conflicts among citizens within its territory, even though not intending to replace it.

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THE MARRAKESH TREATY RATIFICATION IN BRAZIL: IMMEDIATE EFFECTS

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Abstract: This paper will present the ratification process of the Marrakesh Treaty in Brazil, its place within the legal system and the likely effects on copyright limitations. We structure the paper in two parts. First we show how the Brazilian Constitution governs the reception of human rights international treaties and conventions and expose their effects throughout the system. We follow by the presentation of the Marrakesh Treaty's ratification process in Brazil, concentrating on the justifications and results of the legislative procedures. Finally, we consider the likely and possible effects on public policy, legal change and the judicial interpretation of the limitations. We choose to use primary official sources to present the questions for analyses. Our method of choice is inductive, since we extensively use legislative records to elaborate on the political processes and legal rationales behind it.

Keywords: Fundamental Rights – Marrakesh Treaty – Copyright - Brazil

1. INTRODUCTION

The Marrakesh Treaty, first to establish mandatory limitations to copyright, enters into force on September 30, 2016, three months after the deposit of the instruments of ratification or accession by 20 eligible countries, completed in June 2016.¹ Brazil, which was one of the leading proponent and negotiators of this Treaty at the World Intellectual Property Organization (WIPO), deposited its ratification on December 11, 2015, following a year internal legislative process.

The Treaty's main goal is to create a set of mandatory limitations and exceptions for the benefit of the blind, visually impaired, and otherwise print disabled (VIPs). It basically requires the States to introduce a "standard set of limitations and exceptions to copyright rules in order to permit reproduction, distribution and making available of published works in formats designed to be accessible to VIPs, and to permit exchange of these works across borders by organizations that serve those beneficiaries."²

Relevant and interesting on the process of its ratification in Brazil is the fact that it has been internalized as a Constitutional Amendment, in line with the contemporary provisions of the Federal Constitution. As a Constitutional Amendment, it will affect directly and immediately the interpretation and application of any infra-constitutional legislation. It will specifically influence copyright legislation, especially regarding the interpretation of its limitations.

Before we proceed to verify the legislative process of ratification of the Marrakesh Treaty in Brazil, which will be done on the second part of this work, we will first face the question of the role played within the national legal system of the international human rights treaties, and, at the end, we indicate the main effects over the legal system regarding both cultural rights and copyright.

2. INTERNATIONAL TREATIES IN THE BRAZILIAN LEGAL SYSTEM

The Constitutional Amendment n. 45 of December 2004 (EC 45/04), in order to settle the doctrinal and jurisprudential debate about the hierarchy of international human rights treaties in the Brazilian legal system³, among other changes to the Constitution, added a 3rd

1 WORLD INTELLECTUAL PROPERTY ORGANIZATION. News: Canada's Accession to Marrakesh Treaty Brings Treaty into Force. Available at http://www.wipo.int/pressroom/en/articles/2016/article_0007.html.

2 WORLD INTELLECTUAL PROPERTY ORGANIZATION. Summary of the Marrakesh Treaty. Available at http://www.wipo.int/treaties/en/ip/marrakesh/summary_marrakesh.html.

3 CANOTILHO, J. J. Gomes; MENDES, Gilmar Ferreira; SARLET, Ingo Wolfgang; STRECK, Lenio Luiz [et al.]. *Comentários à Constituição do Brasil*. São Paulo: Saraiva/Almedina, 2013,

paragraph to art 5 of the Brazilian Federal Constitution⁴. It established the procedures for granting these treaties the status of fundamental constitutional rights. Since then, are equivalent to constitutional amendments those international human rights treaties and conventions internalized in accordance with the following procedure:

(1) Signing of the Treaty by the President (Article 84, VIII of the Constitution)⁵;

(2) Approval by the House of Representatives and the Senate, in two rounds, in each House, by three-fifths of the votes of all its members, with the enactment of the corresponding Legislative Decree (Art. 5, § 3, and art. 49, I⁶ of the Constitution);

(3) Ratification by the President; and finally,

(4) Promulgation and publication of the Treaty via Presidential Decree.

It turns out that, according to doctrinal understanding, that § 3 of Article 5 only adds formal effects to these treaties, since art. 5, § 2⁷ of the Federal

p. 519.

4 BRAZIL.FEDERAL CONSTITUTION OF 1988. Article 5: All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: § 3º: International human rights treaties and conventions which are approved in each House of the National Congress, in two rounds of voting, by three fifths of the votes of the respective members shall be equivalent to constitutional amendments. Available at: http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf.

5 BRAZIL.FEDERAL CONSTITUTION OF 1988. Article 84. The President of the Republic shall have the exclusive power to: VIII – conclude international treaties, conventions and acts, and referendum of the National Congress. Available at: http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf.

6 BRAZIL.FEDERAL CONSTITUTION OF 1988. Article 49. It is exclusively the competence of the National Congress: (I) to decide conclusively on international treaties, agreements or acts which result in charges or commitments that go against the national property. Available at: http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf.

7 BRAZIL.FEDERAL CONSTITUTION OF 1988. Art. 5º § 2º The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party. Available at: <http://www.stf.jus.br/repositorio/cms/portalStfInternacional/>

Constitution already provides for what is known as the “block of constitutionality”⁸ and, therefore, one cannot consider that the constitutional fundamental rights and guarantees are only those exhaustively listed under Title II of the Constitution.⁹ And, from this perspective, international human rights treaties ratified by Brazil are materially constitutional regardless of the quorum for its approval and, since fundamental rights are corollaries of the very dignity of the person, it “cannot be left to the convenience the ordinary legislator.”¹⁰

In that being so, the Constitution already assigns to human rights treaties materially constitutional status and, as a consequence, bring into play art 5, § 1¹¹, that guarantees to all fundamental rights “immediate applicability at the national and international levels, from the act of ratification, eliminating the need for any legislative intermediation”.¹² Having that in mind, the qualified quorum required by art. 5, § 3 of only adds a “formal constitutional stature to those treaties, providing for the ‘formal constitutionalisation’ of human rights treaties in the domestic legal framework.”¹³ Such understanding is supported by four main arguments:

portalStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf.

8 On this matter Justice Celso de Melo states that: “International Treaties and Conventions on Human Rights assume, in the internal legal order, Constitutional qualification and must be accentuated that International Treaties and Conventions on Human Rights ratified before the Constitutional Amendment 45/04 are materially constitutional, composing, under this perspective, the conceptual notion of block of constitutionality.” BRAZILIAN SUPREME COURT. Recurso Extraordinário n. 466.343/SP, 2008. Opinion of Justice Celso de Melo. p. 129. Available at <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=595444>.

9 CANOTILHO, J. J. Gomes; MENDES, Gilmar Ferreira; SARLET, Ingo Wolfgang; STRECK, Lenio Luiz [et al.]. Comentários à Constituição do Brasil. São Paulo: Saraiva/Almedina, 2013, pp. 513-523.

10 MENDES, Gilmar Ferreira; BRANCO, Paulo Gustavo Gonet. Curso de Direito Constitucional. 7º ed., São Paulo: Saraiva, 2012, pg. 195.

11 BRAZIL. FEDERAL CONSTITUTION OF 1988. Art. 5º § The provisions defining fundamental rights and guarantees are immediately applicable. Available at: http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf.

12 BRAZIL. SUPREME COURT. Recurso Extraordinário n. 466.343/SP, 2008. Opinion of Justice Celso de Melo. p. 136. Available at <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=595444>.

13 BRAZIL. SUPREME COURT. Recurso Extraordinário n. 466.343/SP, 2008. Opinion of Justice Celso de Melo. p. 136. Available at <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=595444>.

(1) The systematic interpretation of the Constitution in order to engage the §§ 2 and 3 of art. 5, since the latter has not revoked the first, but, in reverse, should be interpreted in the light of the constitutional system;

(2) The logic and rationality of materiality that should guide the hermeneutics of human rights;

(3) The need to avoid interpretations that point to acute anachronisms of the legal order; and

(4) The general theory of reception of international human rights treaties within the Brazilian system.¹⁴

Until recently, however, the ratified international treaties were considered by the Supreme Court to have the same hierarchical level of any ordinary federal legislation. As a consequence human rights treaties did not have primacy over infra-constitutional legislation¹⁵ and could even be revoked by them. It did not seem plausible to attribute to such treaties status of ordinary federal law, given that, in a democratic state, whose founding value is the prevalence of human dignity, the material guarantees expressed in the legislation shall prevail over formal ones, so that “the hierarchy of values must match a hierarchy of norms, and not the other way around. That is to say that material preponderance of a legal right - as is the case of fundamental rights - shall condition the formalities, and not be conditioned by it.”¹⁶ Nevertheless, the Supreme Court position with respect to the status of international human rights treaties was reinforced in several cases¹⁷, even after the new Constitution

14 PIOVESAN, Flávia. *Direitos Humanos e o Direito Constitucional Internacional*. 7º ed., São Paulo: Saraiva, 2006, p. 73.

15 Until this case the prevailing understanding was that such treaties were akin to ordinary federal legislation. This position is based on the paradigmatic case at the Brazilian Supreme Court: *Recurso Extraordinário n. 80.004*, decided in 1977. Available at <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=175365>.

16 BRAZIL. SUPREME COURT. *Recurso Extraordinário n. 466.343/SP*, 2008. Opinion of Justice Celso de Melo. p. 136. Available at <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=595444>.

17 Until the outcome of *Recurso Extraordinário n. 466.343/SP*, 2008. Available at <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=595444>. Which reversed the standard position, other Supreme Court decisions maintained the position held by *Recurso Extraordinário 80.004*, 1977. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=175365>. Such as *Habeas Corpus n. 72.131/RJ*, 1995. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=73573>; *Medida Cautelar na Ação Direta de Inconstitucionalidade n. 1.480/DF*, 1997. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=73573>.

was enacted, in 1988.

This position was reviewed in the face of a new case filed in the Supreme Court in 2008. The decision on the appeal n. 466.343 was led by the Judges Gilmar Mendes - rapporteur - and Celso de Mello, and reversed the understanding previously held by the Court, now establishing that international human rights treaties shall have a supra-legal status within the national legal system, in which it is situated under the Constitutional norms but above all infra-constitutional legislation. It was a tight decision, with five votes for the supra-legal status and four in favor of a constitutional status for such treaties.¹⁸

The equivalent position of international human rights treaties to ordinary legislation was gradually abandoned by the Court, while its general direction and perspective turned mainly to protect the human being as such above all other values. The understanding that international treaties and conventions on human rights play a key role in consolidating the humanitarian rights and guarantees was essential to overcome the prior position by the Court, since to attribute to such treaties the same rank as ordinary federal legislation would in fact reduce the level of the protection given to the persons within the legal system.

It is noteworthy to notice that there are four different theoretical proposals about the status of international human rights treaties within the national system. The first recognizes the supra-constitutional nature of these treaties. The second proposal adopts the understanding of their constitutional status. A third position considers such treaties to hold a supra-legal status, which although positioned under the Constitution, are ranked above the infra-constitutional norms. Finally, a fourth position advocates for their equivalence to federal ordinary law.

The first of these approaches defends that the international human rights treaties and conventions should hold a hierarchical value above the Constitution, possessing therefore a supra-constitutional nature. However this position confronts the most basic founding principle of the Brazilian legal system, which is the formal and material supremacy of the Federal Constitution over all other norms. Thus, the acceptance

br/paginadorpub/paginador.jsp?docTP=AC&docID=347083; Habeas Corpus n. 79.870/SP, 2000. Available: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=78179>; Habeas Corpus n. 77.053/SP, 1998. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=77075>; RecursoExtraordinário n. 206.482/SP, 2003. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=240509>; Recursoem Habeas Corpus n. 80.035/SC, 2001. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=102680>.

¹⁸ Voted for the supralegal status of the International Treaties on Human Rights the Justices Gilmar Mendes (majority opinion leader), Carlos Ayres Britto, CarménLúcia, Carlos Alberto MenezesDireito and Ricardo Lewandowski. Supporting the constitutional equivalence were Justices Celso de Mello (minority opinion leader), Cesar Peluso, Ellen Gracie and Eros Grau.

of this model would preclude the Supreme Court from exercising the constitutionality control of the international instruments and if the Constitution is the precondition of validity of all international treaties they could not supersede it.

The second proposition, which attributes constitutional status to these international instruments, is primarily based on the system opening given by § 2 of art 5 of the Constitution, prescribing their automatic inclusion within the scope of core fundamental rights and, therefore, with constitutional status.¹⁹ It is noteworthy that, in this perspective, if there is a direct conflict between a constitutional norm and the human rights treaty, the ideal hermeneutic solution would be to apply the more favorable provision to the victim, thus “domestic law and international law would be in constant interaction in the realization of the convergent and common purpose of protecting the rights and interests of human beings.”²⁰

The third theoretical suggestion assigns supra-legal status to such instruments. It makes the assertion based on the argument that that they are submitted to the Constitution and therefore cannot be on the same hierarchical level, but, because of their special content, they ought to be positioned above all other infra-constitutional laws. So, these treaties would be in an intermediary position within the Brazilian legal system and qualified as “legal diplomas superior to domestic laws in general, nonetheless subordinated to the Constitution authority”²¹, or, in other words, “the human rights treaties could not defy the supremacy of the Constitution, but would have special place within the legal system. Making them akin to ordinary legislation would underestimate its special value in the context of the system of protection of the rights of the human beings.”²²

The fourth and last of doctrinal proposals only recognizes the status of ordinary law to such international documents, and if it were to occur, there would be the possibility of a treaty or human rights convention have its effects suspended by a “simple ordinary law” enacted in the future. As explained above, it is worth emphasizing that this position has been overcome by the Supreme Court, since

19 Such understanding is valid only for Human Rights Treaties and Conventions, and are not extensive to other subject matters.

20 BRAZIL. SUPREME COURT. Recurso Extraordinário n. 466.343/SP, 2008. Opinion of Justice Gilmar Mendes. p. 37. Available at <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=595444>.

21 BRAZIL. SUPREME COURT. Recurso Extraordinário n. 466.343/SP, 2008. Opinion of Justice Celso de Melo. p. 125. Available at <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=595444>.

22 BRAZIL. SUPREME COURT. Recurso Extraordinário n. 466.343/SP, 2008. Opinion of Justice Gilmar Mendes. p. 49. Available at <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=595444>.

international treaties on human rights are forms of protection of the human beings at the international level and, therefore, when internalized by ratification in the Brazilian legal system, should be given the higher constitutional status of fundamental right, which is the internal way to protect the most valuable legal rights, related to human existence, pillars of a contemporary democratic state.

To resolve the conflict of under which paradigm the San Jose Pact and other human rights treaties should be internalized within the Brazilian legal system, two schools of thought stood out: the proposed supra-legal status, based on the vote of Min. Gilmar Mendes, who wrote the majority opinion on the case, and the proposed constitutional equivalence, defended the vote Min. Celso de Mello, responsible for the minority opinion. The Supreme Court, at the end, recognized that for being about fundamental rights and guarantees, this treaty (as well as others of the same nature) shall be hierarchically superior to the ordinary legislation, but not at the same level of the constitution, because of the procedures established by EC 45/04.

The decision of the case, in the end, was for the incompatibility of the rule establishing the arrest of an ‘unfaithful’ trustee within the Brazilian legal system as unconstitutional because, in the rapporteur’s words, Justice Gilmar Mendes, “faced with an unequivocal special character of international treaties that focus on human rights protection, it is not difficult to understand that their internalization in the legal system, through the ratification procedure of the Constitution, has the power to paralyze the legal force of any infra normative discipline that conflicts with it”²³, and goes on to conclude that “in view of the supra-legal character of these international instruments, the subsequent infra-constitutional legislation with them is in conflict also has its paralyzed effectiveness. This is what happens, for example, with art. 652 of the new Civil Code (Law n. 10.406 / 2002).”²⁴

Finally, the Federal Decree n. 678 of November 1992, incorporating the Pact of San Jose of Costa Rica, did not allow for the arrest of an ‘unfaithful’ trustee, being in conflict with art. 652 of the current Civil Code. As a result of this decision was issued the ‘Súmula’ (a binding precedent directive) n. 25 forbidding definitely the imprisonment of the unfaithful trustee based on the understanding that, in this case, freedom and human dignity are values that normatively overlap credit guarantees and property rights, paralyzing, therefore, the

23 BRAZIL. SUPREME COURT. Recurso Extraordinário n. 466.343/SP, 2008. Opinion of Justice Gilmar Mendes. p. 55. Available at <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=595444>.

24 BRAZIL. SUPREME COURT. Recurso Extraordinário n. 466.343/SP, 2008. Opinion of Justice Gilmar Mendes. p. 55. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=595444>.

legal effectiveness of ordinary legislation and turning ineffectual the provision of art 5 LXVII²⁵ of the Federal Constitution, which would exceptionally allow for the imprisonment of the ‘unfaithful’ trustee.²⁶

The combination between the Constitutional Amendment 45/04, which establishes procedures for the internalization of international human rights treaties as core constitutional rights, and the decision on the case above described, which sets as supra-legal all human rights treaties ratified before 2004, reinforce the strength of the fundamental rights within the legal system and their content is expected to spread through the entire system, affecting all legislation and relations, including copyright.

3. THE MARRAKESH TREATY AND ITS INTERNALIZATION IN BRAZIL

On January 16, 2014, it was forwarded to the Presidency a joint memoir by the Ministries of Foreign Affairs, of Culture and by the Human Rights Secretariat of the Presidency containing the justifications and exposing the need for ratification of the Marrakesh Treaty, “which has, from the political and legal perspectives, being based on the United

25 BRAZIL.FEDERAL CONSTITUTION OF 1988.Art. 5º LXVII – there shall be no civil imprisonment for indebtedness except in the case of a person responsible for voluntary and inexcusable default of alimony obligation and in the case of an unfaithful trustee. Available at: http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf.

26 It is interesting to note that during the debate, one of the issues was how the exceptions established in the Federal Constitution allowing for civil imprisonment are to be understood, since the decision ruled for its inefficacy. As pointed out: “It is clear from all the observations I have been making the international treaties and conventions play a significant leading role in terms of affirmation, consolidation and expansion of the basic rights of the human person, of which looms large for its extraordinary importance, the right not to suffer imprisonment for debt, especially if one considers that the civil prison institute for debt is being phased out under the scope of comparative law. (...) We see, then, that the Constitution has legally viable – at the ordinary law level - the possibility of the ordinary legislators, even in the face of only two exceptions provided for in the Constitution, consider the institution of this exceptional instrument of procedural coercion, indicating therefore that it is fully legitimate in the infra-constitutional level for the National Congress, so long as it deems appropriate, to restrict or even suppress the civil prison in our legal order. (...) This current constitutional model in Brazil, therefore, does not impose the common legislature the regulation of the civil prison institute, with the necessary projection and scope of the two exceptional circumstances referred to in the Constitution. (...) It is clear, therefore, that the decision-making autonomy provided, albeit in a limited way, to the common legislator by the Constitution, may be legitimately filled by the emerging normativity of international treaties on human rights, even if given, as stated in his scholarly vote, the eminent Minister GILMAR MENDES, “supralegality” status, or, with much greater reason, as some authors defend, constitutional hierarchy.” BRAZIL. SUPREME COURT. Recurso Extraordinário n. 466.343/SP, 2008. Opinion of Justice Celso de Melo. pp. 118-123. Available at <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=595444>.

Nations Convention on the Rights of Persons with Disabilities”.²⁷

It was emphasized that this treaty is meant to reduce the shortage of works distributed in accessible formats for people with visual disabilities, a problem that prevents the supportive social growth and is known as “hunger for books,” since “less than 5% of published works are available in accessible formats for the use of those people. In developing countries - where, according to the World Health Organization (WHO), home to more than 90% of the 314 million people with visual impairment - this percentage is only 1%.”²⁸

In order to facilitate the availability of works in accessible formats, the Treaty establishes two exceptions to copyright: (1) free production and distribution of works in accessible formats and (2) its cross-border exchange. According to this President message to Congress, the cross-border exchange will contribute to expand significantly the access to knowledge for the visually impaired, since it allows for the sharing of accessible formats between parties.²⁹

Finally, arguing that the Treaty aims to “promote the full realization of the rights of persons with disabilities, in line with international standards of human rights”³⁰, the Presidency suggested to Congress the ratification of the Marrakesh Treaty with status of a constitutional amendment, pursuant to Constitutional Amendment n. 45 of December 8, 2004, and along the lines of the UN Convention.

Related to the Marrakesh Treaty in terms of its content, the United Nations Convention on the Rights of People with Disabilities³¹ (UN Convention) was the first to be ratified as a constitutional amendment following the procedures established on the Constitution. And the UN Convention, on the article 30, obliges the parties to ensure access to cultural material in accessible formats, and, in this sense, establishes duties that go beyond the restricted goals of the Marrakesh Treaty, since it does not limit itself neither to printed material nor to the benefit of the visually impaired only, but includes basically all sorts of cultural expressions and disabilities. The UN Convention was the first to be submitted and ratified according to the constitutional amendment

27 BRAZIL. President Office. Message n° 344 from the President to the National Congress requesting the ratification of the Marrakesh Treaty, pp.1-2.

28 BRAZIL. President Office. Message n° 344 from the President to the National Congress requesting the ratification of the Marrakesh Treaty, pp.1-2.

29 BRAZIL. President Office. Message n° 344 from the President to the National Congress requesting the ratification of the Marrakesh Treaty, pp.1-2.

30 BRAZIL. President Office. Message n° 344 from the President to the National Congress requesting the ratification of the Marrakesh Treaty, pp.1-2.

31 UNITED NATIONS. Convention on the Rights of People with Disabilities. Available at: <http://www.un.org/disabilities/convention/conventionfull.shtml>.

process³² and will necessarily interact with the Marrakesh Treaty in promoting its goals.

On the one hand, the UN Convention provides for the higher goals of comprehensive inclusion of people with disabilities, from physical access to technological, educational, political and cultural access. On the other, the Marrakesh Treaty details the proceeding for the specific cases of printed material for the visually impaired. Furthermore, the federal legislation enacted to assure the full implementation of the UN Convention puts boundaries on IPR maximalism arguments and imposes accessible formats for all cultural products in relation to all sorts of disabilities.

Back on the Marrakesh Treaty, once in the House of Representatives, the process for its adoption took the form of Legislative Decree n. 57/2015, and included the presentation of the project in the Committees on Foreign Relations and National Defense (CRE); Persons with Disabilities (CPD); Culture (CCULT) and Constitution, Justice and Citizenship (CCJC).

On May 25, 2015, in its opinion report on the Committee on the Persons with Disabilities (CPD), the Federal Representative Mr. Aelton Freitas suggested and voted for the adoption of Legislative Decree n. 57/15, noting that the ratification implies the adherence of Brazil to the founding principles of the Convention on the Rights of people with Disabilities, which, in his words, are those of “non-discrimination; respect for the inherent human dignity; individual autonomy, including the freedom to make their own choices and for their independence; full and effective participation and inclusion in society; equal opportunities and accessibility.”³³

The report also highlights the discrimination and historical exclusion suffered by people with visual impairments and other disabilities that affect reading, due to the shortage in the production and distribution of works in accessible format, noting as well that people with disabilities are not claiming for privileges or special treatment, but “aim, in fact, that society allows them the conditions for the exercise of their citizenship rights on an equal basis with all others.”³⁴

The Treaty is one way to realize the principle of equality and

32 BRAZIL. Decree n. 6949/07. Available at: http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/decreto/d6949.htm.

33 BRAZIL. House of Representatives. Report by the Committee on Persons with Disabilities. Rapporteur Representative Aelton Freitas, pp.5-6. Available at: http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=54F81D3EBEF0552939869CD5F57E2476.proposicoesWeb1?codteor=1340006&filename=Tramitacao-PDC+57/2015.

34 BRAZIL. House of Representatives. Report by the Committee on Persons with Disabilities. Rapporteur Representative Aelton Freitas, pp.5-6. Available at: http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=54F81D3EBEF0552939869CD5F57E2476.proposicoesWeb1?codteor=1340006&filename=Tramitacao-PDC+57/2015.

to provide access to printed text and publications in accessible format, as such, it offers disabled people more opportunities in the pursuit of individual improvement and consequent inclusion in more qualified professional demands, reducing thereby the so-called “hunger for books,”³⁵ and therefore “puts an end to the heinous discrimination that keeps these people from accessing the knowledge that can contribute to improving their living conditions, as well expand their autonomy and conditions for the exercise of their right of choice on the publications they want to access.”³⁶

Once approved at the Committee on the Persons with Disabilities (CPD), the proposal moved on to be analyzed by the Committee on Culture (CCULT), where it was reported by Congressman Leo Brito on May 29, 2015. The Congressman also suggested and voted for the adoption of Marrakesh Treaty which, above all, “recognizes the right of persons with disabilities to participate in cultural life on an equal basis with others.”³⁷

He stressed the “notorious relevance of books in the dissemination of information and culture,” claiming the primary objective of the Treaty is to combat the so-called “hunger for books” caused by the lack or restriction of access to printed materials for the visually impaired, which unfairly enhances the “social and economic constraints that people with disabilities face, creating a socio-economic exclusion.”³⁸

On the report, one of the important questions raised concerns the barriers copyright laws cause in the production and distribution of works in accessible format, since the insufficiency of copyright limitations and exceptions in Brazilian Law “hinders the expansion of access to cultural materials by persons with visual impairments”, generating disparity in relation to people who do not have disabilities

35 BRAZIL. House of Representatives. Report by the Committee on Persons with Disabilities. Rapporteur Representative Aelton Freitas, pp.5-6: “there are about 285 million blind or visually impaired people around the world, and less than 10% of the published books are available in accessible format”. Available at: http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=54F81D3EBEF0552939869CD5F57E2476.proposicoesWeb1?codteor=1340006&filename=Tramitacao-PDC+57/2015.

36 BRAZIL. House of Representatives. Report by the Committee on Persons with Disabilities. Rapporteur Representative Aelton Freitas, pp.5-6. Available at: http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=54F81D3EBEF0552939869CD5F57E2476.proposicoesWeb1?codteor=1340006&filename=Tramitacao-PDC+57/2015.

37 BRAZIL. House of Representatives. Report by the Committee on Culture. Rapporteur Representative Leo de Brito, p. 4. Available at: http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=54F81D3EBEF0552939869CD5F57E2476.proposicoesWeb1?codteor=1342276&filename=Tramitacao-PDC+57/2015.

38 BRAZIL. House of Representatives. Report by the Committee on Culture. Rapporteur Representative Leo de Brito, p. 4. Available at: http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=54F81D3EBEF0552939869CD5F57E2476.proposicoesWeb1?codteor=1342276&filename=Tramitacao-PDC+57/2015.

or difficulty. Interestingly noted on the report is that in Brazil “there are only two civic institutions that make accessible formats available. Unsurprisingly all reading material available (to the visually impaired) accounted for mere 2.000 works in 2009.”³⁹

Another key point of the Treaty, as reported by on the Committee on Culture, is the trans-border exchange issue that promises to facilitate the international movement of free copies, but find obstacles on the principle of territoriality of copyright, so, under such circumstances, the “specialized agencies of different countries who share the same language must go through the same process of transforming the same work in an accessible format”⁴⁰, generating a duplication of costs and efforts in the transformation of the work.

At the end, the report states that the ratification of the treaty is a key step in improving the copyright law, as it will bring greater balance between the public and author interests, since “the rights granted to authors are not only ends in themselves but also aims to promote cultural and artistic progress of society.” It concludes by stating that “on the one hand, the Treaty contributes to the cultural development, as it enables the amplification of access to intellectual works for people who are unjustly deprived of them in the present situation. Secondly, the text of the Treaty also presents a series of norms which safeguard the rights of the authors. Its approval is, therefore, fundamental to the balance and the democratization of (the right of) access to culture.”⁴¹

The report also explicitly highlights the links between the Marrakesh Treaty and the UN Convention on the Rights of Persons with Disabilities⁴², arguing that the first is a consequence of the second since, according to article 30.3 of the UN Convention, “States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute

39 BRAZIL. House of Representatives. Report by the Committee on Culture. Rapporteur Representative Leo de Brito, p. 4. Available at: http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=54F81D3EBEF0552939869CD5F57E2476.proposicoesWeb1?codteor=1342276&filename=Tramitacao-PDC+57/2015.

40 BRAZIL. House of Representatives. Report by the Committee on Culture. Rapporteur Representative Leo de Brito, p. 5. Available at: http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=54F81D3EBEF0552939869CD5F57E2476.proposicoesWeb1?codteor=1342276&filename=Tramitacao-PDC+57/2015.

41 BRAZIL. House of Representatives. Report by the Committee on Culture. Rapporteur Representative Leo de Brito, p. 6. Available at: http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=54F81D3EBEF0552939869CD5F57E2476.proposicoesWeb1?codteor=1342276&filename=Tramitacao-PDC+57/2015.

42 BRAZIL. House of Representatives. Report by the Committee on Culture. Rapporteur Representative Leo de Brito, p. 4. Available at: http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=54F81D3EBEF0552939869CD5F57E2476.proposicoesWeb1?codteor=1342276&filename=Tramitacao-PDC+57/2015.

an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.”⁴³

The last to tackle the Treaty in the House of Representatives was the Committee on Constitution, Justice and Citizenship (CCJC). On August 18, 2015, under the Rapporteur of the Congresswoman Mrs. Soraya Santos, succinctly and without bringing about any new arguments for approval of the Treaty, proposed and voted for its constitutionality, because “the subject matter of the project does not contradict with any of the norms of our higher legal diploma”; for its legality since “(she) did not detect any breach of the general principles of law that inform the Brazilian legal system” and for the good legislative technique, since the drafting and legislative technique “received no suggestion for language change.”⁴⁴

Finally, the House of Representatives, which is composed by 513 federal representatives, as provided in the Constitution, voted the Treaty in two rounds. On the first round, on August 20, 2015, it was reached 341 votes in favor and only one against. On September 8, 2015, on the second round of voting, the Legislative Decree Bill No. 57 of 2015 was finally approved unanimously by the 452 lawmakers present.

Once in the Senate, after approval at the House of Representatives, the proposal was sent to the Committee on Foreign Relations and National Defense. The rapporteur was Mrs. Marta Suplicy, Minister of Culture as of the conclusion of the Treaty. In her report, the Senator suggested the adoption of such Treaty as Constitution Amendment, in order to give it greater effectiveness and access to “reading, education, personal development and work on an equal basis” for the visually impaired.⁴⁵

The report emphasized the great diplomatic effort made by Brazil on the WIPO Standing Committee on Copyright and Related Rights and its main goals, since the Marrakesh Treaty “seeks not only to meet the historical demand of people with visual impairments, but also aims to promote an increasing production and distribution of works in accessible formats to the beneficiaries of the agreement.”⁴⁶

It also highlights that, for this purpose, it is provided for in

43 UNITED NATIONS. Convention on the Rights of People with Disabilities. Available at: <http://www.un.org/disabilities/convention/conventionfull.shtml>.

44 BRAZIL. House of Representatives. Report by the Committee on Constitution, Justice and Citizenship Rapporteur Representative Soraya Santos, p.3. Available at: http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=54F81D3EBEF0552939869CD5F57E2476.proposicoesWeb1?codeor=1350426&filename=Tramitacao-PDC+57/2015.

45 BRAZIL. Federal Senate. Report by the Committee on Foreign Relations and National Defense. Rapporteur Senator Marta Suplicy, p.2. Available at: <http://legis.senado.leg.br/mateweb/arquivos/mate-pdf/182434.pdf>.

46 BRAZIL. Federal Senate. Report by the Committee on Foreign Relations and National Defense. Rapporteur Senator Marta Suplicy, p.4. Available at: <http://legis.senado.leg.br/mateweb/arquivos/mate-pdf/182434.pdf>.

Article 4 a few limitations and exceptions relating to copyright to be implemented by States parties in their national legislation, in order to facilitate the availability of works in accessible formats. These limitations reach the rights of reproduction, distribution and making the works available to the public, “as defined in WIPO Copyright Treaty.”⁴⁷

The Senator stresses as well that the provisions in the Marrakesh Treaty have the intention of diminishing the importance of the copyright protection, but to create a balance between copyright protection and the general public interest, “establishing limitations and exceptions to copyright, so as to provide access for people with visual disabilities or other difficulties to the printed texts and works in accessible format.”⁴⁸ It is also clear that this Treaty is a significant milestone in the conquest of rights by persons with visual impairment, since copyright restrictions “prevents them from reading, and also compromises their personal development, access to education and, as a result, to qualified professional work as well.”⁴⁹

On November 24, 2015, the Marrakesh Treaty ratification was approved at the Senate, which holds 81 seats. On the first round it was unanimously approved by 57 senators and by 52 on the second round. Finally, on December 1, 2015, the President signed the ratification of the Treaty with the Constitutional Amendment status.

4. CLOSING REMARKS: INTERNATIONAL HR TREATIES, CULTURAL INCLUSION AND COPYRIGHT

As shown, since human rights are the core of the Brazilian Constitution and of the entire legal system, both the UN Convention and the Marrakesh Treaty are constitutional amendments of a special kind - as it is unconstitutional to even have a legislative projects to restrict or abolish any of the established rights (art. 60, § 4o, IV⁵⁰).

47 BRAZIL. Federal Senate. Report by the Committee on Foreign Relations and National Defense. Rapporteur Senator Marta Suplicy, pp.2-3. Available at: <http://legis.senado.leg.br/mateweb/arquivos/mate-pdf/182434.pdf>.

48 BRAZIL. Federal Senate. Report by the Committee on Foreign Relations and National Defense. Rapporteur Senator Marta Suplicy, p.5. Available at: <http://legis.senado.leg.br/mateweb/arquivos/mate-pdf/182434.pdf>.

49 BRAZIL. Federal Senate. Report by the Committee on Foreign Relations and National Defense. Rapporteur Senator Marta Suplicy, p.4. Available at: <http://legis.senado.leg.br/mateweb/arquivos/mate-pdf/182434.pdf>.

50 BRAZIL. FEDERAL CONSTITUTION OF 1988. Article 60. The Constitution may be amended on the proposal of: § 4: No proposal of amendment shall be considered which is aimed at abolishing: I – the federative form of State; II – the direct, secret, universal and periodic vote; III – the separation of the Government Powers; IV – individual rights and guarantees. Available at: http://www.stf.jus.br/repositorio/cms/portaStfInternacional/portaStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf.

They will necessarily interact and reinforce each other, enhancing the normative power of both. Furthermore, as constitutional amendments with immediate application within the legal system they will directly impact any federal legislation, including copyright law, deeming unconstitutional norms and interpretations that conflict with it.

One example of such legal interaction was, following the approval of the UN Convention, the enactment of legislation for the broad inclusion of people with disabilities that entered into force as of January 04th, 2016, and reaches the cultural and technological realms as well. The Law n. 13.146/15⁵¹ guarantees on article 42 the right of access to cultural products in accessible formats and, even more interestingly, on paragraph 1 it states that “it is forbidden the refusal to offering intellectual works in accessible formats to people with disabilities, under any argument, including under the allegation of intellectual property rights protection.”

The reading of both international instruments, in different passages as well as in their principles and motifs, show the upgrading - in terms of its recognition - of the right of access to culture to a fundamental rights status. Not that, broadly speaking, it could not or was not conceived as such, but its inscription on the texts, even if indirectly, helps to gather normative strength for its application by the Courts.

The preamble of the Marrakesh Treaty at once makes an explicit link to the UN Convention on the Rights of Persons with Disabilities and to the Universal Declaration of Human Rights⁵². It also stresses the relevance of the limitations and the restrictions imposed on other fundamental rights, such as education and freedom of expression, by copyright. It emphasizes the importance of “enhancing opportunities for everyone, including persons with visual impairments or with other print disabilities, to participate in the cultural life of the community, to enjoy the arts and to share scientific progress and its benefits.” The Treaty recognizes the relevance of access to culture for the development of one’s personality as well.

All those converge within Brazilian legal system structure to assure a fundamental status to the right of access to culture and, by consequence, of the limitations to copyright as infra-constitutional expression of such right, obliging therefore an equal balance in the face of copyright protection. And, hopefully, not only have the combined

51 BRAZIL. Law n. 13.146/15. Available at: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13146.htm.

52 WIPO. Marrakesh Treaty. Preamble. “Recalling the principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society, proclaimed in the Universal Declaration of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities”. Available at: http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=301019.

instruments prompted the right of access to culture to a new status within the system, but should necessarily affect judicial interpretation towards the full recognition of unabridged access to culture as an integral and substantial part of the copyright normative system.

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CHALLENGES FACED BY FOREIGN INVESTORS IN THE BRAZIL'S ENERGY SECTOR

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Abstract: The Brazilian energy sector suffered constantly changes during the past years. The process of transformation looked for a competitive market aiming funds to develop infrastructure in Brazil. Foreign investment is necessary to develop and strengthen the energy market, but the sector still present some challenges to be faced by the foreign investors. As consequence, some questions shall be raised in connection with the real effectiveness of mechanisms imposed to foreign investment at its entrance in the Brazilian energy sector. Does the Brazilian legal framework provide legal certainty to the foreign investors interested in investing in the energy sector? The objective of this article is to provide an overview of reform made to the energy market and current hindrances to the investor's entry in such sector.

Keywords: Energy Law - Foreign Investment - Regulatory Panorama

1. INTRODUCTION

The energy sector is strategic to the economy of any country

involving activities regulating an individual daily's life¹. The energy is a process of transformation that involves technology and economic deployment due to its potential scarcity and possibility of economic exploration.² Considering the major relevance taken in a country's economy, the energy system requires a high volume of (national and foreign) investment. In line with such need, an adequate regulation and lawmaking process turns to be essential for the investment attraction in the energy field. As the Brazilian energy sector is an ongoing developing environment, the legislative and regulatory framework shall provide a response to the needs of public and private actors operating in such market.

Unfortunately, there are some public policies that are not favorable for the investor who intends to acting in the Brazilian energy sector: they do not promote and create attractiveness to the private actors to invest money and risk their reputation in certain projects. This paper examines the rules governing the Brazilian energy sector specially focused on the mechanisms of foreign investors' access to such market. The main objective is to examine the instruments that help along with the obstacles that hinder (intentionally or unintentionally) the access of foreign investors to the Brazilian energy market.

In order to pursue the objective of this paper, the authors will firstly present an historical approach of the regulatory changes experienced in the energy sector together with its political and economic factors that influenced such transformations. At a second moment, an analysis will be made over the national legislation and regulatory requirements applicable to the energy sectors that foreign investors shall be mindful to it. At last, the authors will examine the challenges faced by the foreign investors to access Brazilian's energy sector that should be improved. The methodology used in this work is the analysis of national legislation, regulatory rules and concession bid documents imposed by the Brazilian State and regulatory agencies for private investors.

2. A BRIEF HISTORICAL APPROACH OF THE LEGISLATIVE TRANSFORMATIONS OCCURRED IN THE BRAZILIAN ENERGY SECTOR

In the early of the 20th century the electricity industry in Brazil was composed, for the most part, by private companies as Light and American & Foreign Power Co. (Amforp), whose origin were Canadian and American, respectively.³ Due to the lack of specific legislation in

1 LEAL-ARCAS, Rafael; FILIES, Andrew; ABU GOSH, Ehab S. *International Energy Governance: Selected Legal Issues*. Cheltenham: Edward Elgar, 2014, p. 15.

2 ROLIM, MARIA J. *Direito Econômico da Energia Elétrica*. Rio de Janeiro: Forense, 1a ed., 2002, p. 98.

3 TOLMASQUIM. *Maurício T. Novo Modelo do Setor Elétrico Brasileiro*. Rio de Janeiro:

this field, the electricity services were regulated by contracts between entrepreneurs⁴ and the municipal governments and those contracts had as main object the occupation of public assets and hydro-generation potential by entrepreneurs.

The 1934 Brazilian Federal Constitution defined a new scenario for the Brazilian energy sector. The Constitution of 1934 ensured to the Brazilian Government the centralization of exploitation of hydro-generation energy within the national territory.⁵ In the same year, the Decree-Law No. 24.643/1934 (“Code of Waters”) was enacted, limiting the term for concessions regarding energy in thirty years. However, if there were significant investments by entrepreneurs, the concessions’ regular term could be extended reaching fifty years.⁶

In order to verify the activities exercised by the private companies, which obtained the authorization or concession for construction of hydroelectric plants and thermal power plants, the Code of Waters established the right of the public authorities to supervise the companies in the electrical industry⁷. The Code of Waters also

Synergia, 2a ed., 2011, p. 3.

4 According Luiz Gustavo Loureiro Kaercher, entrepreneurs can be defined as companies that occupied public properties. In the case of energy, the entrepreneurs occupied rivers, which are part of the Brazilian’s government ownership. These companies exploited the river’s electric potential to generate energy that was sold by Municipal governments through contracts. KAERCHER Loureiro, Luiz Gustavo. *A Indústria Elétrica e o Código de Águas*. Porto Alegre: Fabris, 2007, p. 27.

5 Article 119 of Brazilian Federal Constitution of 1934 provides “The industrial use of mines and mineral deposits, as well as water and hydroelectric power, although privately owned, depends on the authorization or concession of the Federal Governments in the form required by law”. (“O aproveitamento industrial das minas e das jazidas minerais, bem como das águas e da energia hidráulica, ainda que de propriedade privada, depende de autorização ou concessão federal, na forma da lei”). BRASIL. *Constituição da República Federativa dos Estados Unidos do Brasil* de 16 de Julho de 1934. Available at: http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao34.htm. Access on June 24, 2016.

6 Article 157 of Decree-Law No. 24.642/1934 provides that concessions related to production, transmission or distribution of hydro energy shall have a regular term of 30 years and an exceptional term of 50 years if the works and installations requires more investment. (“As concessões, para produção, transmissão e distribuição da energia hydro-electrica, para quaesquer fins, serão dadas pelo prazo normal de 30 annos. Paragrapho unico. Excepcionalmente, si as obras e installações, pelo seu vulto, não comportarem amortização do capital no prazo estipulado neste artigo, com o fornecimento de energia por preço razoável, ao consumidor, a juízo do Governo, ouvidos os órgãos technicos e administrativos competentes, a concessão poderá ser outorgada por prazo superior, não excedente, porém, em hypothese alguma, de 50 annos.”). BRASIL. *Câmara dos Deputados*. Decreto nº 24.643 de 10 de julho 1934. Available at: <http://www2.camara.leg.br/legin/fed/decret/1930-1939/decreto-24643-10-julho-1934-498122-publicacaooriginal-1-pe.html>. Access on June 21, 2016.

7 Article 144 of Decree-Law No. 24.642/1934 provides that the Agriculture Ministry is the competent body of Federal Government to supervise production, transmission and distribution

established the criteria to require simplified process of authorization or concession to explore the hydro-generation energy⁸ and other relevant provisions related to the exploration of hydro-generation activities.

Later, the Decree-Law No. 852/1938 brought new requirements to the concessions in the energy field, specifically in relation to the construction of transmission lines and distribution networks. This legislation substantially modified the Code of Waters, representing a reconstruction of the Brazilian energy sector, which was not truly regulated until then. The article 5 of Decree-Law No. 852/1938 established the need for authorization or concession for “the establishment of transmission lines or distribution networks for energy”.⁹ In 1940, the requirement of authorization or concession for construction of hydroelectric plants and thermal power plants came into force.¹⁰ Following the trend of the Code of Waters, the Decree-Law No. 3.763/1941 established the supervision to be performed by the public authorities, including the supervision over the accounting field in order to guarantee the services provided to the population were appropriate, the power tariffs were reasonable and the companies presented a financial stability.¹¹

of hydroelectric energy. (“O Serviço de Águas do Departamento Nacional de Produção Mineral do Ministério da Agricultura, é o órgão competente do Governo Federal para: c) fiscalizar a produção, a transmissão, a transformação e a distribuição de energia hidro-elétrica; BRASIL. Câmara dos Deputados. Decreto nº 24.643 de 10 de julho 1934 (Redação dada pelo Decreto-lei nº 3.763, de 25.10.1941) Available at: http://www.planalto.gov.br/ccivil_03/decreto/d24643.htm. Access on June 23, 2016.

8 Article 140 of Decree-Law No. 24.642/1934 provides that the concession is required for the utilization of: (i) the waterfall and other sources of hydro power output exceeding 150 KW or; (ii) the power plants that are intended for services of Federal, State or Municipal public utility or those which are intended for the energy trade. (“São considerados de utilidade pública e dependem de concessão. a) os aproveitamentos de quedas d’água e outras fontes de energia hidráulica de potência superior a 150 kws. Seja qual for a sua aplicação. b) os aproveitamentos que se destinam a serviços de utilidade pública federal, estadual ou municipal ou ao comércio de energia seja qual for a potência”). The article 141 of such Decree-Law establishes the criteria for simple authorization, which are applicable for those plants with a maximum generation of 150KW. BRASIL. Câmara dos Deputados. Decreto nº 24.643 de 10 de julho 1934. Available at: http://www.planalto.gov.br/ccivil_03/decreto/d24643.htm. Access on June 23, 2016.

9 BRASIL. Câmara dos Deputados. Decreto nº 24.643 de 10 de julho 1934. Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/1937-1946/Del0852.htm. Access on July 03, 2016.

10 GANIM, Antonio. Setor elétrico brasileiro: aspectos regulamentares, tributários e contábeis. Rio de Janeiro: Canal Energia; Synergia, 2009. p. 41.

11 Article 178 In the performance of the tasks conferred, the division of the National Department of Mineral Production shall supervise the production, transmission, transformation and distribution of energy hydro-electric, with the threefold purpose of: a) ensure adequate service; b) establish reasonable tariffs; c) to ensure the financial stability of companies. For such purposes, shall exercise the supervision of companies’ accounts. (“No desempenho das atribuições que lhe são conferidas, a Divisão de Águas do Departamento Nacional da Produção

The 1940's era was marked by the Federal Government's concentrated power and its intervention in the economy. Due to the high demand resulting from industrialization and such 'intervener role', the Brazilian Government has also adopted the role of entrepreneur in the energy sector. The Decree-Law No. 8.031/1945 has represented this intervention period as it provided the authorization for the creation and subsequent construction of hydro-electric Company from São Francisco named in Portuguese 'Chesf'.¹² This was the first public company of electric sector and its creation constituted a public action in accordance with the concessions' framework established in the Code of Water which provided: "The creation of Chesf represented a new stage in the development of the Brazilian electricity sector, marking the trend of decoupling between generation transmission and distribution of electric energy and also concentrating production in large power plants"¹³.

The concentration of Government's power in the energy sector was consolidated in 1962, when 'Eletrobrás' (a Brazilian public company) was created.¹⁴ This public company focused its activities in planning, coordinating, supervising construction programs, in the expansion and operation of generation's systems, transmission and distribution of electricity¹⁵ resulting in the expansion of energy sector. This model has brought positive effects to the energy market with a

Mineral fiscalizará a produção, a transmissão, a transformação e a distribuição de energia hidro-elétrica, com o triplice objetivo de: a) assegurar serviço adequado; b) fixar tarifas razoáveis; c) garantir a estabilidade financeira das empresas. Parágrafo único. Para a realização de tais fins, exercerá a fiscalização da contabilidade das empresas"). BRASIL. Decreto-Lei nº 3.763/1941 Consolida disposições sobre águas e energia elétrica, e dá outras providências. Available at: http://www.planalto.gov.br/ccivil_03/Decreto-Lei/1937-1946/Del3763.htm#art144c. Access on June 23, 2016.

12 The Decree-Law 8.031/1945 provides in the Article 1 the creation of "Hydro-electric Company" from São Francisco named in Portuguese 'Chesf'. ("Fica o Ministério da Agricultura autorizado a organizar uma sociedade por ações, com sede e foro na cidade do Rio de Janeiro, destinada a realizar o aproveitamento industrial progressivo da energia hidráulica do Rio São Francisco. Parágrafo único. Na organização da Sociedade, que se denominará Companhia Hidro Elétrica do São Francisco, observar-se-ão as normas constantes dos Estatutos anexos ao presente decreto-lei"). BRASIL Decreto-Lei nº 8.031 de 03 de outubro de 1945. Autoriza a organização da Companhia Hidro Elétrica do São Francisco. Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/Del8031.htm. Access on June 23, 2016.

13 CALDAS, Geraldo P.. Concessões de serviços públicos de energia elétrica. Curitiba: Juruá. 2a ed., 2011. p. 44.

14 Eletrobrás was created by the Decree-Law nº 3.890-A/1961. BRASIL. Decreto Lei Nº 3.890-A/1961. Autoriza a União a constituir a empresa Centrais Elétricas Brasileiras S. A. - ELETROBRÁS, e dá outras providências. Available at: http://www.planalto.gov.br/ccivil_03/leis/L3890Acons.htm Access on June 24, 2016

15 CALDAS, Geraldo P.. Concessões de serviços públicos de energia elétrica. Curitiba: Juruá. 2a ed., 2011. p. 44.

significant increase of electricity supply to the Brazilian population.

During the mid-1980s, a serious crisis smacked the electric sector. This crisis was triggered off by the elimination of some taxes, which resulted in the termination of funding for the energy sector. The phenomenon of funds shortage in the energy sector occasioned the inability of the public sector to invest and promote the necessary growth in the energy sector¹⁶ causing several negative effects to such sector.

Until the early 1990s, the model of state monopoly was still in force in the energy sector. Nevertheless the presence of the public influence in the sector, the events occurred in the 1980s and the financial crisis faced in several areas of the economy evidenced the intervention model present was weak and inefficient.

In order to achieve improvements in the economy as a whole, a regime based on the competition was introduced. Such regime needed to be implemented through a privatization process of public companies, which reduced their market power and established a competition regime among other companies present in the field of energy.¹⁷

After the 1980s crisis, the Brazilian Federal Government decided to pursue a reform in the energy sector. In the beginning of the 1990's, the Federal Government gave an incentive to the States to privatize public companies, especially the power distributors, aiming to obtain financial resources and establish a competitive system in the energy sector.¹⁸

In 1995, the Law No. 8.987/1995 (Concessions Law) was enacted. The Concessions Law established general rules as a guidance for the concessions, permission as authorizations to be established in the energy sector, as well as the rights and obligations of the concessionaires of public service and users. The Concessions Law also established rules for tariff adjustments and mechanisms of reassessments of public concessions, which were required for the maintenance of the economic and financial equilibrium of concessions.¹⁹

In the same year, Law No. 9.074/1995 (Energy Concessions Law) brought important changes to the energy sector because it has

16 TOLMASQUIM. Maurício T. Novo Modelo do Setor Elétrico Brasileiro. Rio de Janeiro: Synergia, 2a ed., 2011, p. 5.

17 TOLMASQUIM. Maurício T. Novo Modelo do Setor Elétrico Brasileiro. Rio de Janeiro: Synergia, 2a ed., 2011, p. 6.

18 Light, CPFL, Cerj, Enersul, Cemat, Coelba, Celce and others are examples of power distributors companies that were privatized in the beginning of the 1990's. Available at: http://www.bndes.gov.br/SiteBNDES/export/sites/default/bndes_pt/Galerias/Arquivos/conhecimento/pnd/Priv_Gov.PDF. Access on June 24, 2016.

19 BRASIL. Lei Nº 8.987, de 13 de fevereiro de 1995. Dispõe sobre o regime de concessão e permissão da prestação de serviços públicos previsto no art. 175 da Constituição Federal, e dá outras providência. Available at: http://www.planalto.gov.br/ccivil_03/leis/L8987cons.htm. Access on June 21, 2016.

created important figures to continue boosting the competitiveness in the market.²⁰ Along with the Energy Concessions Law, the figure of 'Independent Power Producer' has appeared,²¹ and 'Free Consumer'. The main change provided by the Energy Concessions Law was the permission for the Independent Power Producer and Free Consumer to negotiate the price of electricity produced.²² As a result of such modification in the legislation, the Free Consumer was not obligated to buy energy from a local distributor power. In addition to that fundamental change, the Law No. 9.074/1995 has also established that the power distributing companies could not carry another economic activity except the power distribution. The main objectives of such measure were the maintenance of the distributors' monopoly²³ and the

20 BRASIL. Lei Nº 9.074, de 7 de julho de 1995. Estabelece normas para outorga e prorrogações das concessões e permissões de serviços públicos e dá outras providências. Available at: http://www.planalto.gov.br/ccivil_03/leis/L9074cons.htm Access on June 21, 2016.

21 Article 11 of Law No. 9.074/95 established the creation of 'Independent Power Producer' figure in the energy sector. The Independent Power Producer is a company that receives concession or authorization from the Federal government to generating energy for the trade of all or part of the energy generated at its own risk. ("Considera-se produtor independente de energia elétrica a pessoa jurídica ou empresas reunidas em consórcio que recebam concessão ou autorização do poder concedente, para produzir energia elétrica destinada ao comércio de toda ou parte da energia produzida, por sua conta e risco. Parágrafo único. O Produtor Independente de energia elétrica estará sujeito às regras de comercialização regulada ou livre, atendido ao disposto nesta Lei, na legislação em vigor e no contrato de concessão ou no ato de autorização, sendo-lhe assegurado o direito de acesso à rede das concessionárias e permissionárias do serviço público de distribuição e das concessionárias do serviço público de transmissão".) BRASIL. Lei Nº 9.074, de 7 de julho de 1995. Estabelece normas para outorga e prorrogações das concessões e permissões de serviços públicos e dá outras providências. Available at: http://www.planalto.gov.br/ccivil_03/leis/L9074cons.htm. Access on June 24, 2016.

22 Article 15 of Law No. 9.074/1995 established the figure of 'Free Consumers' classified as consumers of electricity with consumption charge of 10.000 kW or more, with a voltage of 69 kV or higher. These consumers are free to buy energy from Independent Power Producers. ("Respeitados os contratos de fornecimento vigentes, a prorrogação das atuais e as novas concessões serão feitas sem exclusividade de fornecimento de energia elétrica a consumidores com carga igual ou maior que 10.000 kW, atendidos em tensão igual ou superior a 69 kV, que podem optar por contratar seu fornecimento, no todo ou em parte, com produtor independente de energia elétrica"). BRASIL. Lei Nº 9.074, de 7 de julho de 1995. Estabelece normas para outorga e prorrogações das concessões e permissões de serviços públicos e dá outras providências. Available at: http://www.planalto.gov.br/ccivil_03/leis/L9074cons.htm. Access on June 24, 2016.

23 Article 4, Paragraph 5 of the Law No. 9.074/1995 provides the monopoly of the energy distributors. The distributors are not allowed to sell energy in the market as generator, transmitters or traders. BRASIL. Lei nº 9.074/1995 Estabelece normas para outorga e prorrogações das concessões e permissões de serviços públicos e dá outras providências. ("Art. 4º As concessões, permissões e autorizações de exploração de serviços e instalações de energia elétrica e de aproveitamento energético dos cursos de água serão contratadas, prorrogadas ou

encouragement of the free initiative of segments such as generation and trade of energy.

It is important to note that the segregation of generation, transmission and distribution²⁴ sectors was a necessary step for the Brazilian energy market.²⁵ The segregation was necessary to create a more competitive segment of energy's generation, especially by the introduction of energy traders.²⁶ On the one hand, the introduction of energy trader in the market has improved the competitiveness in the energy sector. On the other hand, it has maintained energy tariff regulation in the transmission and distribution field due to the fact that the companies exercising activities in this sector had a background in the original public monopoly.²⁷

Nonetheless the modifications made to the energy sector in the 1990's, the inefficiency was still present in the sector. In 2001, the public authorities verified that the water reservoirs (the largest source of power generation in

outorgadas nos termos desta e da Lei no 8.987, e das demais. (...) § 5º As concessionárias, as permissionárias e as autorizadas de serviço público de distribuição de energia elétrica que atuem no Sistema Interligado Nacional – SIN não poderão desenvolver atividades: (Incluído pela Lei nº 10.848, de 2004) I - de geração de energia elétrica; II - de transmissão de energia elétrica; III - de venda de energia a consumidores de que tratam os arts. 15 e 16 desta Lei, exceto às unidades consumidoras localizadas na área de concessão ou permissão da empresa distribuidora, sob as mesmas condições reguladas aplicáveis aos demais consumidores não abrangidos por aqueles artigos, inclusive tarifas e prazos; IV - de participação em outras sociedades de forma direta ou indireta, ressalvado o disposto no art. 31, inciso VIII, da Lei no 8.987, de 13 de fevereiro de 1995, e nos respectivos contratos de concessão; ou V - estranhas ao objeto da concessão, permissão ou autorização, exceto nos casos previstos em lei e nos respectivos contratos de concessão”). Available at: http://www.planalto.gov.br/ccivil_03/leis/L9074cons.htm. Access on July 1, 2016.

24 The generation process comprehends the transformation of primary energy to electricity. The transmission segmentation consists of the transportation of energy from the generation plant to the distribution system. The distributor transmits the electricity to the final consumers. ROLIM, MARIA J. *Direito Econômico da Energia Elétrica*. Rio de Janeiro: Forense, 1a ed., 2002, p. 106-107.

25 Unbundling in the electricity sector involved all regulated companies that were vertically integrated. The result was the separation between generation, transmission and distribution activities in the energy sector. GALLO, Fabiano; LOBIANCO, Eduardo L. *Electricity regulation in Brazil: overview*. Available at: <http://us.practicallaw.com/8-545-7207?q=campos+mello>. Access on June 30, 2016, p. 3.

26 The energy traders are allowed to negotiate the energy's price with generators. (“O comercializador de energia elétrica possui competência para negociar livremente o preço da energia elétrica com os geradores”). BRASIL. Lei Nº 10.848 de 15 de março de 2004. Dispõe sobre a comercialização de energia elétrica. Available at: http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2004/lei/110.848.htm. Access on June 23, 2016.

27 TOLMASQUIM. Maurício T. *Novo Modelo do Setor Elétrico Brasileiro*. Rio de Janeiro: Synergia, 2a ed., 2011, p. 7.

Brazil) were below 40% of the level of storage capacity.²⁸ Facing a high demand and low source of energy, an electricity-rationing program in Brazil was an inevitable measure to be taken by the public authorities.

In June 2001, the Federal Government determined a program of electricity rationing throughout the national territory, except for the Southern Region.²⁹ In this scenario, the Federal Government took several measures such as: (i) establishment of consumption quotas for the private consumers (residences and industries were authorized to consume a specific amount of energy per month), (ii) increase of tariffs imposed on the electrical energy and (iii) payment of bonuses for users who have saved energy during the rationing's period.³⁰ In February 2002, almost one year later, the Operator of the National Electricity System (ONS)³¹ determined that the electricity-rationing program should be terminated.³²

The Brazilian energy crisis in 2001 evidenced the institutions in place and the regulation over the energy sector needed a structural change. The public and private actors observed that the legislation and regulation over the energy sector was clearly vague and sometimes contradictory. The crisis laid off private investors³³ of the energy sector and a new system with bodies capable of guiding and supervising the energy activities was created.

This movement was essential for the restructure, development and operation of the energy sector. In order to address the need for change,

28 TOLMASQUIM. Maurício T. *Novo Modelo do Setor Elétrico Brasileiro*. Rio de Janeiro: Synergia, 2a ed., 2011, p. 14.

29 The program of electricity rationing in Brazil in 2001. Available at http://www.planalto.gov.br/ccivil_03/resolu%C3%A7%C3%A3o/RES04-01.htm Access on July 08, 2016.

30 TOLMASQUIM. Maurício T. *Novo Modelo do Setor Elétrico Brasileiro*. Rio de Janeiro: Synergia, 2a ed., 2011, p. 16.

31 Operator of the National Electricity System (ONS). "The basic role of the ONS is to coordinate and monitor generation and transmission operations in the national interconnected system (Sistema Interligado Nacional (SIN)), subject to regulation and supervision by ANEEL. Its institutional mission is to ensure users of the SIN of the continuity, quality and cost-efficient supply of electric energy. It also proposes expansions of the network and reinforcement of existing systems to be considered in planning extensions of transmission systems as well as rules for operating transmission installations in the SIN grid, subject to approval by ANEEL". GALLO, Fabiano; LOBIANCO, Eduardo L. *Electricity regulation in Brazil: overview*. Available at: <http://us.practicallaw.com/8-545-7207?q=campos+mello>. Access on June 30, 2016, p.2.

32 Operator of the National Electricity System. Available at: http://www.ons.org.br/sala_imprensa/informativos_comunicado_racionamento.htm. Access on June 24, 2016.

33 The private actors were no longer negotiating with companies of the energy sector due to the lack of legal certainty, reason why they were laid off of the energy market. TOLMASQUIM. Maurício T. *Novo Modelo do Setor Elétrico Brasileiro*. Rio de Janeiro: Synergia, 2a ed., 2011, p. 19.

the Federal Government created the Ministry of Mines and Energy³⁴ (in Portuguese, Ministério de Minas e Energia - MME), responsible for the creation and implementation of policies in the energy sector. It also created the Brazilian Electricity Regulatory Agency³⁵ (in Portuguese, Agência Nacional de Energia Elétrica - ANEEL) responsible for the regulation and supervision of the activities developed by agents of generation, transmission, distribution and traders of energy sector.

Currently, the negotiations for trading energy in the Brazilian energy market are held in two different markets. They are called 'Regulated Market' (in Portuguese, Ambiente de Contratação Regulada) and the 'Free Market' (in Portuguese, Ambiente de Contratação Livre).

In the Free Market, generators, independent power producer, traders and free consumers are free to negotiate agreements of energy by establishing volumes, prices and terms of supply at their own discretion. These transactions are agreed through energy purchase agreement held in the Free Market. In the Regulated Market, the purchase of electricity may only occur upon public auctions formally established by the 'Chamber of Commerce of Electric Energy' (in Portuguese, Câmara de Comercialização de Energia Elétrica) and by delegation of the Brazilian Electricity Regulatory Agency. In this case, the energy traders who join the public auctions shall formalize their commercial negotiations by means of a public agreement registered within the Regulated Market.³⁶

The segregation between the Regulated Market and the Free Market was a direct result from the segmentation of energy sector in terms of generation, transmission, distribution and trading of energy. As earlier mentioned, this process has promoted competition among the energy agents, as well as maintained the distribution and transmission's sectors regulated.

3. THE PANORAMA OF FOREIGN INVESTORS' REQUIREMENTS TO THE ENERGY'S FOREIGN DIRECT INVESTMENT IN BRAZIL

The main objective of the several reforms implemented in the Brazilian energy sector was to build a competitive market in order to

34 BRASIL. Lei nº 8.422/1992. Dispõe sobre a organização de ministérios e dá outras providências. Available at: http://www.planalto.gov.br/ccivil_03/leis/L8422.htm. Access on June 24, 2016.

35 ANEEL was established in 1996 by Law No. 9.427/1996 with the main purpose of regulating and supervising the generation, distribution, trading and transmission of energy. The preparation and supervision of public bidding process are one of ANEEL's responsibilities according article 3 of Law No. 9.427/1996. Available at: http://www.planalto.gov.br/ccivil_03/leis/L9427cons.htm. Access on June 30, 2016.

36 For information regarding the Chamber of Commerce of Electric Energy. Available at: <https://www.ccee.org.br>. Access on June 24, 2016.

attract more investments and resources to finance the energy sector and develop infrastructure. The new regulation model pursued a mechanism of liberalization with less State-intervention, authorizing the generation and distribution of electrical services to be executed by private corporations. Along with such authorization, public companies were privatized, consolidating the new paradigm of private sector as investor of the energy sector.

The latest events in the energy sector's regulatory scenario have proved to be favorable to the foreign investors. In line with the investor-promotion attitude, Brazilian Government has promoted events to announce to foreign investors that old restrictions to their access to the Brazilian energy sector were removed.³⁷ The then Minister of Mines and Energy, Eduardo Braga, announced in October 2015 that Brazil government does not impose hindrances to the foreign investor in the energy sector. Eduardo Braga also reaffirmed the legal certainty remain as one of the main commitments from Brazil's public policy and the current tariff systems is very favorable to foreign investors at the present moment.³⁸

The objective of this topic is to understand the necessary steps to be followed by the foreign investor at the moment of decision to pursuing an investment in the Brazilian energy sector. The options of investment in the energy sector include the energy trading and participation of public auctions for energy generation or transmission of electricity in the Brazilian territory. These investments are materialized through concession agreements with a characteristic of long-term investments, balancing the risk of the investment together with the possibility of more profit.³⁹

37 The Brazilian Decree 5.163/2004, article 19, provides that public bidding processes involving contracts related to energy shall observe guidelines established by the Ministry of Mines and Energy. The Ministry of Mines and Energy is the government body responsible for regulating and supervising the energy sector in Brazil. BRASIL. Decreto 5.163/2004. Regulamenta a comercialização de energia elétrica, o processo de outorga de concessões e de autorizações de geração de energia elétrica, e dá outras providências. Available at: http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2004/decreto/d5163.HTM. Access on June 28, 2016.

38 BRASIL. Ministério de Minas e Energia. Available at: http://www.mme.gov.br/web/guest/pagina-inicial/manchete/-/asset_publisher/neRB8QmDsbU0/content/setor-eletrico-brasileiro-esta-aberto-a-investimentos-estrangeiros-e-sem-restricoes-diz-braga;jsessionid=148F3A851FC66A0C0AEAA8D601BE0195.srv154. Access on June 28, 2016.

39 Article 4, paragraph 3 of Law No. 9.074/2004 establishes the regular term for concessions in transmission of lines or distribution of energy is 30 years. BRASIL. Lei Nº 9.074, de 7 de julho de 1995. Estabelece normas para outorga e prorrogações das concessões e permissões de serviços públicos e dá outras providências. Available at: http://www.planalto.gov.br/ccivil_03/leis/L9074cons.htm. Access on July 06, 2016. The renovation of concession term in respect of energy generation and transmission shall be limited to one renovation of 30 years-term. BRASIL. Lei Nº 12.783, de 11 de janeiro de 2013. Dispõe sobre as concessões de geração,

Therefore, the requirements hereby to be analyzed are directed to the foreign direct investment (FDI) in the Brazilian energy market instead of the requirements for the entrance of portfolio investment. The FDI is a type of investment characterized by long-term, transfer of a considerable amount of funds, intention of obtaining profit for a long period and management of the project.⁴⁰ There are other elements, which also characterize the FDI, such as some sort of control and management capacity over the corporation, meaning the interference in the business activities.⁴¹ The investment of portfolio is focused in the financial market with short-term transactions. "Portfolio investment is normally represented by a movement of money for the purpose of buying shares in a company formed or functioning in another company".⁴²

This paper is directed to the energy generation and electricity production for commercial purposes⁴³ as it can be a very attractive market for foreign investors due to the available opportunities of investment and profit.⁴⁴ Energy generation may involve traditional sources of energy and the non-traditional sources focused on renewable

transmissão e distribuição de energia elétrica, sobre a redução dos encargos setoriais e sobre a modicidade tarifária. Available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/Lei/L12783.htm Access on July 06, 2016.

40 Rudolph Dolzer and Christoph Schreuer make appoints the elements that characterize each type of investment: "Economic science often assumes that a direct investment involves (a) the transfer of funds, (b) a longer term project, (c) the purpose of regular income, (d) the participation of the person transferring the funds, at least to some extent, in the management of the project, and (e) a business risk. These elements distinguish foreign direct investment from a portfolio investment (no element of personal management), from an ordinary transaction for purposes of sale of a good or a service (no management, no continuous flow of income), and from a short-term financial transaction". DOLZER, Rudolph; SCHREUER, Christoph. *Principles of International Investment Law*. Oxford: Oxford University Press, 2nd ed., 2012, p. 60.

41 COSTA, José Augusto Fontoura. *Direito internacional do investimento estrangeiro*. Curitiba: Juruá, 2010, p. 36.

42 SORNARAJAH, M. *The International Law on Foreign Investment*. 3rd ed., New York: Cambridge University Press, 2010, p. 8.

43 In this sense, the generation of energy focused on private purposes for individual use is not part of the analysis of this paper.

44 There are several ongoing discussions in the international literature in respect of energy governance and the shift of energy production to the renewables. See: "Were we to shift reliance on energy production to the exploitation of renewables (e.g., power derived from the sun, wind, oceans, and from the heat of the earth), which are abundant, more sustainable and distributed more widely, the zero-sum logic that underlines interstate energy relations could become obsolete". LEAL-ARCAS, Rafael; FILIES, Andrew; ABU GOSH, Ehab S. *International Energy Governance: Selected Legal Issues*. Cheltenham: Edward Elgar, 2014, p. 21.

energy.⁴⁵ ⁴⁶ The promotion of investment in the energy sector may be two-fold: Government's public investment directly in infrastructure or initiating public auctions to private actors.

The article 176 of Brazilian Federal Constitution establishes the Federal Government's monopoly over the use of natural resources allowing its direct exploration or indirect exploration via concessions, permissions or authorizations.⁴⁷ According to the current Brazilian legislation, any concession, permission or authorization to explore services and installations of electrical energy and use of water with energy purposes shall observe the rights and obligations provided by Law No. 8.987/95 (Concessions Law) and Law No. 9.074/2004 (Energy Concessions Law). Such concession, permission or authorization shall be made in favor of the Brazilian Federal Government.⁴⁸

The Energy Concessions Law provides the companies authorized as distributors of energy are not authorized to directly or

45 A distinction between renewable and non-renewable energy may be clarified as following: the renewable is the energy resources easily replaced by the nature (such as wind, sun, biomass, among others) and the non-renewable which its sources are not instantly replace such as oil and gas. PRADO, Thiago G. F. Políticas públicas e programas de desenvolvimento energético com foco em energias renováveis no brasil: do planejamento setorial de infraestrutura em energia às perspectivas de mudanças globais para o acesso e uso de recursos energéticos. 2014. 256 f. Tese (Doutorado em Engenharia Elétrica) – Faculdade de Tecnologia, Universidade de Brasília, 2014, p. 2.

46 Brazilian government has promoted investments in the renewable sector, especially in wind and biomass. The statistics provide that Brazil invested USD 7.6 billion in renewables between 2004 and 2013. Wind power is the renewable source of energy which attracted more investments in comparison with other renewables. REN 21. Renewables 2015 Global Status Report. 2015, p. 81-82. Available at: http://www.ren21.net/wp-content/uploads/2015/07/REN12-GSR2015_Onlinebook_low1.pdf. Access on June 28, 2016. The share of renewables in the Brazilian energy sector is much more relevant in comparison with other countries, especially the Member-States of the Organisation for Economic Co-operation and Development (OECD). PRADO, Thiago G. F. Políticas públicas e programas de desenvolvimento energético com foco em energias renováveis no brasil: do planejamento setorial de infraestrutura em energia às perspectivas de mudanças globais para o acesso e uso de recursos energéticos. 2014. 256 f. Tese (Doutorado em Engenharia Elétrica) – Faculdade de Tecnologia, Universidade de Brasília, 2014, p. 5.

47 BRASIL. Constituição Federal. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Access on June 28, 2016.

48 Law No. 9.074/2004, article 4, paragraph 1 provides “The contracts, rights of use and amendments related to this article shall be in favor of the Federal government”. (“As contratações, outorgas e prorrogações de que trata este artigo poderão ser feitas a título oneroso em favor da União”). BRASIL. Lei Nº 9.074, de 7 de julho de 1995. Estabelece normas para outorga e prorrogações das concessões e permissões de serviços públicos e dá outras providências. Available at: http://www.planalto.gov.br/ccivil_03/leis/L9074cons.htm. Access on June 21, 2016.

indirectly⁴⁹ explore activities of energy generation, transmission or sale of electricity,⁵⁰ consolidating the reforms established in the historic panorama outlined above, which established a independence between the actors playing a role in the energy market. Such independent role shall be played separately by unrelated companies in the field of generation, transmission and distribution of energy.

The public bidding processes for energy generation and transmission are organized by the ANEEL⁵¹ observing the applicable national legislation: Law No. 10.848/2004 and Decree-Law No. 5.163/2004. There are three main objectives of any bidding process established by ANEEL: pursue the best energy price, attract investors focused in the infrastructure for energy generation and retain the current energy generated.⁵² The duration of the concession contracts executed after the Law No. 9.074/2004 was enacted shall be no longer than thirty years with a possible renovation for the same period at the discretion of the public party.⁵³

The first aspect of concern for a foreign investor is the openness of the country's economy to foreign capital and the legal certainty of the transactions. In case of Brazil, some sectors of its economy are still closed to corporations with foreign control, which consist of barrier of 'control criteria' to the access of foreign companies to the Brazilian market.⁵⁴

In respect of the nationality of private actors in the energy sector, a reform to the Brazilian Federal Constitution was performed in 1995, eliminating the exclusivity of exploration of energy sector by the

49 Indirect exploration can be established in case of shareholder's participation in other companies.

50 Article 4, paragraph 1 provides "The contracts, rights of use and amendments related to this article shall be in favor of the Federal government". ("As contratações, outorgas e prorrogações de que trata este artigo poderão ser feitas a título oneroso em favor da União"). Law No. 9.074/2004. BRASIL. LEI Nº 9.074, DE 7 DE JULHO DE 1995. Estabelece normas para outorga e prorrogações das concessões e permissões de serviços públicos e dá outras providências. Available at: http://www.planalto.gov.br/ccivil_03/leis/L9074cons.htm. Access on June 21, 2016.

51 The preparation and supervision of public bidding process are one of ANEEL's responsibilities according article 3 of Law No. 9.427/1996. Public bidding documents can be accessed at ANEEL website. ANEEL. Editais de Geração. Available at: <http://www.aneel.gov.br/geracao4>. Access on June 28, 2016.

52 ANEEL. Editais de Geração. Available at: <http://www.aneel.gov.br/geracao4>. Access on June 28, 2016.

53 Law No. 9.074/2004. BRASIL. Lei Nº 9.074, de 7 de Julho de 1995. Estabelece normas para outorga e prorrogações das concessões e permissões de serviços públicos e dá outras providências. Available at: http://www.planalto.gov.br/ccivil_03/leis/L9074cons.htm. Access on June 28, 2016.

54 DOLINGER, Jacob; TIBURCIO, Carmen. *Direito Internacional Privado*. Rio de Janeiro: Forense, 12a ed. Rev. atual. e ampl., 2016, p. 261.

Brazilian corporations exclusively detained by Brazilian shareholders or Brazilian Government.⁵⁵ After such amendment, companies incorporated under Brazilian laws with seat in national territory, but with foreign ownership,⁵⁶ started to be authorized to hold a concession or permission agreement in the energy field.

In this scenario, it is important to make few distinctions regarding corporate nationality in accordance with Brazilian applicable legislation.⁵⁷ The importance in determining the corporations' nationality relies in the definition of the status of such corporation under Brazilian law. In determining the foreign nationality, some restrictions will apply such foreign corporations that are not applicable to the Brazilian corporations.⁵⁸

According to Brazilian law, the criteria of determination of foreign nationality for corporations, in other words, the corporate's capacity and structure's recognition⁵⁹ is determined by the legislation of its incorporation.⁶⁰ The 'incorporation criteria' shall be used to establish the nationality of the corporation.

Differently from the 'incorporation criteria', the corporation that wishes to acquire the Brazilian nationality needs to follow another special requirement. A corporation which intends to obtain Brazilian

55 BRASIL. Emenda Constitucional no. 6 de 15 de agosto de 1995. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc06.htm#art1. Access on June 28, 2016.

56 DOLINGER, Jacob; TIBURCIO, Carmen. *Direito Internacional Privado*. Rio de Janeiro: Forense, 12a ed. Rev. atual. e ampl., 2016, p. 186.

57 The first observation to be made in this context is related to the distinction between natural person and corporations in its conception. Jacob Dolinger explains the beginning of a life is characterized by a fact - the moment that the human being is born. The corporation starts its corporate life and acquires its nationality by means of registration of its acts of incorporation in accordance with the laws of the country of incorporation. Therefore, the corporation's beginning of a life is characterized by an act. DOLINGER, Jacob. *Sociedade de Economia Mista - Subsidiária no Exterior - Autorização Legislativa*. *Revista de Direito Administrativo*, Rio de Janeiro, v. 203, p. 346-357, p.349.

58 TIBURCIO, Carmen. *Disciplina Legal da Pessoa Jurídica à Luz do Direito Internacional Brasileiro*. *Revista Semestral de Direito Empresarial*, n. 8, 2011, p. 175-204, p.177.

59 "In this context, their capacity and structure are regulated by the law under which the company was constituted." TIBURCIO, Carmen. *Private International Law in Brazil: A brief overview*. *Panorama of Brazilian Law*. Vol 1, No 1, 2013, p. 11-37, p. 24.

60 Article 11 of the Decree No. 4.656/1942. BRASIL. Decreto-Lei Nº 4.657, de 4 de setembro de 1942. *Lei de Introdução às normas do Direito Brasileiro*. Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/Del4657compilado.htm. Access on June 28, 2016. Jacob Dolinger highlights the definition provided in this legislation is directed to the nationality of corporations in the international scenario, establishing the criteria to define if a corporation has a foreign nationality or not. DOLINGER, Jacob. *Sociedade de Economia Mista - Subsidiária no Exterior - Autorização Legislativa*. *Revista de Direito Administrativo*, Rio de Janeiro, v. 203, p. 346-357, p. 352.

nationality shall be incorporated in Brazil and establish its seat⁶¹ in the Brazilian territory⁶² as determined by the Article 60 of Decree-Law No. 2.627/1940,⁶³ which remains valid after the Law No. 6.404/1976 was enacted.

In case of foreign corporations to exercise activities in Brazilian territory, they shall obtain special authorization of the Brazilian Government.⁶⁴ After obtaining such authorization, the foreign corporation will be authorized to execute agreements, demand in Brazilian courts and be a shareholder of a Brazilian company⁶⁵ (as long it maintains a special representative in the national territory with full capacity).⁶⁶

Based on the foregoing, the foreign entities that would like to entry and invest in the Brazilian territory can legally exercise commercial activities through two options: obtaining Government's authorization and incorporating full branch or incorporating a subsidiary under the Brazilian laws and follow the requirements of Article 60 of Decree-Law No. 2.627/1940. In the first case, the corporation shall be submitted to the restrictions and formalities to functioning according to Brazilian legislation. In the second, the subsidiary shall observe Brazilian applicable laws, but its shares can be owned by a holding company incorporated abroad.⁶⁷

Under the bidding process documents made public by ANEEL such as the auction No. 01/2016 - ANEEL for generation⁶⁸, the foreign corporations were allowed to individually participate the bidding process

61 The seat shall not be the seat established in the acts of incorporation, but it shall be understood as the seat where the business activities are explored. DOLINGER, Jacob. *Sociedade de Economia Mista - Subsidiária no Exterior - Autorização Legislativa*. Revista de Direito Administrativo, Rio de Janeiro, v. 203, p. 346-357, p. 350.

62 DOLINGER, Jacob; TIBURCIO, Carmen. *Direito Internacional Privado*. Rio de Janeiro: Forense, 12 ed. Rev. atual. e ampl., 2016, p. 259.

63 BRASIL. Decreto-Lei Nº 2.627, de 26 de setembro de 1940. Dispõe sobre as sociedades por ações. Available at http://www.planalto.gov.br/ccivil_03/decreto-lei/Del2627.htm. Access on July 07, 2016.

64 Article 1.134 of the Brazilian Civil Code. BRASIL. Código Civil. Available at: http://www.planalto.gov.br/ccivil_03/leis/2002/110406.htm Access on June 28, 2016.

65 Article 300 of the Law No. 6.404/76. BRASIL. Lei no 6.404, de 15 de dezembro de 1976. Dispõe sobre as Sociedades por Ações. Available at: http://www.planalto.gov.br/ccivil_03/leis/L6404consol.htm. Access on July 07, 2016.

66 DOLINGER, Jacob; TIBURCIO, Carmen. *Direito Internacional Privado*. Rio de Janeiro: Forense, 12a ed. Rev. atual. e ampl., 2016, p. 265. Article 1.138 of the Brazilian Civil Code. BRASIL. Código Civil. Available at: http://www.planalto.gov.br/ccivil_03/leis/2002/110406.htm Access on June 28, 2016.

67 TIBURCIO, Carmen. *Disciplina Legal da Pessoa Jurídica à Luz do Direito Internacional Brasileiro*. Revista Semestral de Direito Empresarial, n. 8, 2011, p. 175-204, p.189.

68 ANEEL. Leilão nº 01/2016 - Processo nº 48500.004029/2015-41. Available at: http://www2.aneel.gov.br/aplicacoes/audiencia/arquivo/2015/079/documento/edital_leilao_a-5_2016.pdf. Access on June 28, 2016.

as long as they create a special purpose entity (SPE) incorporated under Brazilian laws.⁶⁹ The same requirement was included in the public auction No. 02/2015 - ANEEL for generation of renewable energy through wind power and biomass⁷⁰, the public auction No. 06/2014 for generation of energy through hydro, wind, solar and thermo power.⁷¹

The bidding process No. 13/2015 - ANEEL established a public auction for construction of transmission lines for electrical energy. Differently from the bidding process No. 01/2016 and No. 06/2014, in the bidding process documents No. 13/2015, foreign corporations that would compete individually were allowed to bid directly without the requirements of creating a SPE.⁷² In that case, the foreign corporation had to present the necessary documents to evidence its legal capacity and representatives authorized to represent the company in Brazil. In the same line were the requirements imposed by the bidding process No. 02/2016 - ANEEL for acquisition of electricity.⁷³

Another interesting requirement is provided in case of syndication formed to participate in the public auctions for generation or transmission of electricity. In case of syndication formed by Brazilian and foreign corporations, the syndicate had mandatorily to be led by a Brazilian corporation.⁷⁴ This requirement was present in all public auctions described above.

69 ANEEL. Leilão nº 01/2016 - Processo nº 48500.004029/2015-41. Available at: http://www2.aneel.gov.br/aplicacoes/audiencia/arquivo/2015/079/documento/edital_leilao_a-5_2016.pdf. Access on June 28, 2016, p. 6.

70 ANEEL. Leilão nº 02/2015 - Processo nº 48500.005812/2014-41. Available at: http://www2.aneel.gov.br/aplicacoes/editais_geracao/documentos/EDITAL%20LFA%202015_.pdf. Access on June 29, 2016, p. 6.

71 ANEEL. Leilão nº 06/2014 - Processo nº 48500.002119/2014-16. Available at: http://www2.aneel.gov.br/aplicacoes/editais_geracao/documentos/EDITAL_Leilao_A-5_2014_republicacao_20len_.pdf. Access on June 29, 2016, p. 6-7.

72 ANEEL. Leilão nº 13/2015 - Processo nº 48500.000333/2015-19 Available at: http://www2.aneel.gov.br/aplicacoes/audiencia/arquivo/2015/080/documento/edital_leilao_13_2015_abertura_ap.pdf. Access on June 28, 2016, p. 6.

73 ANEEL. Leilão nº 02/2016, Processos nº 48500.003092/2014-89 e 48500.003437/2015-85. Available at: http://www2.aneel.gov.br/aplicacoes/editais_geracao/documentos/Edital_leilao_02-2016_sistemas_isolados_vf.pdf. Access on June 29, 2016, p. 17.

74 The consortiums formed by Brazilian private corporations and foreign corporations, the lead of the consortium shall be placed to the Brazilian private corporation (“Nos consórcios formados entre pessoas jurídicas de direito privado brasileiras e estrangeiras, a liderança do consórcio caberá, sempre, à pessoa jurídica de direito privado brasileira.”) ANEEL. Leilão nº 13/2015 - Processo nº 48500.000333/2015-19 Available at: http://www2.aneel.gov.br/aplicacoes/audiencia/arquivo/2015/080/documento/edital_leilao_13_2015_abertura_ap.pdf. Access on July 06, 2016, p. 7. See also: ANEEL. Leilão nº 06/2014 - Processo nº 48500.002119/2014-16. Available at: http://www2.aneel.gov.br/aplicacoes/editais_geracao/documentos/EDITAL_Leilao_A-5_2014_republicacao_20len_.pdf. Access on June 29, 2016, p. 7.

4. A CRITICAL ANALYSIS OF THE OBSTACLES FACED BY FOREIGN INVESTORS TO ACCESS BRAZIL'S ENERGY SECTOR

The purpose of this section is to critically analyze what elements can be considered as obstacles to the entry and maintenance of foreign investment in long-term investments specifically focused on the Brazilian's energy sector. As previously highlighted, the scope of our analysis combines FDI and energy sector. Thus, portfolio investment and other sectors in the Brazilian economy were disregarded.

There are some elements we consider as obstacles for the foreign investor's entry in the Brazilian energy market for long-term investments. The requirements imposed to the foreign corporations in the public auctions constitute, in our opinion, an example of these obstacles. Another examples of such obstacles are the legal uncertainty⁷⁵, political instability, and lack of transparency, among others⁷⁶. All these require more a transformation of mindset and body of law other than a single amendment of legislation. These obstacles may lay off foreign investors away from the Brazilian market, which phenomenon have a relevant impact in the government's ability to reach sources of funds to develop its infrastructure sector.

In terms of limits imposed to the foreign investment in specific sectors of the economy, there are two types of restrictions to foreigners: restrictions limiting the foreign corporations to exercise activities under strategic sectors of economy and restrictions imposed to the participation of foreign individuals in Brazilian corporations.⁷⁷

The limits imposed by the national legislator to foreigners are based on the arguments of protection of national interests and protection of sectors seen as strategic and/or essential⁷⁸ to the Brazilian economy. On the one hand, media and aviation are sectors that still suffer with such type of restrictions. Oil and gas and energy sectors, on the other hand, are examples of sectors that foreign participation were made

75 "Regulatory clarity and certainty are valued by businesses and citizens". OECD. Policy Framework For Investment User's Toolkit: Chapter 10. Public Governance. Available at: <http://www.oecd.org/investment/toolkit/policyareas/publicgovernance/41890394.pdf>. Access on July 06, 2016, p. 2.

76 João Araujo list several policies that may hinder investments such as issues with tariff policies, characteristics of the power plants to be submitted to the public auction and political programs that do not address the needs of the energy sector. ARAUJO, João Lizardo. A Questão do Investimento no Setor Elétrico Brasileiro: Reforma e Crise. Available at: < <http://www.anpec.org.br/encontro2001/artigos/200104187.pdf>>. Access on July 11, 2016, p. 10-11.

77 TIBURCIO, Carmen. Disciplina Legal da Pessoa Jurídica à Luz do Direito Internacional Brasileiro. Revista Semestral de Direito Empresarial, n. 8, 2011, p. 175-204, p.184.

78 TIBURCIO, Carmen. Disciplina Legal da Pessoa Jurídica à Luz do Direito Internacional Brasileiro. Revista Semestral de Direito Empresarial, n. 8, 2011, p. 175-204, p.185.

flexible by amendments to the Brazilian Federal Constitution occurred in the 1990's.

The Brazilian Federal Constitution provides that the ownership of any media corporation shall be restricted to Brazilian individuals or Brazilian corporations with seat in Brazil. In case of corporations, Brazilian individuals shall hold at least 70% of the total shares or of the total voting shares of the company. The owners shall mandatorily exercise the management of the activities and establish the media content.⁷⁹

In aviation sector, the domestic transport is currently reserved to Brazilians corporations.⁸⁰ Foreigners can only own 20% of the voting ordinary shares of such Brazilians corporations. There is an ongoing debate undergoing in the Brazilian Parliament to modify the current legislation and permit foreign shareholder control in the Brazilian corporations.⁸¹ The legislative proposal initially submitted by the Government's commission proposed an increase from 20% to 49% of the voting ordinary share authorized to be acquired by foreigners.⁸²

In case of oil and gas sector, the previous legal regime established the Government's monopoly of the exploration of oil, gas and other hydrocarbons fluids as provided under article 177 of the original version of the Brazilian Federal Constitution.⁸³ The constitutional monopoly suffered changes by the adoption of Constitutional Amendment n. 9 of 1995.⁸⁴ "These provision were amended to maintain the Union's monopoly over oil and gas, but, at the same time, to allow International

79 Article 222 of the 1988 Brazilian Federal Constitution. BRASIL. Constituição da República Federativa do Brasil DE 1988. http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm. Access on July 08, 2016.

80 ("Art. 216. Os serviços aéreos de transporte público doméstico são reservados às pessoas jurídicas brasileiras.") BRASIL. Lei Nº 7.565, de 19 de dezembro de 1986. Dispõe sobre o Código Brasileiro de Aeronáutica. Available at: http://www.planalto.gov.br/ccivil_03/leis/L7565.htm Access on July 08, 2016.

81 The aviation sector is one example of the restriction of foreign capital in the corporations exploring activities in sensitive sector of Brazilian economy. Recently, the parliament approved the participation of 100% of foreign capital in the ordinary shares of Brazilian corporations. CAMARA DOS DEPUTADOS. <http://www2.camara.leg.br/camaranoticias/noticias/TRANSPORTE-E-TRANSITO/511051-CAMARA-APROVA-MP-QUE-PERMITE-100-DE-CAPITAL-ESTRANGEIRO-EM-EMPRESAS-AEREAS.html>. Access on June 28, 2016.

82 BRASIL. Medida provisória nº 714, de 1º de março de 2016. Extingue o Adicional de Tarifa Aeroportuária e altera a Lei nº 5.862, de 12 de dezembro de 1972, e a Lei nº 7.565, de 19 de dezembro de 1986. http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2016/Mpv/mpv714.htm#art4. Access on July 07, 2016.

83 BRASIL. Constituição da República Federativa do Brasil DE 1988. http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm. Access on July 08, 2016.

84 BRASIL. Emenda Constitucional no. 9 de 09 de novembro de 1995. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc09.htm. Access on July 08, 2016.

Oil Companies to act in Brazil”.⁸⁵ The Constitutional Amendment n. 9 had a significant impact and reoriented the Brazilian legal system regarding exploration of oil and gas.⁸⁶

In case of energy sector, the Constitutional Amendment n. 6 of 1995 amended the first paragraph of article 176 of the Brazilian Federal Constitution excluding the concept of Brazilian corporation with “national shares”.⁸⁷ After such amendment, Brazilian corporations with foreign ownership were allowed to explore hydro-generation energy, eliminating the requirement of the shares to be owned by Brazilian individuals.

Another type of restriction to the access of foreigners to the Brazilian market is connected with the formalities imposed to the foreigners under public auctions for concession agreements. It is understood the administrative burden of a legal system may reduce the interest of investors in a certain country. The excess of requirements to pursue administrative simple procedures and its time-length may result in an excessive cost negatively effect on the investor’s decision to invest.

In the Brazilian energy markets, it is common to find requirements related to syndications formed by Brazilian and Foreign corporations in the public auction process for energy concessions. In the public bidding documents analyzed above, in case of syndication with participation of a foreign corporation, a Brazilian corporation shall lead the syndication, not the foreign corporation. Not allowing a foreign corporation to lead a syndicate is an example of the barriers imposed under concessions in infrastructure projects that we currently face in Brazil. The result of the imposition of this type of barrier is the difficulty to attract foreign investment.⁸⁸

Another example of excess of administrative burden imposed to foreign corporations is the requirement of creation of a special purpose entity. In the public bidding documents analyzed above, the foreign corporations that win the bid shall create a special purpose entity to execute the concession agreement.

A third example can be represented by the preference given to the Brazilian bidders participating of any type of public bidding process occurred in Brazil. Brazilian corporations’ bid have preference

85 ALMADA, Laís P.; PARENTE, Virginia. Oil & Gas Industry in Brazil: A brief history and legal framework. *Panorama of Brazilian Law*. Vol 1, No 1, 2013, p. 223-252, p. 227.

86 RIBEIRO, Marilda. *Direito do Petróleo*. Rio de Janeiro: Renovar, 3a ed. rev., atual. e ampl, 2014, p. 407.

87 BRASIL. Emenda Constitucional no. 6 de 15 de agosto de 1995. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc06.htm#art1. Access on June 28, 2016.

88 BAPTISTA, Patricia. Governança Pública e Aperfeiçoamento Institucional da Administração Pública: Características fundamentais e perspectivas para a atuação do poder público de forma a atrair investimentos estrangeiros. In: *Simpósio Estadual de Investimentos*. Rio de Janeiro: Procuradoria do Estado do Rio de Janeiro, I, 2016.

in comparison with the bid of foreign corporations⁸⁹. According to article 3, paragraph 2 of the Law No. 8666/93 the tie-bracking criteria to decide between bids with equal conditions given in a public auction shall be the criteria of products and services provided by Brazilian corporations.⁹⁰ This provision can also be considered a hindrance to foreign investment's entry.

In the opinion of Patricia Baptista, the model of public bidding process and applicable legislation does not attract the type of investment the Brazilian Government should wish. The reason for that is because the concession contracts with Brazilian States is so favorable to the State itself and the Brazilian Judiciary is so paternalist and protective the result is a non-profit relationship for the foreign investor. An example of such paternalism is the non-observation of the right of the private party of the concession agreement to terminate it at the time the public party delays the payment for a period equal to or more than 90 days as provided in the Article 78, XV of the Law No. 8.666/93.⁹¹

Nevertheless the attractiveness of the Brazilian energy sector in terms, of natural resources⁹², extensive territory, the challenges faced by foreign investors do not encourage the attraction of private funds. Some still argue one of the main issues of foreign investor's at the entrance in the Brazilian market is the concern with legal uncertainty.⁹³ Some aspects of such uncertainty are reflected in the regulatory panorama, lack of national standards to guarantee the safety to foreign investors and culture of trust of the private sector in the public regulatory entities.

The Organization for Economic Co-operation and Development (OECD) developed a guide on public governance that highlights six elements inherent to the good governance: "accountability, transparency, efficiency, effectiveness, responsiveness and rule of law"⁹⁴. These

89 TIBURCIO, Carmen. *Disciplina Legal da Pessoa Jurídica à Luz do Direito Internacional Brasileiro*. Revista Semestral de Direito Empresarial, n. 8, 2011, p. 175-204, p.177.

90 BRASIL. Lei nº 8.666 de 21 de junho de 1993. Regulamenta o art. 37, inciso XXI, da Constituição Federal, institui normas para licitações e contratos da Administração Pública e dá outras providências. Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/Del8031.htm. Access on July 06, 2016.

91 BRASIL. Lei nº 8.666 de 21 de junho de 1993. Regulamenta o art. 37, inciso XXI, da Constituição Federal, institui normas para licitações e contratos da Administração Pública e dá outras providências. Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/Del8031.htm. Access on July 06, 2016.

92 Brazilian territory permits a range of source of energy and space to implement different plants such wind, hydro and solar power plants.

93 BAPTISTA, Patricia. *Governança Pública e Aperfeiçoamento Institucional da Administração Pública: Características fundamentais e perspectivas para a atuação do poder público de forma a atrair investimentos estrangeiros*. In: *Simpósio Estadual de Investimentos*. Rio de Janeiro: Procuradoria do Estado do Rio de Janeiro, I, 2016.

94 OECD. *Policy Framework For Investment User's Toolkit: Chapter 10. Public Governance*.

elements are necessary to maximize the investment flow in the countries based on the trust and certainty as base-ground assumptions observed by the investors at the first step of an investment's decision.

In respect to those elements, the corruption is an issue that remains present in different scenarios of the relationship between public and private sector, which has generated a scenario of political instability. Brazil is currently appointed as very corrupt under the '2015 Corruption Perceptions Index' holding the position 78 of 168's world countries ranking.⁹⁵ In addition, the latest events involving corruption's investigations in the public sector and oil and gas industry had a strong impact in the economic scenario.⁹⁶

Transparency can also be considered an issue in several layers: transparent rules, making the obligations of foreign investors clear and predictable. Transparent administrative procedures, clarifying to the private sector the cost efficiency of the investment to be made, are practices that need to be present in a developed market. In both cases, Brazil does not present the elements of public governance as established by OECD.⁹⁷

All the elements to build good governance should be observed by Brazilian's Government to improve its capacity of attraction of foreign source of funds. Public governance "helps build trust and provides rules and stability needed for planning investment in the medium and long term".⁹⁸ The consequences for a non-attractive environment for foreign investors are the lack of interest in the Brazilian concession bids and scarcity of financial sources to develop the electricity industry.

In our recent past, we have observed some cases of public

Available at: <http://www.oecd.org/investment/toolkit/policyareas/publicgovernance/41890394.pdf>. Access on July 06, 2016, p. 2.

95 Denmark is positioned as the first of the world's ranking, being the country most clean in terms of corruption. TRANSPARENCY INTERNATIONAL. Available at: <https://www.transparency.org/cpi2015/>. Access on July 06, 2016.

96 An example of the consequences of the political instability and consequences of the corruptions events and investigatios occurred in Brazil: the country's rating was downgraded by the International Rating Agencies. MOODY'S INVESTORS SERVICE. Moody's rebaixa rating do Brasil para Baa3 de Baa2; perspectiva é alterada para estável, 11 ago. 2015. Available at: https://www.moody's.com/research/Moodys-rebaixa-rating-do-Brasil-para-Baa3-de-Baa2-perspectiva-PR_332264?lang=pt&cy=bra. Access on July 11, 2016.

97 In terms of concession in the energy sector, an example of the lack of transparency occurred in the Light concession. According to João Araújo, the concession agreement presented favorable clauses to the contracting party, but these clauses were proven not as favorable as Light imagined. ARAUJO, João Lizardo. A Questão do Investimento no Setor Elétrico Brasileiro: Reforma e Crise. Available at: <http://www.anpec.org.br/encontro2001/artigos/200104187.pdf>. Access on July 11, 2016, p. 10.

98 OECD. Policy Framework For Investment User's Toolkit: Chapter 10. Public Governance. Available at: <http://www.oecd.org/investment/toolkit/policyareas/publicgovernance/41890394.pdf>. Access on July 06, 2016, p. 2.

auction's abandonment by the private sector. Even international companies with high expertise in some sectors of the economy, such as the energy sector, abandoned public auctions in Brazil due to the lack of interest in the terms of conditions of the bidding process.

An example of this situation was the public bidding process to contract with an energy generation provider in 2015 necessary for the Olympics in Rio.⁹⁹ Four years before, the multinational corporation 'Aggreko', one of the experts company in such type of electricity provider service, has predicted a relevant opportunity of investment for the sport events in Brazil, such as the World Cup and Olympics. Looking for such type of opportunities, the multinational Aggreko opened 12 offices in Brazil.¹⁰⁰ However, after having participated in the World Cup concession agreement, Aggreko decided not to participate in the public bidding of 2015 to provide energy in the Olympics in Rio de Janeiro. Despite the concern of Municipal government of Rio de Janeiro with finding remedies for such deserted public auction, there is no debate in the media or any other forum regarding the reasons for such abandonment by Aggreko.

This type of abandonment of public auctions is a concern for the economy of a country. It is impressive not seen any type of manifestation from the public authorities in terms of motivation to change the current scenario private investors face.

In conclusion, public authorities in Brazil should be more interested in addressing the needs of the private sector, especially the foreign investors, to improve a more benefic environment for investment. Provisions fulfilled with consistency and coherence for the entrance of foreign investment in the national territory and certainty for long-term investments are vital for the development of the infrastructure. Public governance shall focus on a dynamic, efficient, long-term agenda for investment attraction and infrastructure development.

It is necessary to highlight that aiming for efficiency and effectiveness in the regulatory framework and prioritize good governance is not synonym of deregulation. "Regulations which encourage market dynamism, innovation and competitiveness improve economic performance".¹⁰¹

99 REUTERS. Geradora de energia Aggreko se retira de licitação para Jogos Rio 2016. Available at: <http://br.reuters.com/article/sportsNews/idBRKBN0TX1WU20151214>. Access on July 08, 2016.

100 ISEBVMF. Infraestrutura - Fornecedores de serviços reforçam bases no país. <http://isebvmf.com.br/?r=noticias/view&id=226910>. Access on July 08, 2016.

101 OECD. Policy Framework For Investment User's Toolkit: Chapter 10. Public Governance. Available at: <http://www.oecd.org/investment/toolkit/policyareas/publicgovernance/41890394.pdf>. Access on July 06, 2016, p. 4.

5. CONCLUSION

The relevance of the energy sector to a country's economy requires a significant amount of investment necessary for the infrastructure involving the generation, transmission and distribution of electricity to its population. Concerned with the volume of investment required for development, public authorities shall focus on the mechanisms of attraction of the investors.

Departing from that assumption, the historic outlook presented in the first section recapitulated several events that modified the legislative and regulatory panorama of the energy sector. The creation of the Code of Waters, the Concessions Law, Energy Concession Law and segmentation of the energy sectors in generation, transmission and distribution were events looking for improvement of the energy market. These events had one main objective: create competition with less State-intervention and more participation of the private sector as source of investment.

Notwithstanding all changes made to the legislative panorama over the energy sector, requirements imposed to foreign investors remained in the public auction documents. After an analysis of bidding process provisions established by ANEEL, a number of requirements inflicted to foreign corporations were identified. These requirements play more a role of hindrance of investments than to protect national market.

Along with issues such as legal uncertainty, political instability, administrative burden and lack of transparency present in the Brazilian system as a whole, these requirements negatively impact the energy sector instead of improving it. After a critical analysis of the obstacles faced by foreign investors to access Brazil's energy sector, the conclusion is a necessary reformulation of the regulatory framework to eliminate such type of hindrances to the access of foreign investor's access to the infrastructure sector. "Regulations which are poorly designed or weakly applied can slow business responsiveness, divert resources away from productive investments, hamper entry into markets, reduce job creation and generally discourage entrepreneurship."¹⁰²

Public authorities shall value for a regulatory framework that promotes efficiency and effectiveness. Good governance with all its inherent elements shall drive public policies, building a system with stability and incentives necessary to plan investments in the medium and long term by private investors. Brazil needs to eliminate the issues found in the concession bidding process, the administrative burden and promote the participation of the private sector to pursue infrastructure

102 OECD. Policy Framework For Investment User's Toolkit: Chapter 10. Public Governance. Available at: <http://www.oecd.org/investment/toolkit/policyareas/publicgovernance/41890394.pdf>. Access on July 06, 2016, p. 4.

projects, developing the economy, improving wide access and competition in the energy sector. The risk of not adoption measures like this is the danger of facing a new energetic crisis and suffer with difficulties related to scarcity of source of funds.

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NUEVO CONSTITUCIONALISMO LATINOAMERICANO: EL ESTADO MODERNO EN CONTEXTOS PLURALISTAS

NEW CONSTITUTIONALISM IN LATIN AMERICA: THE MODERN STATE IN PLURALIST CONTEXTS

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Resumen: Las discusiones sobre el Estado moderno, fundado en la idea de que nación y país se confunden, generan una tensión permanente en las antiguas colonias europeas en América Latina. La existencia de los pueblos y las civilizaciones indígenas, con sus propias costumbres y sensibilidades legales, no se tuvo en cuenta en la construcción de los sistemas políticos y judiciales del continente. Al largo de las últimas décadas, el surgimiento de movimientos sociales que luchan por el reconocimiento del carácter plural del continente, junto con los cambios constitucionales profundos convencionalmente llamado «nuevo constitucionalismo latinoamericano», hace que estas encrucijadas del Estado Clásico sean de suma importancia a los juristas del Sur.

Palabras clave: Teoría Jurídica - Constitucionalismo - Cultura - Pluralismo - América Latina

Abstract: The discussions about the modern state, founded on the idea that nation and country are the same, generates a permanent tension in the former European colonies in Latin America. The presence of peoples and civilizations, with its own customs and legal sensibilities, was disregarded in the construction of political and judicial systems of this continent. Over the past decades, the emergence of social movements fighting for recognition of plural context in the continent, combined with profound constitutional changes which is conventionally called the «new Latin American constitutionalism», makes these crossroads of

classical state of utmost importance for jurists of the South.

Keywords: Legal theory - Cnstitutionalism - Culture - Pluralism - Latin America

1. INTRODUCCIÓN

Desde mediados de los 80, América Latina ha sido campo de una serie de reformas constitucionales en Nicaragua en 1987, Brasil en 1988, Colombia en 1991, Paraguay en 1992, Perú en 1993, Argentina en 1994, Venezuela en 1999, Ecuador en 2008 y Bolivia en 2009¹. Parte de este proceso se produjo después de la abolición de largos regímenes militares; o en medio de las demandas de los movimientos populares en plena democracia, por profundizar las transformaciones institucionales que acompañaron el surgimiento de nuevas fuerzas políticas. Hasta entonces, las reformas constitucionales en el continente se habían caracterizado por poca participación popular, y objetivos programáticos a corto plazo, como las cuestiones relativas a la reelección presidencial o la introducción de las instituciones de la experiencia externa, como el consejo judicial europeo. Resultado de la colonización, la cultura jurídica y las instituciones en América Latina provienen de la tradición jurídica europea y están marcados por su característica elitista y, con el tiempo, se profundizó la invisibilidad de los pueblos indígenas y sus costumbres.

Por lo tanto, la independencia de las colonias no tuvo lugar sobre la base de una interrupción significativa en los ámbitos social, económico y político-constitucional. Con el tiempo va a incorporar y adaptar doctrinas capitalistas eurocéntricas económicas del liberalismo y el positivismo. Este último, considerado como la expresión de un nuevo orden político y legal, encontró suelo fértil en la construcción de los estados, por la elite blanca de origen europeo, que surgen durante este período (WOLKMER; FAGUNDES, 2011, p. 375). El constitucionalismo se ha desarrollado desde las tradiciones constitucionales clásicas: la americana y la francesa. Y proporciona una serie de principios universales, como la igualdad y la libertad, en una sociedad estratificada, jerárquica que ha marginado a los pueblos indígenas y esclavizó descendientes de los africanos.

A medida que la dominación de clase y la dominación étnica y racial, derivado del proceso de colonización, están relacionados (SANTOS, 2010, p. 29), la lucha anti-capitalista y la lucha anti-colonial pasar un impulso en el período que comienza a finales del 80. Venezuela, Colombia, Perú, Bolivia y Ecuador², países andinos marcados por

¹ Y también las reformas en Costa Rica /1989, y México/1992 (UPRIMNY, 2011, p. 109).

² Del mismo modo, México, Nicaragua y Paraguay. cf. ORGANIZACIÓN INTERNACIONAL

la existencia de culturas tradicionales en sus territorios, vienen a reconocer el pluralismo jurídico constitucionalmente. En contraste con el constitucionalismo convencional, individualista y del estado liberal, sobre el que ha caminado constituciones de América Latina; el pluralismo jurídico rompe con el monismo del Estado nacional y propone una visión multicultural/emancipadora y la perspectiva democrática con un nuevo Estado de Derecho, llamado Pluridimensional (WOLKMER, 2010, p. 145). El reconocimiento del derecho consuetudinario de los pueblos precolombinos se convertirá en la marca líder de lo que se suele llamar el “nuevo constitucionalismo latinoamericano”.

La contribución de los pueblos indígenas, que han sido históricamente excluidos de los procesos constituyentes, dio apoyo para el desarrollo de una nueva forma de organización del Estado, con el objetivo de la armonía con la naturaleza y la construcción de otra convivencia ciudadana³. El proyecto constitucional llevado a cabo en estos países transformó la organización del poder del Estado, con una fuerte participación popular en el proceso. Son sus objetivos la integración de los sectores históricamente excluidos y la búsqueda de la realización de los derechos sociales fundamentales y los derechos humanos internacionales. Se basa también en el carácter de descolonización, dando protagonismo a los principios de las naciones indígenas y al proceso intercultural. La plurinacionalidad acaba rompiendo los límites del Estado de derecho y requiere un nuevo marco institucional. Aunque que las características que asumen son diferentes para cada país, algunos autores clasifican los estados de América Latina según el reconocimiento, en mayor o menor grado, de pluralismo jurídico y derecho indígena: en un primer nivel serían los Estados monistas, que no reconocen los sistemas jurídicos indígenas; segundo, los estados que aceptan las costumbres jurídicas indígenas antes de los juicios estatales, sin reconocer la jurisdicción de las autoridades indígenas; por último, los Estados que reconocen tanto la ley como la jurisdicción indígena (ALMEIDA, 2011, p. 45).

El primer contacto empírico con el tema del constitucionalismo latinoamericano ocurrió en Sucre - capital de Bolivia y la sede de la Asamblea Constituyente - durante las manifestaciones que tuvieron lugar a finales de 2007. En aquellos días, la “Ciudad Blanca”, como era conocida, había sido testigo de la oposición al gobierno del indígena Evo Morales a retirarse del proceso constitucional. Hubo una serie de actos para mantener su condición de capitalidad plena y su paisaje comenzó a ajustarse a las protestas intermitentes y coches quemados,

DEL TRABAJO. Los derechos de los pueblos indígenas y tribales en la práctica. Un guía sobre el convenio núm. 169 de la OIT. Perú: Programa para promover el convenio núm. 169 de la OIT, Departamento de Normas Internacionales del Trabajo, 2009, 201 p.

3 Mirar la parte “Decidimos construir” del Preámbulo de la Constitución ecuatoriana de 2008.

que culminó con la policía local a abandonar sus puestos. Me di cuenta de que el contractualismo y el poder constituyente, explicado desde las clases de derecho constitucional, no contenía la realidad dinámica de ese proceso. La futura constitución tomó parte de las discusiones políticas locales del momento, marcadas con la popularización del proyecto de texto constitución, publicado y vendido en las calles.

Más tarde, se promulgaron las Constituciones de Ecuador (2008) y Bolivia (2009), lo que representa un punto de inflexión en el constitucionalismo local, por la participación popular en su desarrollo y el reconocimiento de nuevos derechos para los grupos sociales marginados, hasta entonces, del proceso político. Aunque este proceso sea relativamente reciente, la obra aborda estas transformaciones constitucionales y sus principios programáticos que apuntan la superación del estado moderno. En primer lugar, con la traducción de esta realidad por la teoría constitucional, y después con un estudio de los textos constitucionales para trazar lo que es el carácter innovador de este movimiento y las razones que lo hizo apodado como constitucionalismo “transformador” (SANTOS, op. cit., p. 71), “de la diversidad” (UPRIMNY, 2011, p. 112) “comprometido” (PASTOR, DALMAU, 2011, p. 313), entre otros.

2. LA MIRADA DE LA TEORÍA CONSTITUCIONAL

Entre los conceptos de “Constitución”, el cual me parece más cercano a la realidad en el presente trabajo, es lo que revela su carácter de correlación de fuerzas y luchas sociales, en un determinado momento histórico del desarrollo de la sociedad⁴. En su obra sobre “¿qué es una constitución?”, Ferdinand Lassalle ya indicó la importancia de los fundamentos sociales y políticos, más allá de las cuestiones formales, en una constitución. En su opinión, la Constitución es la ley fundamental, básica, y el verdadero fundamento de otras leyes (LASSALLE, 2000, p. 9) por lo que debe irradiar a través de las leyes ordinarias del país. Por otro lado, la constitución de un país tiene como esencia la suma de los factores reales de poder que gobierna una nación (ibíd., p. 17) que cuando positivada acaba por convertirse en instituciones jurídicas. Mientras pacto político que expresa la pluralidad, se materializa como una forma de poder que está legitimada por la convivencia de concepciones divergentes, diversas y participativas. En esta dimensión

4 “Assim, toda sociedade política tem sua própria constituição, corporalizando suas tradições, costumes e práticas que ordenam a tramitação do poder. A constituição em si não só disciplina e limita o exercício do poder institucional, como também busca compor as bases de uma dada organização social e cultural, reconhecendo e garantindo os direitos conquistados de seus cidadãos, materializando o quadro real das forças sociais hegemônicas e das forças não dominantes.” (WOLKMER, 2010, p. 143)

del concepto de constitución, Wolkmer (2010, p. 144) ve un espacio estratégico y privilegiado para múltiples intereses materiales, los factores socioeconómicos y tendencias pluriculturales, que reúne y refleje, por supuesto, los horizontes de Pluralismo,

El constitucionalismo, teniendo en cuenta el camino desde la Revolución Gloriosa (1688), la guerra de independencia de los Estados Unidos (1776) y la Revolución Francesa (1789), se caracterizó por ser una corriente ideológica que evoluciona con el concepto mismo de la palabra. Renunciando el intento de explicar todo el proceso histórico hasta el denominado neoconstitucionalismo, señalo los cuatro paradigmas constitucionales descritos por los constitucionalistas españoles Roberto Viciano Pastor y Prof. Rubén Martínez Dalmáu (2011, p. 309): el surgimiento del constitucionalismo liberal de las revoluciones burguesas, desde finales del siglo XVIII, centrado en la defensa de los derechos individuales y la limitación del poder; su evolución conservadora al positivismo y el establecimiento del Estado de Derecho, que va desde el siglo XIX a principios del siglo XX; el constitucionalismo democrático en las primeras décadas del siglo XX, o que sería reanudar principios del contratualismo y de la legitimidad democrática del poder en Rousseau; y el constitucionalismo social, a fin de garantizar los derechos sociales en el contexto de la sociedad capitalista de bienestar, lo que hizo espacio para el concepto de Estado social y democrático.

La implementación del Estado democrático constitucional contemporáneo, conducido a cambios en el papel jugado por la Constitución, que ahora son vistos como un programa positivo de valores que deben ser atendidos por el legislador (ZAGREBELSKY apud MAIA, 2009, p.5). Las constituciones como la española (1978) o la de Brasil (1988) se configuran como límite y conducción al mismo tiempo, y no se limitan a establecer habilidades o ramas separadas de poderes y funciones del Estado. En cambio, tienen altos niveles de normas materiales o de fondo que afectan a la acción del Estado, ordenando ciertas metas y objetivos. En este sentido, el constitucionalismo europeo contemporáneo reconoce tanto la tradición liberal, que comprende la orden constitucional como un instrumento de garantía de la esfera mínimo intangible de la libertad de los ciudadanos; como las modificaciones establecidas por el constitucionalismo de posguerra. Contrariamente a las sugerencias de Kelsen, lo que vimos fue una fusión de contenidos subjetivos en la parte superior del ordenamiento jurídico, que establece una relación necesaria entre el derecho y la moral. Los principios constitucionales abrieron una vía para la entrada de la moral en el derecho positivo, con la incorporación de la dignidad humana, la solidaridad social, la libertad y la igualdad, haciendo legalmente válidas expresiones de la ética política modernas. Este movimiento rechaza

las proposiciones del positivismo teórico y tratar de convertir, sin ruptura, el Estado de Derecho en el Estado Constitucional de Derecho. Para Pastor y Dalmáu (2011, p. 311), el neoconstitucionalismo se configura como una teoría del derecho y no exactamente como una teoría de la constitución. Mientras es una “teoría del derecho”, está basada en la omnipresencia de principios jurídicos, como la interpretación constitucional, para describir los logros de constitucionalización: este proceso que modificó los grandes sistemas jurídicos contemporáneos, haciendo de la constitución una norma superior del Estado que presente por todo el sistema. El neoconstitucionalismo, como se puede ver, es el producto de las teorías del mundo académico; mientras, como se verá, el nuevo constitucionalismo latinoamericano parte de las demandas populares y de los movimientos sociales:

El nuevo constitucionalismo mantiene las posiciones sobre la necesaria constitucionalización del ordenamiento jurídico con la misma firmeza que el neoconstitucionalismo y plantea, al igual que éste, la necesidad de construir la teoría y observar las consecuencias prácticas de la evolución del constitucionalismo hacia el Estado constitucional. Pero su preocupación no es únicamente sobre la dimensión jurídica de la constitución sino, incluso en un primer orden, sobre la legitimidad democrática de la constitución. En efecto, el primer problema del constitucionalismo democrático es servir de traslación fiel de la voluntad constituyente del pueblo y establecer los mecanismos de relación entre la soberanía, esencia del poder constituyente, y la constitución, entendida en su sentido amplio como la fuente del poder (constituido y, por lo tanto, limitado) que se superpone al resto del derecho y a las relaciones políticas y sociales. Desde este punto de vista, el nuevo constitucionalismo reivindica el carácter revolucionario del constitucionalismo democrático, dotándolo de mecanismos que pueden hacerlo más útil para la emancipación y avance de los pueblos, al concebir la constitución como mandato directo del poder constituyente y, en consecuencia, fundamento último de la razón de ser del poder constituido. (ibíd.).

3. EL NUEVO CONSTITUCIONALISMO LATINOAMERICANO

Como se explica en la introducción, el período posterior a la colonización no presupone una ruptura en el orden social, y mucho menos una reflexión sobre el pluralismo cultural que existía en nuestras sociedades. Al tratar de superar este pasado no resuelto, las antiguas colonias implementan hoy una serie de reformas constitucionales que se le llama “el nuevo constitucionalismo latinoamericano”. Esta teoría del derecho excede los debates sobre la dimensión positiva de las constituciones, por reanudar los problemas relacionados con el contratualismo, y centrándose en la exterioridad de la Constitución, su legitimidad democrática y la relación entre la voluntad constituyente y constituida. Dentro de la perspectiva democrática, sólo puede utilizarse como base de un sistema jurídico una constitución que realmente representa la voluntad constituyente popular. En este sentido, el nuevo constitucionalismo puede verse, con carácter subsidiario, como una teoría democrática de la constitución, recuperándose de forma radicalizada el constitucionalismo democrático. Como señaló Pastor y Dalmáu (2011, p. 321), esta teoría se convirtió en la práctica en América Latina, ya que esos procesos constituyentes se realizaron a partir de la convocatoria de una Asamblea Constituyente elegida democráticamente, y seguido de una ratificación popular directa de la Constitución.

Sobre el punto de partida del nuevo constitucionalismo, es preferible reconocer su evolución desde diferentes ciclos de reformas constitucionales, como se indica por el diseño tripartito de Raquel Yrigoyen Fajardo (2011, p. 141). Para la autora, el primer ciclo sería el constitucionalismo multicultural (1982/1988), que introduce el concepto de diversidad cultural y reconoce los derechos indígenas específicos. Subrayo que, a pesar del intento de establecer el comienzo y fin cronológicos, este ciclo aún se mezcla con el período de neoconstitucionalismo que trata de alejarse. De eso se desprende el hecho de que la Constitución de Brasil sea más representativa de un neoconstitucionalismo, ya que la preocupación con la legitimidad democrática no sería su principal característica aún que poseyendo instrumentos como el referéndum y el plebiscito. Debido a la acogida de los principios del multiculturalismo y el reconocimiento del derecho a la diferencia de las minorías sociales, pueden ser incluidos en este ciclo el texto de Brasil (1988) y las reformas en Guatemala (1985) y Nicaragua (1987).

El segundo ciclo está marcado por el constitucionalismo participativo y pluralista, que según Wolkmer (2011, p. 403) tiene su pico en la Constitución de Venezuela de 1999. Para Fajardo (2011, p. 142) se llama constitucionalismo pluricultural (1988/2005), y abarca conceptos de nación multiétnica y Estado pluricultural. Establece un

amplio catálogo de derechos de los indígenas y otros colectivos étnicos, fuertemente influenciado por los principios que surgen del Convenio 169 / OIT. En medio del reconocimiento de la identidad multicultural y del pluralismo social, político y jurídico de América Latina, este ciclo incluye reformas de Colombia (1991), México (1992), Paraguay (1992)⁵, Perú (1993), Bolivia (1994), Argentina (1994), Ecuador (1998) y Venezuela (1999).

El tercero y, por ahora, el último ciclo, marcado por el carácter revolucionario de las Constituciones de Ecuador (2008) y Bolivia (2009), sería el constitucionalismo plurinacional (2006-2009). O, en palabras de Wolkmer (ibíd.), se convierte en un “constitucionalismo plurinacional comunitario”. Fajardo (2011, p. 149) da como punto de partida la Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas (2006-2007). Su principal innovación es romper con el universalismo y señalar una salida pluralista a la cuestión de la igualdad y la libertad del Estado de Derecho, desde las experiencias de las sociedades interculturales, reconociendo nuevas fuentes de producción de derecho: junto a la jurisdicción ordinaria, se considera ahora la jurisdicción de los pueblos originarios, sus autoridades, instituciones, prácticas y costumbres.

En el análisis de las características del nuevo constitucionalismo, Pastory Dalmáu (2011) señalan: i) la ruptura con el régimen constitucional anterior, con el fortalecimiento, el nivel simbólico, de la dimensión política de la Constitución; ii) textos innovadores que proporcionan una nueva integración nacional y una nueva institucionalidad; iii) basados en los principios antes que normas; iv) extensos textos constitucionales, pero marcados por el uso de un lenguaje sencillo, por ejemplo, los términos como habeas corpus - ahora acción de libertad; y habeas data - ahora acción de protección de privacidad; v) la rigidez de las constituciones, que prohíben los parlamentos reformarlas sin un nuevo proceso constitucional⁶; vi) tratan de recuperar la relación entre soberanía y gobierno con la democracia participativa, además del sistema representativo; vii) una extensa declaración de derechos, con

5 Aunque Wolkmer o Fajardo no coloque Paraguay en cualquiera de los ciclos, este documento demostrará su similitud con otros textos de este segundo ciclo.

6 “Por último, ya se ha hecho referencia a la eliminación del e poder constituyente constituido, poder constituyente derivado, o poder de reforma; esto es, a la prohibición constitucional de que los poderes constituidos dispongan de la capacidad de reforma constitucional por ellos mismos. Se trata de una fórmula que conserva en mayor medida la fuerte relación entre la modificación de la Constitución y la soberanía del pueblo, y que cuenta con su explicación política en el propio concepto de Constitución como fruto del poder constituyente y, complementando el argumento teórico, en la experiencia histórica de cambios constitucionales por los poderes constituidos propia del viejo constitucionalismo y tan extendida en el constitucionalismo europeo”. (VICIANO PASTOR; MARTÍNEZ DALMAU, 2011, p. 324).

la incorporación de los tratados internacionales y la integración de los sectores marginados; viii) la superación de un predominio del control difuso del constitucionalismo por el control concentrado, incluyendo fórmulas mixtas; ix) un nuevo modelo de “constitución económica”, al mismo tiempo un fuerte compromiso con la integración latinoamericana de la naturaleza no sólo económica.

El tercer ciclo es una maduración de las características innovadoras del constitucionalismo que culmina con la llamada refundación del Estado moderno. Los textos andinos serán dedicados a superar la herencia colonial, con la valoración de las antiguas culturas de los pueblos y naciones de estos países. Para este propósito, hay un marco institucional que trae el pluralismo cultural e incorpora procesos de organización comunitaria. Uno de los resultados del proyecto de descolonización es la creación de un nuevo catálogo de derechos y principios que rompe la tradición generacional y eurocentrada. En las constituciones de Bolivia y Ecuador, por ejemplo, el ancestral principio andino del Buen Vivir se elevó a la lista de principios constitucionales fundamentales. En nuestra gramática, similar a lo bien común de la humanidad visto desde la cosmovisión andina: el buen vivir pone la vida como un eje central de la comunidad y abre un abanico de garantías y de derechos sociales, económicos y ambientales. El vínculo con los conocimientos tradicionales logró la inclusión en las constituciones de la expresión en idiomas originarios: Sumak Kawsay (EQUADOR, 2008) e Suma Qamaña (BOLÍVIA, 2009), respectivamente. El octavo artículo de la Constitución de Bolivia también prevé como principios y valores éticos y morales del Estado plurinacional la tríada “ama qhilla, ama llulla, ama suwa” – en traducción literal, esta regla que se refiere al régimen incaico (DELGADO BURGOA 2010, p; 45) significa “no seas flojo, no seas mentiroso ni seas ladrón”; ñandereko – vida armoniosa, teko kavi – buena vida, ivi maraei – tierra sin mal - y qhapaj ñan – camino o vida noble. El liderazgo indígena, y la inclusión de principios de su visión del mundo, han influenciado, ainda, los derechos de la Pachamama. Es decir, derechos de la naturaleza, como la protección de fuentes de agua y los ríos o preservación de los paisajes naturales y bosques, que ahora se eleva a sujeto de derechos⁷.

3.1. La refundación del Estado en los textos constitucionales

Cada uno de estos temas abre la vía para un campo fértil para la investigación en ciencias sociales y jurídicas, pero nos atendremos

⁷ Para profundizar en el tema específico de la pachamama, véase ZAFFARONI, E. R. La naturaleza como persona: Pachamama y Gaia. In: CHIVI VARGAS, I. M. (coord.). Bolivia. Nueva Constitución Política del Estado, 1 ed., La Paz: Vicepresidencia del Estado Plurinacional, 2010, p. 109- 132.

al objeto - la encrucijada del Estado moderno en medio de este nuevo constitucionalismo - específicamente en la ruptura con el sistema clásico del poder tripartita esbozado por Montesquieu y las transformaciones en el concepto de ciudadanía de las revoluciones burguesa de los siglos XVII y XVIII. En Bolivia, un cuarto poder ha sido creado - Órgano Electoral Plurinacional, que busca controlar y supervisar a los órganos de representación política estatal bolivianos; en Ecuador hay cinco funciones del Estado - además de los poderes ejecutivo, legislativo y judicial, se añaden la Función Electoral y la Función de Control y Transparencia Social (SANTOS, 2010, p. 95). Las características de los tres poderes clásicos de gobierno no se mantuvieron en su totalidad, habiendo sido transmutado en nuevas instituciones como el Tribunal Constitucional Plurinacional de Bolivia, con miembros elegidos por voto; o transformado para acomodar la contribución de los pueblos indígenas (ibid.), como en el caso del poder “judicial y justicia indígena”.

La ciudadanía empieza a adquirir nuevas dimensiones, así como su relación con la nacionalidad, la identidad y la cultura. Hay referencias directas a la ciudadanía de los pueblos indígenas y los indígenas en las constituciones de Bolivia y Ecuador – también en Venezuela, pero en el caso de otro ciclo. La nación boliviana, por ejemplo, se compone por los bolivianos y bolivianas, por las naciones y pueblos indígenas, y las comunidades interculturales y afrobolivianas (CPE, Art. 3. A nacionalidade equatoriana é reconhecida como o vínculo jurídico ao Estado (CRE, Art. 6), sin perjuicio de pertenecer a nacionalidades indígenas que coexisten en el Ecuador plurinacional. La Constitución venezolana trata el tema con un enfoque distinto, afirmando el papel de los pueblos indígenas en la formación del pueblo venezolano como “único, soberano e indivisible” (CRBV, Art.126).

Las naciones y pueblos indígenas o indígenas, protagonistas de este proceso, tienen derechos políticos específicos, que rompe la lógica de la igualdad formal del estado liberal: los derechos de voto y la participación de los pueblos originarios en Bolivia, como la celebración de elecciones de acuerdo con sus propias reglas (CPE, Art. 26°, II e 211°, I, II); la proporcionalidad de la Cámara reflejan la composición multinacional de la sociedad (CPE, Art. 146°, IV), incluso en los departamentos (CPE, Art. 278°, I, II). El derecho a la representación pluralista está garantizado, incluso entre ministros del gobierno (CPE, Art. 172°, 22); en el Tribunal Constitucional (CPE, 197, I) también debe tener representantes de los sistemas originarios; y el Tribunal Supremo Electoral debe garantizar al menos dos miembros – del total de siete – para las naciones indígenas rurales (CPE, Art. 206°, II). Más modestamente, Ecuador garantiza la participación de las comunidades, pueblos y nacionalidades indígenas en las decisiones sobre las políticas públicas, la planificación y los proyectos estatales (CRE, Art.57). También como

parte de la representación, la Constitución colombiana establece 2% de los escaños del Senado para las comunidades indígenas (CPC, Art. 171), su propia jurisdicción ante las autoridades indígenas (CPC, Art. 246) su participación en la planificación de la configuración territorial del país (CPC, Art. 329). En comparación, Venezuela establece el derecho de los pueblos indígenas a participar en la política y estar representados en la Asamblea Nacional (CPC, art. 125), su participación en la demarcación de sus tierras (CPC, art. 119) y la competencia territorial de sus autoridades en la administración de la justicia segundossus tradicionesy, solo para sus miembros (CPC, art. 260).

Como se puede apreciar en algunos dispositivos, el tema de la cultura y la identidad está cubierto más por la gramática de reconocimiento de un multiculturalismo existente que de hecho una refundación del Estado. En este contexto, se han garantizado los derechos como ser juzgado en su propio idioma en Bolivia (CPE, Art. 120º, II) y Peru (CPP, Art. 2, 19), y el derecho a un traductor en Paraguay (CRP, Art. 12, 4), Ecuador (CRE, Art. 76, 7, “f”) y Venezuela (CRBV, Art. 49, 3); así como los principios de la no discriminación en relación con el lenguaje y la protección y la educación de las lenguas nativas⁸. Sin embargo, con respecto a la lengua oficial del país hay una importante innovación: en Bolivia 36 lenguas se han convertido en oficial, además de castellano (CPE, Art. 5º, I), se prevé la obligación de los gobiernos a utilizar al menos dos idiomas. El importante número supera las predicciones hechas hasta ahora por Paraguay (castellano y guaraní prevista en el Art.140 da CRP), Peru (art. 48, castellano, y cuando predominante, también aymara, quechua o cualquier otro) o Ecuador, que prescribe tres lenguas como oficiales en las relaciones interculturales⁹.

Por último, la superación de la dominación de los pueblos indígenas implica necesariamente el derecho de autogobierno y la administración de justicia, de acuerdo con sus métodos y costumbres tradicionales. En América Latina, el pluralismo jurídico¹⁰ encuentra

8 Está presente en las constituciones de Argentina (CNA, Ar. 75, 17), Bolivia (CPE, Art. 30, II, 9 y el Art. 95, II), Brasil (CRFB, Art. 210, § 2 y Art. 231), Colombia (CPC, art. 10), Paraguay (CRP, art. 140) y Venezuela (CRBV, art. 9).

9 Estos son el español, el kichwa y el shuar. (CRE, Art. 2º)

10 Sobre el concepto de pluralismo: “Hay una situación de pluralismo jurídico cuando en un mismo espacio social o geopolítico (como el de un Estado) co-existen varios sistemas normativos. Boaventura de Sousa Santos (1994) considera que puede haber muchas fuentes del pluralismo legal: una situación colonial, la presencia de pueblos indígenas, un periodo revolucionario o de modernización, poblaciones marginales en zonas urbanas de países independientes; así como también situaciones de desregulación al interior del propio Estado, y un pluralismo transnacional (lex mercatore) que imponen las transnacionales por encima delas regulaciones locales.” (FAJARDO, 2006)

un terreno fértil y, en mayor o menor medida, la mayoría de sus países abordará los poderes jurisdiccionales y administrativos de los originarios en sus textos, o son signatarios de los tratados internacionales que abordan el tema. Pluralismo jurídico. El Estado Plurinacional de Bolivia es el más dedicado a las jurisdicciones ordinarias e indígenas¹¹, estableciendo que ambas tienen igual jerarquía (CPE, Art. 179, II). Las naciones y pueblos originarios indígenas tienen su jurisdicción sobre la base de sus autoridades propias, principios, valores culturales, normas y procedimientos. El texto expresa que debe respetar los derechos a la vida, la defensa y los garantizados en la Constitución. Esta jurisdicción se basa en un tipo específico de conexión entre los miembros de una nación o de su gente, y sus miembros están sujetos a ella siempre que aparece como parte y legales hechos han ocurrido en el interior. Obedece a una legislación de deslinde entre las jurisdicciones y sus decisiones deben ser escuchadas por todas las personas y autoridades públicas (CPE, Art. 190, I, II, Art. 191, I, II e Art. 192, I, II, III).

La Constitución boliviana dedica también un capítulo sobre la “autonomía indígena originaria campesina”, que es la garantía de la autonomía y la autodeterminación de estos grupos. La conformación de estas autonomías se basa en las tierras ancestrales, debe pasar por la consulta y la elaboración de su propio Estatuto, y tiene un nombre que corresponde al pueblo, nación o comunidad. Pueden ser unificadas con otras autonomías, y se ejercen de acuerdo con sus propias normas, instituciones, autoridades, procedimientos, siempre en armonía con la Constitución (CPE, Art. 289, 290, I, II, Art. 292 e Art. 296). La lista de competencias de estas autonomías es extensa, algunas que se pueden transferir o delegar. Entre las competencias exclusivas, subrayo: desarrollar y ejercer sus propias instituciones democráticas; para gestionar y administrar sus recursos naturales; crear y administrar tasas, patentes y contribuciones especiales en virtud del mismo; gestionar sus impuestos; planificación y gestión de su territorio, el sistema eléctrico, el patrimonio cultural, natural, etc. Todavía hay competencias compartidas que compiten con las otras entidades del Estado Plurinacional (CPE, Art. 304).

Guiándose por la interculturalidad y la plurinacionalidad, la Constitución ecuatoriana establece una organización política y administrativa del Estado que acepta las circunscripciones territoriales

11 Como en Chivi Vargas (2010, p. 197): “un sistema de justicia plural basado en el reconocimiento de diferentes jurisdicciones — ordinaria, agroambiental, indígena originaria campesina— que, bajo sus propias autoridades, normas y procedimientos resuelven controversias que se presentan en los lugares en que se aplican. Su convivencia protege los derechos individuales y colectivos. [...] Es una expresión fundamental de la plurinacionalidad el reconocimiento de que existe en cada pueblo una forma de ejercer justicia según su propia cultura. Es otra forma esencial de descolonización porque deja de lado la visión monocultural y exclusivamente liberal.”

de los pueblos indígenas y afroecuatorianos. Estos regímenes especiales de administración, lo que corresponde al autogobierno, se regirán de acuerdo a sus derechos colectivos. Para crear las circunscripciones, es necesaria la aprobación en consulta con los dos tercios de los votos válidos (CRE, Art. 257). Acerca de la *jusdiversidade*, la constitución de Ecuador establece que las comunas, comunidades, pueblos y naciones indígenas tienen derecho a crear, desarrollar, aplicar y practicar su derecho propio y consuetudinario, dentro de los límites de la Constitución y específicamente, sin violar los derechos de las mujeres, los niños y jóvenes (CRE, Art. 57, 10) y los derechos humanos internacionalmente reconocidos. La “justicia indígena”, que ahora forma parte de la función judicial del Estado, se llevará a aplicar sus propias reglas para la resolución de conflictos internos, siempre con la participación de las mujeres (CRE, Art. 171). El poder constituyente ecuatoriano impidió algunas de las consecuencias del pluralismo jurídico, positivando el principio conocido como “*non bis in idem*”.

En Colombia, las autoridades indígenas pueden ejercer su jurisdicción en sus territorios, siempre y cuando no entren en conflicto con la Constitución y las leyes de la República (CPC, Art. 246). Paraguay adoptó resolución similar – “siempre que ellas no atenten contra los derechos fundamentales establecidos en esta Constitución” (CRP, Art. 63), o Perú – “siempre que no violen los derechos fundamentales de la persona” (CPP, Art. 149) – y Venezuela – “siempre que no sean contrarios a esta Constitución, a la ley y al orden público” (CRBV, Art. 260). Aunque no sea el “nuevo constitucionalismo” en sí, todas las disposiciones constitucionales reflejan a nivel local el Convenio 169 de la Organización Internacional del Trabajo sobre Pueblos Indígenas y Tribales en Países Independientes (1989). En América del Sur, sólo el Uruguay, Suriname y Guyana no firmaron.

4. CONCLUSIÓN

Las reformas de los últimos decenios pusieron muchas preguntas al constitucionalismo. El contrato social, clave de la racionalidad social y política moderna, está muy ligado a la idea de una nacionalidad asentada en un territorio; y de la soberanía caminando junto a una ciudadanía igualitaria y universal. Empíricamente lo que estaba era una sociedad jerárquica y excluyente, que no consideraba su diversidad cultural, lo que perpetúa las relaciones de dominación colonial. El tema de las plurinacionalidades, también colocado en Asia, África, y más tímidamente en el “Norte”, como Suiza, Bélgica, España y Canadá, trae completamente nuevas realidades jurídicas, así como los nuevos desafíos a la teoría y la doctrina del derecho. Del mismo modo abrirá nuevos caminos por recorrer, nuevos enfoques y

perspectivas a las cuestiones legales. Esta nueva forma de ver la ley y la Teoría Constitucional, a la luz de la verdadera y democrática voluntad constituyente, nos permite poner en duda la existencia de un único ideal de justicia y su regulación. Entre los autores más entusiastas del potencial de estas transformaciones: Boaventura de Souza Santos resalta el carácter de uso contrahegemónico de instrumentos hegemónicos (2010, p. 30); Wolkmer y Fagundes (2011, p. 378) hablan de un proceso de descolonización del poder y la justicia.

El objeto de este trabajo no podía soportar una conclusión definitiva, ya que este es un proceso reciente y que tampoco puede considerarse cerrado. Por ejemplo, después de las grandes manifestaciones populares que tienen lugar en junio de 2013, algunas fuerzas políticas brasileñas presentaron la propuesta de un “constituyente exclusivo”, para hacer una reforma electoral como uno de los pactos propuestos para frenar la crisis política del Estado. Para allá de la discusión de la viabilidad de este proyecto, cierto es que durante el último año, un momento u otro, los partidos políticos o movimientos populares reanudaron esta bandera. Otra novedad es la reanudación de la agenda pluralista en Chile, que vio diversos movimientos populares, estudiantiles, izquierda y mapuches defendiendo la propuesta de una Asamblea Constituyente. Señalo también la disposición del gobierno uruguayo a firmar el Convenio 169 de la OIT sobre pueblos indígenas y tribales recientemente. Es decir, es posible que el proyecto “nuevo constitucionalismo latinoamericano” aún no se ha agotado, de hecho, parece haber ganado un nuevo aliento. Dada la profusión de movimientos y la enorme contribución de los derechos, principios y valores, los investigadores de las ciencias sociales y jurídicas han tenido suficiente campo de búsqueda, especialmente de la búsqueda empírica para analizar la efectividad de estas garantías y para evaluar cómo los textos constitucional se ha relacionado con la realidad.

Entre las conclusiones a las que ya se puede obtener de estos procesos y textos constitucionales, es la construcción de un nuevo tipo de Estado. Las reformas constitucionales operadas en América Latina terminaron la tradición liberal monista y redefinen conceptos tales como la unidad nacional, la soberanía y la nacionalidad. El plurinacionalismo superó el universalismo propuesto por teorías europeas, y arrojó nueva luz sobre las cuestiones de la ciudadanía, la igualdad jurídica y la diversidad. Todo esto se configura como “nuevo”, y todos los adjetivos ya mencionados anteriormente, por no haber sido desarrollado exclusivamente en la facultad, pero sí son frutos de los procesos de luchas sociales y movimientos populares. El “nuevo constitucionalismo latinoamericano” comparte el carácter verdaderamente revolucionario del constitucionalismo americano y francés del siglo XVIII. De este proceso dialéctico, la emergencia de nuevos actores sociales, nuevas instituciones, nuevas prácticas es, al mismo tiempo, la condición y

resultados de las reformas constitucionales.

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LA OBLIGACIÓN INTERAMERICANA DE INVESTIGAR Y LA RESPUESTA BRASILEÑA

THE INTER-AMERICAN OBLIGATION TO INVESTIGATE AND THE BRAZILIAN RESPONSE

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Resumen: El presente artículo analiza la obligación de investigar violaciones de Derechos Humanos dictadas por la Corte Interamericana de Derechos Humanos en los casos en los cuales fue parte Brasil. De esta manera, son analizados los casos brasileños que fueron juzgados por la Corte Interamericana, las sentencias en específico y, cuando existentes, las Resoluciones de Cumplimiento de Sentencia. A través de dicha análisis, se concluyó que las condenas relacionadas a la obligación de investigar dictadas por la Corte Interamericana no llevaron a una grane actuación en el ámbito interno por parte del Estado brasileño.

Palabras clave: Corte Interamericana de Derechos Humanos - Obligación de investigar y sancionar - Derecho a la justicia

Abstract: This article analyzes the obligation to investigate human rights violations dictated by the Inter-American Court of Human Rights which Brazil was part of. Thus, it analyzes the Brazilian cases brought to the jurisdiction of the Inter-American Court, its judgments and, when applicable, judgment Enforcing Resolutions. Through this analysis, it is concluded on convictions related to the obligation to investigate the Inter-American Court and the Brazilian responses related to those sentences.

Keywords: Inter-American Court of Human Rights - The obligation to investigate and punish - Right to justice

1. INTRODUCCIÓN

Lo que se llamó de “Fortalecimiento del Sistema Interamericano de Derechos Humanos”¹ llevó a la comunidad internacional a indagar cuáles son las acciones que deben ser realizadas para una efectividad más grande de los órganos de protección regionales de Derechos Humanos, en específico en las Américas. Otro punto en cuestión es pensar cuáles son los caminos que llevarían a una aproximación y participación más activa de los países miembros del Sistema.

Además, es notable la aproximación de Brasil al Sistema Interamericano, una vez que el número de casos brasileños presentados ante la Comisión y la Corte Interamericana de Derechos Humanos ha aumentado considerablemente. Incluso, según Flavia Piovesan “se no período de 1970 a 1992, ou seja, em 22 anos, 11 ações foram impetradas contra o Brasil, a partir da ratificação da Convenção Americana em 1992, e considerando o período de 1992 a 2008, em 16 anos, portanto, um total de oitenta e sete ações foi impetrado”.² Asimismo, con el acuerdo firmado entre el Conselho Nacional de Justiça y la Comisión Interamericana³, es posible percibir una preocupación creciente de creación de conexiones entre el sistema jurídico interno e el Interamericano, como nunca antes había pasado en Brasil.

Sin embargo, a pesar de todos los avances realizados por el Estado brasileño para mejorar su relación con el Sistema Interamericano de Derechos Humanos, aún existe un distanciamiento claro entre los dos sistemas y algunos problemas relacionados al cumplimiento de resoluciones y sentencias dictadas por las Comisión y Corte Interamericanas. Esto es visible al analizarse la pequeña cantidad de casos que son llevados al Sistema Interamericano por Brasil, en comparación con la cantidad de casos de otros países de la región.

También, existe solamente un caso llevado a la Corte IDH que tuvo su supervisión de cumplimiento de sentencia terminada, y por lo tanto, tuvo su archivamiento decretado. Esto ocurre porque Brasil sigue no cumpliendo los puntos resolutivos de las sentencias de la Corte Interamericana.

1 AG/RES. 1 (XLIV-E/13) Resultado del proceso de reflexión sobre el funcionamiento de la Comisión Interamericana de Derechos Humanos para el fortalecimiento del Sistema Interamericano de Derechos Humanos.

2 PIOVESAN, Flavia. Direitos humanos e o direito constitucional internacional / Flávia Piovesan. – 14. ed., rev. e atual. – São Paulo: Saraiva, 2013. P. 440. “si en el periodo de 1970 a 1992, o sea, en 22 años, 11 acciones fueran impetradas en contra de Brasil, a partir de la ratificación de la Convención Americana en 1992, y considerando el periodo de 1992 a 2008, en 16 años, por lo tanto, un total de ochenta e siete acciones fue impetrado” (traducción libre)

3 “CNJ assina nesta semana documento inédito com CIDH”. Disponible en:

<<http://www.cnj.jus.br/noticias/cnj/62437-cnj-assina-nesta-semana-documento-inedito-com-cidh>> acesado en: 14 de mayo de 2016.

En este sentido, en las cinco sentencias dictadas por la Corte Interamericana de Derechos Humanos en las cuales el Estado brasileño fue parte, hay una reclamación común, por parte dos representantes de las víctimas, la reclamación de violación de los artículos 8 y 25 de la Convención Americana. Dichos artículos hablan sobre garantías y protección judiciales. El Estado brasileño fue condenado por violar dichos artículos de la Convención Americana en cuatro de las sentencias condenatorias, menos en el caso Nogueira de Carvalho⁴ en el cual la Corte consideró que no existía prueba existente después de reconocimiento brasileño de la competencia contenciosa de la Corte por parte de Brasil para condenar el Estado.

El caso Escher⁵ es el único de los cuatro casos brasileños en el cual hubo condena de la Corte IDH que se encerró la supervisión de cumplimiento de sentencia. Esto se dió por la Corte considerar que, después de la prescripción de la investigación en ámbito interno, no habrían más puntos resolutivos a ser cumplidos.

Los otros tres casos siguen en la etapa de Supervisión de Cumplimiento de Sentencias, todos aún sin una conclusión en el punto que se refiere a la obligación de investigar y sancionar.

De esta manera, se debe analizar la relación entre el Estado brasileño y el Sistema Interamericano de Derechos Humanos, en especial en la cuestión de que no se cumple la obligación de investigar dictada por las sentencias de la Corte Interamericana en el ámbito interno brasileño.

2. LA INSERCIÓN BRASILEÑA AL SISTEMA INTERAMERICANO

El Sistema Interamericano de Derechos Humanos surgió efectivamente a través de la aprobación de dos documentos jurídicos en 1948: la Carta de la Organización de los Estados Americanos y la Declaración Americana de Derechos y Deberes del Hombre. Este fue un momento, en los ámbitos universal y regional, de búsqueda por un desarrollo en la protección internacional de los Derechos Humanos.

Como continuación del desarrollo de la protección de Derechos Humanos prevista tanto en la Carta de la OEA como en la Declaración Americana, la Comisión Interamericana fue creada en 1959. Ella inicia sus actividades para “promover la observancia y la defensa de los derechos humanos y de servir como órgano consultivo”⁶ de la OEA, y su primera reunión fue realizada en 1961. Posteriormente, en el año de

4 Corte IDH. Caso Nogueira de Carvalho y otro Vs. Brasil. Excepciones Preliminares y Fondo. Sentencia de 28 de Noviembre de 2006. Serie C No. 161.

5 Corte IDH. Caso Escher y otros Vs. Brasil. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 6 de julio de 2009. Serie C No. 200.

6 Carta de la Organización de los Estados Americanos, Capítulo XV, artículo 106.

1969 fue aprobada la Convención Americana de Derechos Humanos, sin embargo, su entrada en vigencia ocurrió solamente en 1978 cuando once Estados depositaron sus respectivos instrumentos de ratificación o de adhesión, de acuerdo con su artículo 74.2.

La Convención Americana fue ratificada por el Estado brasileño en 1992, existiendo una reserva en relación a los artículos 43 e 48.d de la Convención, una vez que Brasil entiende que tales artículos no incluyen el derecho automático de visitas e investigaciones in loco de la Comisión Interamericana de Derechos Humanos, dependiendo de la anuencia expresa por parte del país.

A pesar del Estado brasileiro haber ratificado la Convención Americana en 1992, el país solamente reconoció la competencia jurisdiccional de la Corte Interamericana en diciembre de 1998, con la publicación del Decreto Legislativo n. 89, de 3 de diciembre de 1998. De esta manera, a penas después de 1998 fue posible el encaminamiento de casos relacionados a violaciones de Derechos Humanos realizados pelo Estado brasileño para análisis por parte de la Corte Interamericana de Derechos Humanos.

De esta manera, cuando se compara la cantidad de casos en que hubo denuncias al Estado brasileño a la Corte con la cantidad de casos de otros países pertenecientes al Sistema Interamericano, se percibe que hay una gran diferencia en los números. Hasta el presente momento, mientras existen solamente siete casos contenciosos llevados a la Corte denunciando actuaciones de Brasil, hay diecisiete en contra Argentina e casi cuarenta casos en contra de Perú.

También es importante subrayar que existe un número de medidas provisionales dictadas por la Corte que no son analizadas en el presente artículo por tratarse de situaciones de emergencia que no llevan a una decisión final del caso contencioso que fue llevado al Sistema Interamericano.

2.1. Casos contenciosos presentados en contra de Brasil en la Corte Interamericana

El primer caso llevado a la Corte en contra Brasil fue el caso *Ximenes Lopes*⁷, el primer caso de la Corte a tratar de violaciones relacionadas a salud mental. Era el caso del señor Damião Ximenes Lopes, que falleció en un hospital psiquiátrico atendido por el Sistema Único de Saúde (SUS) después de estar solamente tres días internado. La sentencia de este caso fue publicada el 4 de julio de 2006, condenando el Estado brasileño por violar el derecho a la vida, a la integridad personal e a la protección judicial del señor Ximenes Lopes y sus familiares.

⁷ Corte IDH. Caso *Ximenes Lopes Vs. Brasil*. Sentencia de 4 de julio de 2006. Serie C No. 149.

Hasta el presente momento, en relación al cumplimiento de dicha sentencia en el ámbito de la Corte, fue declarado en Resolución de Cumplimiento de Sentencia⁸ que aún no fueran cumplidos por Brasil los puntos relacionados a la creación de un programa de formación y capacitación de personal vinculado al tratamiento de sufrimiento mental; y el punto relacionado a la obligación de investigar.

En el mismo año de 2006, fue dictada la sentencia relacionada al caso Nogueira de Carvalho. En este caso, el señor Gilson Nogueira de Carvalho fue asesinado por ser el abogado defensor de Derechos Humanos que denunció el grupo de exterminio de Rio Grande do Norte intitulado “muchachos de oro”⁹. En este caso, como el hecho del asesinato ocurrió el 20 de octubre de 1996, la Corte IDH no tendría competencia temporal para conocer la violación del derecho a la vida del señor Nogueira de Carvalho. Sin embargo, como los representantes de las víctimas también alegaran falta de protección y garantías judiciales, hechos que se extendían hasta el momento de juzgamiento internacional, la Corte Interamericana tuvo la competencia para juzgar las violaciones de los artículos 8 y 25 de la Convención Americana, desde el período que el Estado brasileño reconoció la competencia contenciosa del Tribunal IDH¹⁰. Asimismo, la Corte consideró que, con las pruebas que correspondían al período pasible de análisis, no era posible comprobar la falta de protección y garantías judiciales realizadas por el Estado brasileño, por lo tanto el caso fue archivado.

Solamente pasados tres años de las primeras decisiones de la Corte Interamericana relacionadas a casos brasileños, fue dictada la sentencia del caso Escher, en 2009. El caso trataba sobre la responsabilidad internacional de Brasil por la interceptación, monitoreo y divulgación de conversas telefónicas de los señores Arlei José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral y Celso Aghinoni, por la Policía Militar de Paraná. Todos estos individuos eran miembros de las organizaciones sociales Cooperativa Agrícola de Conciliação Avante Ltda. (“COANA”) y Associação Comunitária de Trabalhadores Rurais (“ADECON”). De esta manera, la Corte consideró que el Estado violó los derechos a la vida privada, a la honra y a la reputación, a la libertad de asociación y a la protección y garantías judiciales.

El 19 de junio de 2012, en Resolución de Cumplimiento de Sentencia, el Tribunal IDH encerró el caso Escher, por considerar que no hay más acciones a ser realizadas por el Estado brasileño para cumplir

8 Corte IDH. Caso Ximenes Lopes Vs. Brasil. Supervisión de Cumplimiento de Sentencia. Resolución de la Corte Interamericana de Derechos Humanos de 17 de mayo 2010. Punto declarativo 1.

9 En el caso original en portugués, el término utilizado es “meninos de ouro”.

10 Corte IDH. Caso Nogueira de Carvalho y otro Vs. Brasil. Excepciones Preliminares y Fondo. Sentencia de 28 de Noviembre de 2006. Serie C No. 161. Punto 81.

la decisión de la Corte Interamericana en su sentencia, y declaró su archivamiento.¹¹

También en el año de 2009, el 23 de septiembre, fue dictada la sentencia del caso Garibaldi.¹² Este caso trata de la ejecución extrajudicial del señor Garibaldi, que ocurrió el 27 de noviembre de 1998, mientras era realizado el desalojo de cincuenta familias de trabajadores que ocupaban una hacienda llamada São Francisco en Querência no Norte, en Paraná. Un grupo de aproximadamente veinte hombres encapuchados llegaron a la hacienda disparando tiros y el señor Sétimo Garibaldi fue herido por uno de estos tiros, en su pierna izquierda. Tal herida le llevó al fallecimiento, debido a una hemorragia. También fue discutido por los representantes de las víctimas que la investigación, tanto policial como judicial, tuvo una serie de irregularidades, lo que llevó el caso a ser archivado sin la realización de mayores investigaciones o sanciones de los culpables.

Así como ocurrió en el caso Nogueira de Carvalho, como fue explicado *supra*, la Corte solamente puede analizar los hechos ocurridos dentro del período de tiempo en que Brasil reconoció su competencia jurisdiccional. Por lo tanto, el Tribunal no podría analizar el asesinato del señor Sétimo. Sin embargo, con el análisis de las pruebas presentadas por los representantes de las víctimas, la Corte Interamericana entendió que el Estado brasileño debería ser condenado por la violación de las garantías y protección judicial es este caso, una vez que se comprobó que no fue realizada la debida investigación sobre la muerte del señor Garibaldi.

En la Resolución de Cumplimiento de Sentencia publicada el 20 de febrero de 2012, la Corte resaltó que el único punto que se mantiene abierto para su análisis continuo es el punto de investigar eficazmente en un plazo razonable y, eventualmente, sancionar los responsables por el asesinato del señor Sétimo Garibaldi.¹³

El caso sentenciado más recientemente es el conocido caso Gomes Lund, también llamado de caso de la “Guerrilla de Araguaia”.¹⁴ La sentencia fue publicada el 24 de noviembre de 2010 y trata sobre la desaparición forzada de los miembros de la llamada Guerrilla de Araguaia entre los años de 1972 y 1975. Durante este período de

11 Corte IDH. Caso Escher y otros Vs. Brasil. Supervisión de Cumplimiento de Sentencia. Resolución de la Corte Interamericana de Derechos Humanos 19 de junio de 2012. Puntos resolutivos 1 y 2.

12 Corte IDH. Caso Garibaldi Vs. Brasil. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 23 de septiembre de 2009. Serie C No. 203.

13 Corte IDH. Caso Garibaldi Vs. Brasil. Supervisión de Cumplimiento de Sentencia. Resolución de la Corte Interamericana de Derechos Humanos 20 de febrero de 2012. Puntos declaratorios 1 y 2.

14 Corte IDH. Caso Gomes Lund y otros (“Guerrilha do Araguaia”) Vs. Brasil. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 24 de noviembre de 2010. Serie C No. 219.

tiempo Brasil estuvo bajo el comando de un régimen dictatorial militar. Además, con la creación de la ley de amnistía por el Estado brasileño, los hechos ocurridos, incluso los asesinatos y desapariciones forzadas de los miembros de la guerrilla no fueron investigados ni juzgados penalmente. De esta manera, Brasil fue condenado por violación de los derechos al reconocimiento de la personalidad jurídica, a la vida, a la integridad personal, a la libertad personal, a la libertad de expresión, así como la violación de los derechos de garantía y protección judicial.

El 17 de octubre de 2014 fue publicada la Resolución de Cumplimiento de Sentencia sobre el caso Gomes Lund, en la cual la Corte constató que solamente se dio total cumplimiento a los puntos relativos a la publicación de la Sentencia y al permiso que fue dado a los familiares para presentaren sus pedidos de indemnización conforme la ley 9.140/95.¹⁵ Existen otros tres puntos que son reconocidos como parcialmente cumplidos, pero que aun deben ser completados por Brasil. Sin embargo, está claro que a mayor parte de los puntos resolutivos de la Sentencia de 2010 no fueran cumplidos por el Estado brasileño.

Posteriormente a las cinco sentencias que fueran mencionadas *supra*, existen dos casos relacionados a violaciones brasileñas de Derechos Humanos que se encuentran actualmente para juzgamiento de la Corte Interamericana. Son los casos Trabajadores de la Hacienda Brasil Verde y Cosme Rosa Genoveva, también conocido como caso Favela Nova Brasília. El primero tuvo su audiencia realizada en el 113º período de Sesiones Ordinarias de la Corte, en los días 18 y 19 de febrero de 2015. Además tratase de un caso marco por tratar de trabajo esclavo en una hacienda en Pará, norte de Brasil. El segundo caso aun no tuvo su audiencia hasta el presente momento y trata sobre ejecuciones extrajudiciales realizadas por la policía en la favela Nova Brasília, en Río de Janeiro. Los dos casos tienen, entre sus diversas denuncias de violaciones de Derechos Humanos realizadas por los representantes de las víctimas, la denuncia de falta de garantías y protección judiciales por parte del Estado brasileño.

3. LA OBLIGACIÓN DE INVESTIGAR EN EL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS

La obligación de investigar violaciones de Derechos Humanos busca proteger el derecho de los individuos de conocer la verdad de los hechos que les afectaran y con esto conseguir algún tipo de cierre para su situación. Por lo tanto, la obligación de investigar y sancionar es un deber fundamental del Estado para garantizar que los Derechos

15 Corte IDH. Caso Gomes Lund y otros (“Guerrilha do Araguaia”) Vs. Brasil. Supervisión de Cumplimiento de Sentencia. Resolución de la Corte Interamericana de Derechos Humanos de 17 de octubre de 2014. Punto resolutivo 1.

Fundamentales de los individuos sean tutelados correctamente.

La investigación judicial permite esclarecer las circunstancias en las que ocurrieron los hechos que generan responsabilidad estatal, constituyendo un paso necesario para el conocimiento de la verdad por parte de los familiares de las víctimas y la sociedad, así como el castigo de los responsables y el establecimiento de medidas que prevengan la repetición de las violaciones a los derechos humanos.¹⁶

Esto se percibe cuando, al convalidar la importancia de la obligación de investigar y sancionar, la Corte Interamericana de Derechos Humanos en su primera sentencia de casos contenciosos, el conocido caso Velásquez Rodríguez, destacó la existencia de un deber estatal de “investigar seriamente con los medios a su alcance las violaciones que se hayan cometido dentro del ámbito de su jurisdicción a fin de identificar a los responsables, de imponerles las sanciones pertinentes y de asegurar a la víctima una adecuada reparación”.¹⁷

De esta manera, la obligación de investigar y, cuando posible, de sancionar los culpables por violaciones de Derechos Humanos fortifica la lucha para la protección de los derechos de los individuos. Además, esta obligación trae consigo la búsqueda por el control estatal para evitar la repetición de la violación de dichos derechos. Por esto, la obligación de investigar es una de las llamadas medidas de no repetición del Sistema Interamericano.

3.1. El cumplimiento de la obligación de investigar en los casos brasileños ante el Sistema Interamericano

En los casos contenciosos sentenciados por la Corte Interamericana que involucraban el Estado brasileño, todas contuvieran análisis sobre la obligación de investigar y los artículos 8 y 25 de la Convención Americana, relativos a la garantía y a la protección judiciales. De acuerdo con lo que fue discutido anteriormente, solamente en el caso Nogueira de Carvalho Brasil no fue condenado, por falta de pruebas en el período temporal en el cual la Corte tenía jurisdicción sobre los hechos realizados por el Estado brasileño.

16 CEJIL, Centro por la Justicia y el Derecho Internacional. Debida Diligencia en la Investigación de Graves Violaciones a Derechos Humanos CEJIL/Buenos Aires, Argentina: CEJIL, 2010. P. 1

17 Corte IDH. Caso Velásquez Rodríguez Vs. Honduras. Fondo, Reparaciones y Costas. Sentencia de 29 de julio de 1988. Serie C No. 4. Párrafo 174.

En los casos en que hubo una condena, el caso Escher es el único que tuvo su Supervisión de Cumplimiento de Sentencia archivado, por la Corte considerar que todos los puntos resolutive fueron cumplidos por Brasil. Sin embargo, cuando se trata del punto relacionado a la obligación de investigar, el Estado declaró que los hechos que llevaron a la condena brasileña “ya estarían prescriptos de acuerdo con el artículo 10 de la Ley No. 9.296/96 y el artículo 109 del Código Penal brasileño”.¹⁸ A pesar de que los representantes de las víctimas habían declarado que no sería posible declarar el cumplimiento de la obligación de investigar a través del reconocimiento de prescripción del tipo penal, la Corte se pronunció, declarando que

toda violación a los derechos humanos supone una cierta gravedad por su propia naturaleza, porque implica el incumplimiento de determinados deberes de respeto y garantía de los derechos y libertades a cargo del Estado a favor de las personas. Sin embargo, ello no debe confundirse con lo que el Tribunal a lo largo de su jurisprudencia ha considerado como “violaciones graves a los derechos humanos”, las cuales, como se desprende de lo establecido precedentemente, tienen una connotación y consecuencias propias. Aceptar que el presente caso reviste una gravedad por la cual no sería procedente la prescripción implicaría que en todo caso sometido a la Corte, por tratarse de violaciones de derechos humanos que, en sí mismas, implican gravedad, no procedería dicho instituto procesal.

Este Tribunal recuerda que en la Sentencia del presente caso no se declaró la improcedencia de la prescripción, sino que se estableció que se investigara penalmente determinadas conductas y se establecieran las consecuencias que la ley previera, lo cual no descartaba la posibilidad de que la acción penal, respecto de los hechos a ser investigados, se encontrara prescripta. En vista de lo anterior, teniendo en cuenta su jurisprudencia constante, en el presente caso la Corte considera que es pertinente dar por concluida la supervisión de cumplimiento de la Sentencia respecto de la

18 Cfr. Corte IDH. Caso Escher y otros Vs. Brasil. Supervisión de Cumplimiento de Sentencia. Resolución de la Corte Interamericana de Derechos Humanos 19 de junio de 2012. Párrafo 13.

obligación de investigar los hechos, establecida en el punto resolutivo noveno de la Sentencia.¹⁹

De esta manera, resta claro que lo que causó el cumplimiento del punto resolutivo de la sentencia del caso Escher relativo a la obligación de investigar fue la prescripción del delito, y no la real investigación y posible sanción de los culpables por las escucha telefónicas ilegales realizadas. En los otros tres casos brasileños que continúan bajo la Supervisión de Cumplimiento de Sentencia realizada por la Corte Interamericana - los casos Ximenes Lopes, Garibaldi y Gomes Lund - hay apenas uno de ellos, el caso de la Guerrilla de Araguaia, en el cual fue citada la imprescriptibilidad de los delitos que fueron juzgados.

De esta manera, en el caso Ximenes Lopes, en la última Resolución de Cumplimiento de Sentencia publicada por la Corte en el año de 2010, la Corte Interamericana se pronunció que

Brasil recordó que el 29 de junio de 2009 el Tercer Juzgado de la Comarca de Sobral, Ceará, emitió una sentencia condenatoria en el marco de la Acción Penal No. 2000.0172.9186-1, relativa a los hechos de este caso. Posteriormente, fueron interpuestos recursos en sentido estricto y de apelación, razón por la cual la acción penal se encuentra actualmente bajo análisis del Tribunal de Justicia del estado de Ceará (TJ-CE).²⁰

Sin embargo, desde el momento en que la Corte se pronunció, el recurso en el caso interno ya fue juzgada por la 1a Cámara del Tribunal de Justicia del Estado de Ceará, bajo el número 0012736-95.2000.8.06.0167. En la sentencia fue decidido que

1. Inexistindo provas suficientes, imperiosa se torna a desclassificação do crime de maus-tratos qualificado pelo resultado morte (art. 136, § 2º, do CPB) para sua forma simples (art. 136, caput, do CPB), em virtude da ausência de alicerce probatório capaz de evidenciar o nexo de causalidade entre as condutas dolosas (expor a perigo a vida ou a saúde) e o resultado culposos (óbito). 2. As duas necropsias

19 Cfr. Corte IDH. Caso Escher y otros Vs. Brasil. Supervisión de Cumplimiento de Sentencia. Resolución de la Corte Interamericana de Derechos Humanos 19 de junio de 2012. Párrafos 20 y 21

20 Cfr. Corte IDH. Caso Ximenes Lopes Vs. Brasil. Supervisión de Cumplimiento de Sentencia. Resolución de la Corte Interamericana de Derechos Humanos de 17 de mayo 2010. Párrafo 8.

realizadas no ofendido (uma delas pós-exumática) não foram capazes de atestar a causa mortis [...] 3. Outrossim, tendo em vista o frágil estado de saúde do ofendido, que, antes da entrada na casa de repouso, já não vinha se alimentando direito e nem dormindo ou tomando sua medicação, existe a possibilidade considerável da vítima ter falecido por enfermidade pré-existente ao internamento, o que representaria concausa absoluta ou relativamente independente (art. 13, caput e § 1º, do CPB), excluindo o nexo de causalidade da conduta dos acusados em relação ao óbito. 4. A indeterminação pericial da causa da morte e a possibilidade concreta da existência de concausa independente, envolvendo circunstâncias que não estavam na linha de desdobramento físico das ações e omissões imputadas aos acusados, por força do princípio do “in dubio pro reo”, excluem a responsabilidade pelo resultado, restando somente a responsabilização pelos atos praticados. 5. Operada a desclassificação, há que se reconhecer restar configurada, nos termos do art. 109, inciso V, da Lei Penal Codificada, a prescrição em abstrato da pretensão punitiva, uma vez que a pena máxima prevista para o delito do art. 136, caput, do CPB, é de 01 (um) ano de detenção. É que, da data do recebimento da denúncia (07/04/2000) até a data da publicação da sentença (29/06/2009), transcorreram mais de 04 (quatro) anos. 6. Apelo parcialmente provido, todavia, reconhecendo-se de ofício a extinção da punibilidade.²¹

Lo que se concluye, una vez que no se interpuso ningún tipo de recurso a dicha decisión, es que a pesar de la condenación, fue reconocida la extinción de la punibilidad por el delito de malos tratos realizado en contra el señor Ximenes Lopes, a través de la llamada prescripción retroactiva. Una vez más, el Estado brasileño utilizase de la prescripción de un delito llevado al Sistema Interamericano para no sancionar los responsables por los delitos realizados.

En el caso Garibaldi, en el momento que la Corte Interamericana publicó su última Resolución de Cumplimiento de Sentencia en febrero de 2012, aún no existía una sentencia interna sobre el caso posterior al

21 BRASIL. Tribunal de Justiça do Ceará. Acórdão de Apelação n.0012736-95.2000.8.06.0167. Relator: Luiz Evaldo Gonçalves Leite. Publicado em el Diário da Justiça do Ceará el 30 de noviembre de 2012, edição 613, página 63.

archivamiento que llevó el Estado brasileño a ser condenado. De esta manera, la Corte en aquel momento declaró que en

*cuanto a la investigación penal de los hechos, la Corte toma nota de la interposición de una denuncia penal en contra de un presunto responsable, de la instrucción de la Procuraduría General para el trámite urgente del caso y la designación de una audiencia de instrucción y juzgamiento para el día 22 de noviembre de 2011. El Tribunal recuerda que han pasado más de 12 años desde la muerte del señor Garibaldi sin que se hayan esclarecido los hechos ni sancionado a los responsables. Teniendo en cuenta estas circunstancias, Brasil deberá continuar adoptando las medidas y acciones necesarias para el efectivo y total cumplimiento de esta medida de reparación. Asimismo, dentro del plazo señalado en el punto resolutivo cuarto de esta Resolución, deberá remitir información completa y detallada, incluyendo documentación de respaldo, sobre el cumplimiento de dicha obligación.*²²

Sin embargo, el 18 de abril de 2016 fue publicada la decisión del Recurso Especial nº 1351177/PR, decisión final sobre el cuestionamiento sobre la reapertura del caso en el ámbito interno, conforme la condena de la Corte Interamericana. La decisión del Superior Tribunal de Justicia fue la siguiente:

1. Feita a comparação do conteúdo dos artigos apontados como violados com o teor do acórdão recorrido, constata-se que, por um lado, apenas a matéria do art. 18 do Código de Processo Penal foi objeto de debate. E, por outro, nos embargos declaratórios opostos pelo Parquet, não se postulou o pronunciamento da Corte estadual acerca dos arts. 647 e 648 do Código de Processo Penal e do art. 68, 1, c/c o art. 28, 2, da Convenção Americana de Direitos Humanos. Sendo assim, em relação aos aludidos temas, tem incidência a Súmula 356/STF.
2. [...] O que se constata é não ter havido sequer o prequestionamento implícito, pela ausência do debate das matérias que encontram amparo no

22 Cfr Corte IDH. Caso Garibaldi Vs. Brasil. Supervisión de Cumplimiento de Sentencia. Resolución de la Corte Interamericana de Derechos Humanos 20 de febrero de 2012. Párrafo 15.

conteúdo normativo dos dispositivos apontados como ofendidos no recurso especial, à exceção do art. 18 do Código de Processo Penal. 3. Em nenhum momento se discutiu a existência ou não de justa causa para a propositura da ação penal, mas, sim, se haveria novas provas que autorizariam a reabertura do inquérito anteriormente arquivado, matérias, portanto, distintas. [...] 5. Se as instâncias ordinárias, soberanas na análise da matéria de cunho fático-probatória, a partir da verificação do conteúdo das provas que deram ensejo à reabertura do inquérito, concluíram que não trouxeram elas elemento novo às investigações, é inviável concluir de modo diverso sem que se proceda à revisão desse mesmo conteúdo. Aplicação da Súmula 7/STJ. [...] 8. No caso concreto, não se debate se determinado tipo de prova pode ser juridicamente utilizado como meio probatório para dar reabrir a persecução penal. O que se pretende é que esta Corte verifique se o conteúdo do conjunto probatório traria elementos inéditos que se caracterizassem como prova nova, nos termos do art. 18 do Código de Processo Penal. Isso não é valoração jurídica da prova, mas reexame do acervo probante, vedado pela Súmula 7/STJ. 9. Recurso especial não conhecido.²³

Una vez más, es posible percibir que el poder judicial brasileño simplemente ignora la existencia del Sistema Interamericano de Derechos Humanos. Esto resta claro cuando el propio Superior Tribunal de Justicia consideró que mismo con la condena dictada por la Corte no sería posible la reapertura del juzgamiento del asesinato del señor Sétimo Garibaldi.

En la última sentencia dictada por la Corte Interamericana, en el caso Gomes Lund, por tratarse de una situación contextualizada en la dictadura militar brasileña, hay expresa imprescriptibilidad de los delitos de desaparición forzada de los miembros de la Guerrilla de Araguaia. Es un caso diferente de las otras condenas brasileiras, y, por lo tanto, debe ser analizado en separado.

3.1.1. La particularidad del Caso Gomes Lund versus Brasil

23 BRASIL. Superior Tribunal de Justiça. Recurso Especial n 1351177/PR. Relator: Min Ericson Marinho. Publicado en el Diário Oficial 18 de abril de 2016. Disponible en: <https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1448761&num_registro=201202255153&data=20160418&formato=PDF>

Conforme explicado anteriormente, el caso Gomes Lund abordó la desaparición forzada de miembros de la llamada Guerrilla de Araguaia en el período entre 1972 e 1975, fechas en las cuales el país se encontraba bajo un gobierno dictatorial militar. En la propia sentencia dictada por la Corte sobre el caso, fue declarado que

no encuentra fundamentos jurídicos para apartarse de su jurisprudencia constante, la cual, además, concuerda con lo establecido unánimemente por el derecho internacional y por los precedentes de los órganos de los sistemas universales y regionales de protección de los derechos humanos. De tal modo, a efectos del presente caso, el Tribunal reitera que “son inadmisibles las disposiciones de amnistía, las disposiciones de prescripción y el establecimiento de excluyentes de responsabilidad que pretendan impedir la investigación y sanción de los responsables de las violaciones graves de los derechos humanos tales como la tortura, las ejecuciones sumarias, extralegales o arbitrarias y las desapariciones forzadas, todas ellas prohibidas por contravenir derechos inderogables reconocidos por el Derecho Internacional de los Derechos Humanos”.

La Corte Interamericana considera que la forma en la cual ha sido interpretada y aplicada la Ley de Amnistía adoptada por Brasil (supra párrs. 87, 135 y 136) ha afectado el deber internacional del Estado de investigar y sancionar las graves violaciones de derechos humanos al impedir que los familiares de las víctimas en el presente caso fueran oídos por un juez, conforme a lo señalado en el artículo 8.1 de la Convención Americana y violó el derecho a la protección judicial consagrado en el artículo 25 del mismo instrumento precisamente por la falta de investigación, persecución, captura, enjuiciamiento y sanción de los responsables de los hechos, incumpliendo asimismo el artículo 1.1 de la Convención. Adicionalmente, al aplicar la Ley de Amnistía impidiendo la investigación de los hechos y la identificación, juzgamiento y eventual sanción de los posibles responsables de violaciones continuadas y permanentes como las desapariciones forzadas, el Estado incumplió la obligación de adecuar su

*derecho interno consagrada en el artículo 2 de la Convención Americana.*²⁴

En la Resolución de Cumplimiento de Sentencia publicado el 17 de octubre de 2014, la Corte Interamericana continuaba expresando su preocupación relacionada al hecho de que el Estado brasileño seguía con la ley de amnistía y que el poder judicial al juzgar casos particulares relacionados con el período dictatorial aplicaba tanto la ley de amnistía como la prescripción para los delitos juzgados. La Corte afirmó que

en las cuatro decisiones emitidas por un juez federal de primera instancia, por un juez federal miembro del Tribunal Federal de la Primera Región (en dos decisiones), y por el pleno de dicho tribunal federal [...] se interpreta y aplica la Ley de Amnistía a la investigación penal de hechos del presente caso. [...] Esas decisiones judiciales, fundadas en dicha decisión del Supremo Tribunal Federal y emitidas durante la etapa de supervisión de cumplimiento de la Sentencia del Caso Gomes Lund y otros, desconocen los alcances de lo resuelto por la Corte en la Sentencia de este caso la cual estableció que “las disposiciones de la Ley de Amnistía brasileña que impiden la investigación y sanción de graves violaciones de derechos humanos son incompatibles con la Convención Americana, carecen de efectos jurídicos y no pueden seguir representando un obstáculo para la investigación de los hechos del presente caso, ni para la identificación y castigo de los responsables” [...]. La Corte recuerda que en la Sentencia, al pronunciarse sobre la incompatibilidad de las disposiciones de la Ley de Amnistía brasileña con la Convención Americana, también observó que “no fue ejercido un control de convencionalidad por las autoridades judiciales del Estado, y que por el contrario la referida decisión del Supremo Tribunal Federal confirmó la validez de la interpretación de la Ley de Amnistía sin considerar las obligaciones internacionales de Brasil derivadas del derecho internacional” [...]. Por lo tanto, posteriores decisiones judiciales

24 Cfr. Corte IDH. Caso Gomes Lund y otros (“Guerrilha do Araguaia”) Vs. Brasil. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 24 de noviembre de 2010. Serie C No. 219. Párrafos 171 e 172.

*internas no podrían estar fundadas en esa decisión del Supremo Tribunal Federal.*²⁵

Como es posible percibir, el Estado brasileño sigue sin cumplir las decisiones emitidas por la Corte Interamericana de Derechos Humanos, pretiriendo su obligación de investigar cuando alega prescripciones y se utiliza de la ley de amnistía. De esta manera Brasil, mismo en un caso en que fue declarada en sentencia Interamericana la imprescriptibilidad de los delitos, sigue esquivándose de cumplir sus obligaciones internacionales.

3.2. Los casos brasileños que esperan juzgamiento por la Corte Interamericana

Conforme dicho anteriormente, existen dos casos que aguarda sentencia por la Corte Interamericana relacionados a Brasil: el caso Trabajadores de la Hacienda Brasil Verde y el caso Cosme Rosa Genoveva. Una preocupación existente es la de que ambos los casos también tratan de problemas relacionados a la protección y garantías judiciales.

Si el Estado brasileño seguir haciendo lo que hizo en las otras condenas, es posible que siga sin cumplir las sentencias de la Corte Interamericana en los puntos relacionados a la obligación de investigar y sancionar los responsables por realizar delitos y que no fueron debidamente juzgados.

4. CONCLUSIÓN

A lo largo de este artículo fue posible analizar los aún pocos casos brasileños que fueron llevados a la jurisdicción de la Corte Interamericana de Derechos Humanos. Un punto común en todos estos casos es que los representantes de las víctimas siempre enfatizaron el gran problema brasileño de no cumplir con los artículos 8 y 25 de la Convención Americana de Derechos Humanos, o sea, los derechos a las debidas garantías y a la protección judicial en el ámbito interno.

La importancia de la obligación de investigar y, cuando posible, sancionar, es clara, una vez que las víctimas y la sociedad como un todo tienen el derecho de conocer la realidad de las violaciones de Derechos Humanos ocurridas. De esta manera, a través de la condena a investigar y sancionar los responsables, la Corte Interamericana busca evitar que dichos delitos vuelvan a existir, o al menos sean mitigados en estas sociedades. Por lo tanto, está claro que tratase de una medida de no

25 Cfr. Corte IDH. Caso Gomes Lund y otros (“Guerrilha do Araguaia”) Vs. Brasil. Supervisión de Cumplimiento de Sentencia. Resolución de la Corte Interamericana de Derechos Humanos de 17 de octubre de 2014. Parágrafos 17 e 18

repetición, que visa garantizar el fin de violaciones de Derechos Humanos.

Exactamente por ser reconocida la importancia de la obligación de investigar es que la situación brasileña relacionada a las sentencias del Sistema Interamericano parece preocupante. En ninguna de las condenas existentes se completaron las investigaciones y nunca fue posible sancionar a los individuos culpables por las violaciones de Derechos Humanos.

En el caso Escher, la Corte Interamericana reconoció la prescripción del delito cometido cuando se realizaron y publicaron escuchas telefónicas ilegales por, según el entendimiento del Tribunal IDH, tratarse de violación menor de Derechos Humanos. De esta manera, a través de la declaración de prescripción, se encerró la Supervisión del Cumplimiento de Sentencia en el caso Escher, sin ninguna persona condenada internamente.

En los casos que siguen bajo Supervisión de Cumplimiento de Sentencia por la Corte Interamericana, los casos no están en situaciones muy distintas del caso Escher en el ámbito interno, una vez que la prescripción también fue alegada en el caso Ximenes Lopes. Ya en el caso Garibaldi el Superior Tribunal de Justicia declaró que no existían pruebas nuevas que justificarían la reapertura de la investigación del asesinato del señor Sétimo Garibaldi.

Ambos los casos tratan sobre la investigación y condena de los perpetradores de delitos que llevaron a la muerte dos individuos: el señor Damião Ximenes Lopes y el señor Sétimo Garibaldi. De esta manera, la Corte Interamericana no podrá alegar violaciones menores de Derechos Humanos caso acepte ambas las situaciones para encerrar el monitoreo de Cumplimiento de Sentencia de ambos los casos.

Como la Corte no se pronuncia hace algunos años sobre el cumplimiento de sentencia de los casos Ximenes Lopes y Garibaldi, solamente es posible esperar que en una futura Resolución de Cumplimiento de Sentencia, el Tribunal se pronuncie en favor de una investigación completa y debida de los hechos ocurridos en ambos asesinatos.

El caso Gomes Lund posee sus particularidades, por tratar de delitos imprescriptibles, las desapariciones forzadas de miembros de la llamada Guerrilla de Araguaia en el contexto de la dictadura militar brasileña. Asimismo, este caso, que es mucho más discutido que los demás por el sistema judicial brasileño, tendrá su Supervisión de Cumplimiento de Sentencia mantenida abierta por la Corte hasta el momento que el Estado brasileño decida que realmente los casos judiciales relacionados a las desapariciones forzadas causados por la dictadura militar sean debidamente juzgados.

Mismo tratándose de caso distinto, es posible percibir que Brasil sigue sin cumplir la obligación de investigar, mismo en el caso Gomes Lund. Tampoco se sabe cuándo el Estado brasileño estará

de acuerdo con el Sistema Interamericano y aplicará el control de convencionalidad para internalizar las decisiones que son dictadas por la Corte Interamericana.

En el presente momento, solamente es posible analizar la enorme distancia que aun existe entre el sistema judicial brasileño y las decisiones proferidas por el Sistema Interamericano. Y a partir de dicha distancia, es creada una gran problemática para realizar el cumplimiento de la obligación de investigar como medida de no repetición de violaciones de Derechos Humanos por parte de Brasil.

Por fin, se debe esperar la reacción del poder judicial brasileño relacionada a las próximas dos sentencias que serán dictadas por la Corte Interamericana, lo que debe ocurrir pronto. Lo esperado es que el posicionamiento de Brasil sea aproximarse cada vez más al Sistema Interamericano. Y con esta actitud, garantizar que sus ciudadanos tengan, también en el ámbito interno, el reconocimiento de violaciones de sus derechos. Solamente así la obligación de investigar y sancionar será seguida por el Estado brasileño y llevará Brasil a un mejor funcionamiento de su poder judicial tanto interna como internacionalmente.

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LA SOCIETÀ COOPERATIVA BRASILIANA

THE BRAZILIAN COOPERATIVE PARTNERSHIP

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Sommario: Considerando la vastità del tema e dei problemi che ne derivano, trattasi di esposizione relativamente sintetica sulla società cooperativa brasiliana, concentrandosi in particolar modo sui seguenti punti: (i) sviluppo storico-legislativo sul cooperativismo e sulla società cooperativa in Brasile; (ii) caratteri principali dello schema giuridico-organizzativo della società cooperativa brasiliana; e (iii) numeri e dati statistici ed economici complessivi sulla attività economica svolta tramite le cooperative in Brasile e sulla diffusione (costituzione), in Brasile, di quel tipo societario chiamato “sociedade cooperativa”. Il testo quindi si concentra esclusivamente sulla società cooperativa brasiliana, assente qualsiasi tentativo di confronto diretto con la disciplina della società cooperativa italiana, anche se gli esperti in materia possono indirettamente cogliere i contrasti tra l’uno e l’altro ordinamento giuridico, trovando somiglianze e differenze tra i rispettivi schemi legali della cooperativa.

Parole-chiave: Cooperativismo in Brasile - Società cooperativa brasiliana - Sviluppo storico-legislativo e caratteri dello schema societario - Dati statistici

Abstract: Considering the vastness of the topic and the related problems that may arise, the text is a relatively synthetic presentation on the Brazilian cooperative partnership, focusing in particular on the following points: (i) historical and legislative development of the Brazilian cooperativism and the Brazilian cooperative partnership; (ii) the main traits of the Brazilian cooperative partnership legal and organizational framework; and (iii) overall statistical and economical numbers and data on the economic activity carried out by cooperatives in Brazil and on the spread, in Brazil, of the partnership type called “sociedade cooperativa”. The text therefore

focuses exclusively on the Brazilian cooperative partnership, absent any attempt to make a direct comparison with the Italian discipline, although experts in the field can indirectly capture the contrasts between one and the other legal systems, finding similarities and differences between their respective cooperative legal frameworks.

Keywords: Cooperativism in Brazil - Brazilian cooperative partnership - Historical and legislative development and legal framework - Statistical data

1. SVILUPPI STORICI-LEGISLATIVI DELLA SOCIETÀ COOPERATIVA IN BRASILE

In Brasile, le prime cooperative emersero nel XIX secolo, soprattutto come cooperative di consumo. La storiografia evidenzia quanto segue: la “Cooperativa de Produção Teresa Cristina” (1847), in Paraná; la “Cooperativa de Consumo dos Empregados da Companhia Paulista” (1887), in Campinas, São Paulo; la “Cooperativa de Consumo dos Funcionários da Prefeitura de Ouro Preto” (1889), in Minas Gerais; e la “Cooperativa Militar de Consumo do Rio de Janeiro” (1894)¹. Nel 1902, ebbe origine la prima cooperativa di credito del paese (ed anche della America Latina), la “Caixa de Crédito Rural de Petrópolis”, in Rio Grande do Sul, in attività ancora oggi². Uno dei fattori che hanno contribuito alla realizzazione, lo sviluppo e il consolidamento del movimento cooperativo in Brasile è stato in grande afflusso di immigrati europei, in particolare italiani e tedeschi, alla fine del XIX secolo e l’inizio del XX secolo³, avendo gli immigrati portato il loro bagaglio culturale il lavoro associativo e l’esperienza delle attività familiari comunitari, che li hanno motivati a organizzarsi in cooperative.

Dal punto di vista della legislazione, il primo riferimento alle cooperative che conosciamo è contenuto nel decreto n° 796, del 2 ottobre 1890, che trattò specificamente di una cooperativa organizzata dai militari, la “Sociedade Cooperativa Militar do Brasil”. Solo all’inizio del XX apparvero, nel diritto brasiliano, norme di carattere generale sulle cooperative, la prima corrispondente al decreto n° 979,

1 Cf. J. Batista Brito Pereira, Da Sociedade Cooperativa, in D. Franciulli Netto, G. Ferreira Mendes & I. Gandra da Silva Martins Filho (coordinadores), *O Novo Código Civil. Homenagem ao Professor Miguel Reale*, 2.^a ed., São Paulo, 2006, p. 937. [= in *Revista do Tribunal Superior do Trabalho*, vol. 69, n.º 2, Brasília, julho-dezembro de 2003, pp. 32-54.]

2 Cf. M.A. Henriques Pinheiro, *Cooperativas de Crédito. História da Evolução Normativa no Brasil*, 6.^a ed., Brasília, 2008, p. 27.

3 Solo per curiosità, si registra, in riferimento ai numeri di immigrazione italiana in Brasile, un’impressionante contingente di più di 1,4 milioni di immigrati tra il 1884 e il 1933 (cf., in tal senso, le statistiche del documento del Ministério do Planejamento, Orçamento e Gestão, Instituto Brasileiro de Geografia e Estatística, Centro de Documentação e Disseminação de Informações, *Brasil. 500 Anos de Povoamento*, Rio de Janeiro, 2007, p. 226).

del 6 gennaio 1903, la quale, nel suo art. 10, ha agevolato i sindacati rurali con la possibilità di organizzare banche agricole di credito, così come cooperative di produzione o di consumo, senz'altro prevedere maggiori dettagli sul tema⁴.

Successivamente, nacque quello che sarebbe probabilmente primo statuto brasiliano dedicato alle cooperative: il decreto n° 1637, del 5 gennaio 1907, destinato a regolamentare il settore ancora nascente⁵. Questo decreto già delineò alcune caratteristiche delle cooperative, per stabilire: la variabilità del capitale; la non limitazione del numero di soci; l'inalienabilità delle azioni, quote o parti a terzi esterni all'azienda; e la non obbligatorietà di capitale per alcuni tipi di cooperative. Tuttavia, in questa occasione ancora non fu attribuita una forma propria alle società cooperative, che dovrebbero essere organizzate come società anonima, in nome collettivo o in accomandita.

Si aggiunga che questo passo legislativo dell'innesto della società cooperativa in Brasile è stato caratterizzato da una grande libertà operativa di quest'ultima, che non è subordinata ad alcuna agenzia statale⁶.

Nei decenni successivi, il settore ha conosciuto un'enorme espansione, attraverso la nascita di regole molto specifiche per alcuni tipi di cooperative, come le cooperative di credito di tipo Reiffeisen e di tipo Luzzatti, previste nel decreto n° 17339, del 2 giugno 1926.

Il quadro legislativo seguente, risultato della maturazione dell'organizzazione cooperativa nel Paese, è stato il decreto n° 22.239, del 19 dicembre 1932, che ha modificato la legge del 1907 e ha definito l'inizio del periodo di consolidamento della idea di cooperativa in Brasile.⁷ Nonostante i difetti tecnici e terminologici, questo decreto ha stabilito i principi dottrinali delle cooperative e conservato, di regola, la loro libertà di stabilimento e di attuazione, favorendo una loro maggiore diffusione.⁸ Si cercò di dare una forma propria alla società cooperativa, come si vede nella definizione giuridica del art. 2° della riferita norma: "Associações cooperativas, qualquer que seja a sua natureza, civil ou mercantil, são sociedades de pessoas e não de capitais, de forma jurídica sui generis, que se distinguem das demais sociedades."

Tuttavia, non avendo previsto norme specifiche per la responsabilità dei soci e terzi, non avendo stabilito chiaramente la sua

4 Cf. J. Batista Brito Pereira, *Da Sociedade Cooperativa* cit., p. 941; e M.A. Henriques Pinheiro, *Cooperativas de Crédito* cit., p. 28.

5 Cf. M. Carvalhosa, *Comentários ao Código Civil*, vol. 13, Parte Especial. Do Direito de Empresa. Da Sociedade Personificada. Do Estabelecimento. Dos Institutos Complementares (Artigos 1.052 a 1.195), 2.ª ed., São Paulo, 2005, p. 394.

6 Cf. M. Carvalhosa, *Comentários ao Código Civil* cit., p. 394.

7 Cf. M. Carvalhosa, *Comentários ao Código Civil* cit., p. 394.

8 Cf. N. Reis Júnior, *Sociedades Cooperativas. Linhas Gerais e Aspectos Societários*, in F. Viana Rodrigues (coordinador), *Direito de Empresa no Novo Código Civil*, Rio de Janeiro, 2004, p. 372.

natura come civile o commerciale, e avendo fatto appello a molte delle disposizioni relative alle società di tipo classico, il legislatore non ha osato considerarla, espressamente e chiaramente, un nuovo tipo di società. In ogni caso, venne meno, anche se in modo imperfetto, la subordinazione della società cooperativa alle forme delle altre società.⁹ Inoltre, questo documento legale ha ribadito la non obbligatorietà del capitale sociale, in particolare per le cooperative di tipo Raiffeisen, e ha portato una lunga lista di modalità di cooperative: di assicurazione, di alloggi, di scuole ecc.

Diverse iniziative legislative seguirono la norma del 1932, sempre, però, con l'intento di limitare la precedenti libertà d'azione delle cooperative. Prima revocato, poi ristabilito questo documento legale, si creò insicurezza nel settore. Tra le norme del periodo, si può citare il decreto-legge n° 581, del 1° agosto 1938, che prevedeva la registrazione, la supervisione e l'assistenza alle società cooperative, e il decreto-legge n° 5.893, del 19 ottobre 1943, che si occupava dell'organizzazione, gestione e supervisione delle cooperative.¹⁰

Il successivo quadro giuridico rilevante per le cooperative è stato il decreto-legge n° 59, del 21 novembre 1966, che ha definito la politica nazionale di cooperazione e ha creato il "Conselho Nacional do Cooperativismo", revocando il decreto n° 22.239/1932. È stata inaugurata una fase di stretto controllo statale sul settore cooperativo brasiliano. È stata stabilita la obbligatorietà dell'autorizzazione del governo per il funzionamento delle cooperative e sono stati cancellati una parte dei benefici fiscali e del credito di cui beneficiavano, generando insicurezza e insoddisfazione nel settore. La ovvia conseguenza fu una profonda crisi del sistema cooperativo.¹¹

Purtuttavia, bisogna riconoscere l'indubbio apporto positivo della norma del 1966, che conferì espressamente, per la prima volta, una forma societaria propria alla società cooperativa.¹²

In seguito, il decreto-legge n° 59/1966, è stato abrogato dalla legge n° 5.764, del 16 dicembre 1971, ancora in vigore, che definisce la "Política Nacional de Cooperativismo" e ha stabilito il quadro giuridico per la società cooperative, dando loro forma e caratteristiche proprie. In linea con quanto già intravisto con la legge precedente, la legge del 1973 sulla società cooperativa "representou, semdúvidaalguma, nítidaevolução no sentido de atribuirnaturezaprópria à cooperativa, inconfundívelcomasdemaisformasassociativas e societáriasatéentãoconhecidas no direitopátrio"¹³.

9 Cf. W. Bulgarelli, *SociedadesComerciais. SociedadesCivis. SociedadesCooperativas. Empresas. EstabelecimentoComercial*, 7.^a ed., São Paulo, 1998, p. 252.

10 Cf. M. Carvalhosa, *Comentáriosao CódigoCivil cit.*, p. 394.

11 Cf. M. Carvalhosa, *Comentáriosao CódigoCivil cit.*, p. 395.

12 Cf. W. Bulgarelli, *SociedadesComerciais cit.*, p. 256.

13 Cf. A. Wald, *Da Natureza e do Regime Jurídico das Cooperativas e do SócioDemitido ou Que*

Si noti, per inciso, la definizione legale degli articoli 3° e 4°:

“Art. 3° Celebram contrato de sociedade cooperativa aspersoasque reciprocamente se obrigam a contribuir combensouserviços para o exercício de umaatividadeeconômica, de proveitocomum, semobjetivo de lucro.”

“Art. 4° Ascooperativassãosociedades de pessoas, com forma e naturezajurídicapróprias, de naturezacivil, não sujeitas a falência, constituídas para prestarserviços aos associados, distinguindo-se das demais sociedades pelas seguintes características (...).”

Si segnala, inoltre, come una delle principali innovazioni delle legge del 1971, il capitolo sul sistema operativo di cooperative, in cui si stabilisce, per esempio, che gli atti di cooperazione non costituiscono operazioni di mercato.¹⁴

D'altra parte, la legge n° 5.764/1971, ha promosso, nei suoi 117 articoli, un'ampia regolamentazione del settore. Si è definita, per mezzo d'essa, la politica nazionale di cooperazione, assegnandosi al governo federale il coordinamento e l'incoraggiamento delle cooperative, attraverso il “Conselho Nacional de Cooperativismo”. Si resero maggiormente dettagliati i meccanismi e gli organi di vigilanza e controllo del settore, mantenendo, al contempo, la previa autorizzazione per il funzionamento delle cooperative, come previsto dalla legislazione del 1966. Nonostante tale controllo del governo, la dottrina intravide, nella legge vigente, una “tendência à mitigação da intervenção estatal no setor”, dal momento che, “em diversos pontos da lei, percebe-se que a intenção foi flexibilizar gradativamente as estruturas do cooperativismo”, rappresentando tale flessibilità il punto di partenza di un periodo di rinnovamento del settore, che ha portato alla attuale fase della liberalizzazione delle cooperative, che ha avuto inizio con la Costituzione Federale del 1988.¹⁵

Infatti, la Costituzione del 1988 ha riconosciuto l'importanza delle cooperative e la loro indipendenza¹⁶, affermando che “a lei apoiará e estimulará o cooperativismo e outras formas de associativismo” (art. 174, § 2°); disponendo un “adequado tratamento tributário ao ato cooperativo

se Retira da Sociedade, in *Revista dos Tribunais*, vol. 711, São Paulo, janeiro de 1995, p. 64.

14 Cf. W. Bulgarelli, *Sociedades Comerciais* cit., pp. 260-262.

15 Cf. M. Carvalhosa, *Comentários ao Código Civil* cit., pp. 395-396.

16 Cf. P.M. Pereira Corrêa da Fonseca & R. Sztajn, *Código Civil Comentado*, vol. XI, Direito de Empresa (Artigos 887 a 926 e 966 a 1.195), São Paulo, 2008, p. 596.

praticado pelas sociedades cooperativas” (art. 146, III, c); e inserendo una clausola di autonomia cooperativa, secondo la quale “a criação de associações e, na forma da lei, a de cooperativas independem de autorização, sendo vedada a interferência estatal em seu funcionamento.” (art. 5º, XVIII). Essendo state le cooperative esentate, in sede costituzionale, della previa autorizzazione e dell'intervento dello Stato nel suo funzionamento, le disposizioni della legge 5.764/1971 che prevedono tale autorizzazione, chiaramente, non sono state accolte dalla Costituzione del 1988.¹⁷

Infine, la legge n° 10.406, del 10 gennaio 2002, che ha istituito il nuovo Codice Civile brasiliano, ha dedicato, nell'ambito del Libro sulla Società, tra i tipi di società ammesse nel diritto brasiliano, una sezione per le società cooperative, senza rimuovere l'applicazione della legge speciale del 1971. Pertanto, le società cooperative sono attualmente disciplinate dalle disposizioni e dai principi costituzionali a loro inerenti, dalla legge n° 5.764/1971, e del Codice Civile del 2002¹⁸ (e questo, ovviamente, senza ignorare le varie normative specifiche, sui vari tipi di cooperative). È certo che la legge speciale del 1971 e del Codice Civile devono coordinarsi, e ci possono essere alcune difficoltà ermeneutiche nei casi di conflitto tra i diversi dispositivi. La dottrina è incline ad affermare la prevalenza del Codice Civile del 2002, essendo, da un punto di vista temporale, l'ultima legge sulla stessa materia, a partire dalla legge n° 5.764/1971, revocando le disposizioni di quest'ultima ad esso contrarie.¹⁹

È necessario, ora, precisare che l'avvento del Codice Civile ha aperto una discussione sulla natura della società cooperativa. Se la legge n° 5.764/1971 le conferiva, nel suo art. 4º, la condizione di tipo speciale di società, il Codice Civile la ha trattato, nel suo art. 982, par. singolo, come società semplice (società che non esercitano attività d'impresa). Sembra prevalere la posizione secondo cui le cooperative non sarebbero un tipo di società semplice, avendo una natura giuridica ibrida, tra le società civile e quelle che esercitano attività d'impresa, in tal modo la remissione citata del Codice Civile per le società semplici sarebbe solo un modo per la soluzione delle lacune nella legislazione speciale sulle cooperative (cioè, la legge n° 5.764/1971, fatte salve le disposizioni del Codice Civile del 2002).²⁰

In sintesi, e al di là di una mero resoconto cronologico delle principali fonti normative, l'evoluzione storico-legislativa della

17 Cf. M. Carvalhosa, *Comentários ao Código Civil* cit., p. 396.

18 Cf. N. Reis Júnior, *Sociedades Cooperativas* cit., pp. 372-373.

19 Cf. M. Carvalhosa, *Comentários ao Código Civil* cit., p. 397; N. Reis Júnior, *Sociedades Cooperativas* cit., p. 376; e H. Malheiros Duclerc Verçosa, *Curso de Direito Comercial*, vol. 2, *Teoria Geral das Sociedades. As Sociedades em Espécie do Código Civil*, São Paulo, 2006, pp. 544-545.

20 Cf. H. Malheiros Duclerc Verçosa, *Curso de Direito Comercial* cit., pp. 545-546; e N. Reis Júnior, *Sociedades Cooperativas* cit., p. 374.

società cooperativa brasiliana, verificati i tratti distintivi che sono state descritti nei paragrafi precedenti, può essere organizzata secondo l'identificazione di alcuni periodi, che permettono di comprendere lo sviluppo globale del fenomeno, a partire dalle ripercussioni del proprio impatto sull'ambiente cooperativo²¹: (i) periodo di impiantazione, che inizia con la prima legge organica nel 1907; (ii) periodo di consolidamento parziale, che inizia con la promulgazione del decreto del 1922; (iii) Periodo di centralismo statale, che è sancito dalla norma del 1966, e ha provocato una profonda crisi del sistema cooperativo brasiliano; (iv) Periodo del rinnovo delle strutture, con la legge del 1971, ancora in vigore, e, in ogni caso, nell'ambito di un sistema di coordinamento centrale dello Stato; e (v) Periodo di liberalizzazione, dopo la promulgazione della Costituzione del 1988.

2. CARATTERISTICHE DELLA SOCIETÀ COOPERATIVA BRASILIANA

Da un lato, se l'elemento della cooperazione deve essere presente in tutte le società, dall'altro lato, la scelta della forma della società cooperativa per il tramite di agenti economici avrà rapporto con le sue caratteristiche specifiche, le quali, sotto molteplici aspetti, differiscono da quelle di altre figure aziendali.

La prima di queste caratteristiche, che comunque non è esclusiva della sola forma cooperativa, è la *affectiosocietatis*. Tuttavia, nel caso specifico della cooperativa, il fatto di essere una società di persone dà centralità all'elemento della *affectiosocietatis*. Nonostante alcune somiglianze di struttura organizzativa fra società cooperativa e la società anonima, la prima non perde la sua natura di società di persone, pur mantenendo una certa vicinanza con la natura della seconda (società di capitali). Poiché la cooperativa si basa sul legame personale tra i suoi membri, l'*affectiosocietatis* ha chiara natura *intuitupersonae*, cioè, è costituita sulla base delle caratteristiche e qualità individuali di ogni membro.²²

Ma, ancora una volta, al contrario di quanto avviene in altre strutture aziendali, nella cooperativa i cooperati hanno due funzioni, essendo soci e "clienti" o "fornitori", cioè, essendo produttori e consumatori di beni e servizi offerti dalla società cooperativa.²³ Per quanto riguarda la integralizzazione del capitale, interessante osservare che i membri, secondo

21 Cf. W. Bulgarelli, *A Sociedade Cooperativa e a Sua Disciplina Jurídica*, Rio de Janeiro, 1988, pp. 63-76.

22 Cf. W. Bulgarelli, *A Sociedade Cooperativa* cit., pp. 54-55; M. Carvalhosa, *Comentários ao Código Civil* cit., p. 399; e F.C. Pontes de Miranda, *Tratado de Direito Privado*, vol. XLIX, Rio de Janeiro, 1965, p. 429.

23 Cf. A. Wald, *Da Natureza e do Regime Jurídico das Cooperativas* cit., p. 63; N. Reis Júnior, *Sociedades Cooperativas* cit., p. 373; e H. Malheiros Duclerc Verçosa, *Curso de Direito Comercial* cit., p. 545.

la situazione, sono obbligati o ad un contributo limitato o non sono tenuti ad alcun contributo (cooperative senza capitale sociale).²⁴

Per questo motivo, si classifica la società cooperativa come quella società in cui i soci forniscono una “contribuição-patrimonial-limitadaouilimitada e contribuição-pessoal-máxima”. Quest’ultimo elemento, inoltre, è essenziale per caratterizzare la cooperativa come una società di persone di eccellenza, dal momento che in nessun altro tipo di società la partecipazione dei soci non è così intensa, la qual cosa spiega anche il fatto che non sia classificata in dottrina come società mista, nonostante sia regolata, in concomitanza, dalle disposizioni delle società di capitali e da quelle delle società di persone.²⁵

Un’altra caratteristica importante di una società cooperativa è la variabilità o rinuncia del capitale. A differenza di altre aziende, in cui la indicazione di capitale sociale è elemento essenziale e indispensabile per la sua iscrizione nel registro delle imprese, questo non è elemento obbligatorio per la valida costituzione della cooperativa. Nel caso in cui ci sia l’indicazione del capitale, questo sarà variabile e potrà aumentare o diminuire a seconda della variazione del numero dei membri o delle azioni sottoscritte, senza modifiche di statuto o la manifestazione dell’assemblea.²⁶

Per quanto riguarda il numero di soci, la legge richiede che esso sia illimitato relativamente al numero massimo, ma dovrebbe rappresentare un numero minimo di soci sufficiente per ricoprire tutte le cariche di gestione cooperativa, in ogni caso mai essere inferiore a venti individui. Non si può negare che si tratta di una soluzione logica e efficace, perché con essa si garantisce la distribuzione fra i soci delle funzioni amministrative necessarie per svolgere l’attività d’impresa. Tuttavia, la dottrina non manca di sottolineare il pericolo intrinseco di tale disposizione di legge, non essendo quest’ultima in armonia con il principio costituzionale di adesione volontaria (art. 5º, XX). Così, per rendere compatibile le disposizioni appena richiamate, è necessario che si interpreti la norma giuridica alla luce della norma costituzionale, affinché non si legga la disposizione di cui sopra come una mera costrizione o convinzione del socio della cooperativa ad associarsi od a rimanere nello status di associato, in virtù di qualsivoglia legame che si stabilisca con la cooperativa o funzione da effettuarsi nella cooperativa. D’altra parte, il principio appena esposto non deve essere interpretato in forma assoluta: ne consegue che è riconosciuto in capo alla cooperativa

24 Cf. W. Bulgarelli, *A Sociedade Cooperativa cit.*, pp. 55-56; A. Wald, *Da Natureza e do Regime Jurídico das Cooperativas cit.*, p. 63.

25 Cf. W. Bulgarelli, *A Sociedade Cooperativa cit.*, p. 56.

26 Cf. J. Batista Brito Pereira, *Da Sociedade Cooperativa cit.*, p. 945; G. Mamede, *Direito Empresarial Brasileiro*, vol. 2, *Direito Societário: Sociedades Simples e Empresárias*, 4ª ed., São Paulo, 2010, pp. 589-590; N. Reis Júnior, *Sociedades Cooperativas cit.*, p. 376; e H. Malheiros Duclerc Verçosa, *Curso de Direito Comercial cit.*, p. 547.

il diritto di rifiutare l'ingresso di persone che non siano in grado di sviluppare le attività della società o non accettino le responsabilità risultanti dell'adesione.²⁷

Per quanto riguarda la quota dei soci, essa si caratterizza dalla non-trasferibilità delle azioni ai terzi. Cioè, a differenza di quanto accade con i membri delle altre società, i soci della cooperativa non possono cedere proprie quote a persone che non siano già membri della cooperativa. In nessun caso è, difatti, permesso tale trasferimento, neanche in caso di trasferimento causa mortis²⁸. Inoltre, la legge pone un limite, nel caso delle cooperative, al numero di quote del capitale sociale che ogni membro può sottoscrivere. La legge dispone che ciascuna quota non possa avere valore superiore al salario minimo più alto del paese e che il socio non possa sottoscrivere più di un terzo delle quote (la qual cosa trova giustificazione nel fatto che non è previsto fra gli scopi della società cooperativa quello di permettere ad un socio di essere controllore di maggioranza delle quote, attraverso una partecipazione prevalente nel capitale rispetto ad altri soci)²⁹.

Questa regola ha una connessione logica diretta con un'altra caratteristica delle società cooperative, ovvero la regola dell'unicità del voto (principio di gestione o di amministrazione democratica). In altre parole, nelle cooperative il socio ha diritto a un solo voto, indipendentemente dal numero di quote possedute. Per questo motivo, il quorum deliberativo nelle assemblee generali della società cooperativa non si basa sulla rappresentatività del capitale, ma sul numero dei soci. In tal modo, si garantisce anche che nell'assemblea generale si abbia l'effettiva partecipazione dei soci anche nelle cooperative in cui non c'è il capitale, dal momento che la fase deliberativa in tale organo non è correlata alla partecipazione economica dei soci. Inoltre, come conseguenza di ciò, le decisioni in assemblea generale sono prese sempre a maggioranza dei voti, dal momento che ogni voto rappresenta la manifestazione della volontà di un solo socio, indipendentemente dal fatto che questi sia entrato nella cooperativa con un apporto economico al capitale sociale e quanto, da un punto di vista proporzionale, il valore dell'apporto rappresenti nella totalità del capitale sociale.³⁰

27 Cf. J. Batista Brito Pereira, *Da Sociedade Cooperativa* cit., pp. 945-946; G. Mamede, *Direito Empresarial Brasileiro* cit., pp. 588-589; N. Reis Júnior, *Sociedades Cooperativas* cit., p. 376; e H. Malheiros Duclerc Verçosa, *Curso de Direito Comercial* cit., pp. 547-548.

28 Cf. J. Batista Brito Pereira, *Da Sociedade Cooperativa* cit., p. 947; e N. Reis Júnior, *Sociedades Cooperativas* cit., p. 376.

29 Cf. J. Batista Brito Pereira, *Da Sociedade Cooperativa* cit., pp. 946-947; G. Mamede, *Direito Empresarial Brasileiro* cit., pp. 590-591; N. Reis Júnior, *Sociedades Cooperativas* cit., p. 376; e H. Malheiros Duclerc Verçosa, *Curso de Direito Comercial* cit., p. 548.

30 Cf. J. Batista Brito Pereira, *Da Sociedade Cooperativa* cit., pp. 947-948; G. Mamede, *Direito Empresarial Brasileiro* cit., pp. 591-592; N. Reis Júnior, *Sociedades Cooperativas* cit., pp.

Tuttavia, è importante notare che, per quanto riguarda la ripartizione della responsabilità tra i soci, non è rilevante, a priori, la partecipazione di questi nel capitale sociale, ma, piuttosto, rileva il livello di partecipazione alle operazioni dannose nei confronti di terzi, o, in aggiunta, rileva la responsabilità illimitata, che, a seconda del caso, non impedisce che le quote-parte, quando esistano, possano servire da base per eventuali responsabilità. Dunque, l'ordinamento classifica le cooperative in limitate, in cui i soci rispondono solo per il valore del capitale sottoscritto e non ancora conferito, ed illimitate, dove il socio è responsabile personale, in solido ed illimitatamente per gli impegni di cooperazione, tuttavia, rispettandosi sempre, nel caso, il beneficio dell'ordine, in virtù del quale i soci possono essere responsabili solo per obbligazioni inadempite dalla società a favore di terzi, dopo che lo stesso debito sia stato richiesto in giudizio alla cooperativa.³¹

Per quanto riguarda la questione della distribuzione dei risultati tra i cooperati, si applica alle cooperative il cosiddetto principio del ritorno, secondo il quale i risultati sono distribuiti tra soci in proporzione al valore delle transazioni effettuate da loro nella normale attività della cooperativa. Inoltre, se c'è un capitale sociale, lo statuto può prevedere che i soci ricevano una remunerazione fissa in ragione del capitale che hanno conferito o può anche prevedere l'assegnazione di un interesse fisso per lo stesso capitale versato. È importante, infine, ricordare che parte del surplus delle operazioni della cooperativa può essere assegnato alla costituzione di fondi, come il Fundo de Reserva e o Fundo de Assistência Técnica, Educacional e Social.³²

Un'altra caratteristica di una cooperativa è il suo carattere non imprenditoriale, che è strettamente connesso con la questione dello scopo lucrativo. La cooperativa, a differenza di altre società, è impegnata nel “viabilizar a atividades socioeconômica de seus associados”, il che non implica la realizzazione di operazioni di qualunque attività economica specifica. La struttura organizzativa di un tale genussociale, dunque, è focalizzata sugli interessi dei soci, il che, non necessariamente, significa la ricerca del profitto.³³

375-376; e H. Malheiros Duclerc Verçosa, *Curso de Direito Comercial* cit., pp. 548-549.

31 Cf. G. Mamede, *Direito Empresarial Brasileiro* cit., p. 588; J. Batista Brito Pereira, *Da Sociedade Cooperativa* cit., p. 947; N. Reis Júnior, *Sociedades Cooperativas* cit., pp. 381-382; e H. Malheiros Duclerc Verçosa, *Curso de Direito Comercial* cit., pp. 547, 548 e 550.

32 Cf. H. Malheiros Duclerc Verçosa, *Curso de Direito Comercial* cit., p. 549; J. Batista Brito Pereira, *Da Sociedade Cooperativa* cit., p. 948; e G. Mamede, *Direito Empresarial Brasileiro* cit., pp. 592-593.

33 Cf. J. Batista Brito Pereira, *Da Sociedade Cooperativa* cit., pp. 948-949; e W. Bulgarelli, *Perspectivas da Empresa Perante o Direito Empresarial – II (Conclusão: a Empresa Cooperativa)*, in *Revista de Direito Mercantil, Industrial, Econômico e Financeiro*, ano 11 (nova série), n.º 6, São Paulo, 1972, pp. 44-51.

Questa definizione dell'oggetto della società cooperativa è un riflesso diretto del concetto di cooperativa elaborata nel XIX secolo e che rimane ancora oggi, ovverossia quello di solidarietà equidistante dall'individualismo capitalista e dalla soluzione comunista³⁴. Questo risulta essere il cooperativismo antispeculativo. Oltre alle funzioni economiche essenziali, si ricercano anche obiettivi meta-economici, per esempio, di natura educativa e culturale, mettendo in primo piano non il capitale, ma la gente e il contributo personale di ciascun membro, con lo scopo di miglioramento della situazione economica dei cooperati. Pertanto, si dice che la cooperativa ha carattere meramente strumentale, che si serve di un mezzo per raggiungere il suo scopo principale: la promozione dell'economia individuale dei soci.³⁵

Questa caratteristica, a sua volta, è direttamente correlata alla natura giuridica di questo tipo di società. In realtà, la cooperativa è una persona giuridica di diritto privato, organizzata come una comunità di persone con finalità economica (e per questo è denominata società), ma non a scopo di lucro, come visto sopra. Il profitto è "remunerazione del capitale investito" e, dunque, in quanto non vi è necessariamente apporto di capitale da parte dei cooperati, non si deve parlare di profitto, che è remunerazione per gli investimenti.³⁶

Le cooperative, oltre ad essere enti dotati di personalità giuridica (dalla registrazione del loro statuto nel registro delle imprese) e di scopo economico (per questo chiamate "società") senza scopo di lucro, sono società istituzionali, e non contrattuali, cioè, sono istituite e non contrattate. Tanto che le norme contenute negli statuti dell'organizzazione, l'attività degli organi e i diritti e i doveri dei soci, in relazione alla associazione, non hanno carattere contrattuale ma, piuttosto, normativo e istituzionale.³⁷

Per quanto riguarda la struttura organizzativa e amministrativa della società cooperativa, l'assemblea generale è l'organo supremo, con poteri di decisione di tutte le questioni relative all'oggetto e alle prestazioni della società, dentro, tuttavia, i limiti statutari. Il quorum costitutivo è di almeno due terzi, in prima convocazione; della metà, in seconda convocazione (un'ora dopo la prima); e di dieci soci, in terza convocazione (un'ora dopo la seconda). La convocazione della assemblea compete al presidente, a qualsiasi organo di amministrazione

34 Cf. W. Franke, *DireitodasSociedadesCooperativas (Direito Cooperativo)*, São Paulo, 1978, pp. 3-4; e W. Bulgarelli, *Perspectivas da EmpresaPerante o DireitoEmpresarial cit.*, pp. 45-47.

35 Cf. J. Batista Brito Pereira, *Da Sociedade Cooperativa cit.*, pp. 940-941 e 950-951; P.M. Pereira Corrêa da Fonseca & R. Sztajn, *CódigoCivilComentado cit.*, pp. 597-599; e W. Bulgarelli, *Perspectivas da EmpresaPerante o DireitoEmpresarial cit.*, pp. 44-51.

36 Cf. G. Mamede, *DireitoEmpresarial Brasileiro cit.*, pp. 586-587; A. Wald, *Da Natureza e do Regime Jurídico das Cooperativas cit.*, pp. 64-65.

37 Cf. G. Mamede, *DireitoEmpresarial Brasileiro cit.*, pp. 586-587.

(tra cui il consiglio fiscale) e agli stessi cooperati, a condizione che siano almeno il 25% del numero totale dei soci.³⁸

Come accennato in precedenza, nell'assemblea generale la deliberazione è approvata dalla maggioranza, ogni socio dispone di un voto, indipendentemente dalla propria partecipazione nel capitale sociale. L'assemblea delibera sulle questioni avanzate dai soci presenti e la decisione è vincolante per tutti, anche i contrari e gli assenti, essendo, di regola, vietata la rappresentazione per procura. Se la deliberazione è viziata da errore, dolo, frode, simulazione o in violazione della legge o dello statuto, è concesso ai soci l'esercizio di un'azione per annullarla, soggetta al termine di prescrizione di quattro anni dalla deliberazione della precitata assemblea.

Sono previste due forme di assemblea generale, l'ordinaria e la straordinaria. La prima, secondo la legge, dovrebbe sempre essere convocata entro tre mesi dalla termine dell'anno fiscale e decide sui seguenti temi: la prestazione di conti degli organi di amministrazione accompagnata dal parere del "Conselho Fiscal"; l'assegnazione dei fondi rimanenti (dedotti da essi il valore delle parcelle destinate ai fondi obbligatori) o la ripartizione delle spese che hanno superato le ricorsi della società; l'elezione dei componenti degli organi di gestione, del "Conselho Fiscal" ecc.; la fissazione, se previsto, degli onorari, dei bonus e dello scrutinio della presenza dei membri del "Conselho de Administração" o della "Diretoria" e del "Conselho Fiscal"; altre questioni di interesse della società cooperativa. L'assemblea generale straordinaria, a sua volta, viene convocata quando è necessario e può decidere su tutte le questioni di interesse per la società, a condizione che sia elencato nel relativo ordine del giorno. Tuttavia, alcune questioni sono soltanto di competenza esclusiva dell'assemblea generale, vale a dire: modifica dello statuto; fusione, consolidamento o smembramento; cambio degli oggetto sociale; scioglimento volontario della società e nomina dei liquidatori; approvazione dei conti del liquidatore. L'adozione della decisione in una assemblea straordinaria richiede l'accordo di almeno due terzi dei soci presenti.³⁹

L'amministrazione della cooperativa, a sua volta, è affidata alla "Diretoria" o al "Conselho de Administração" e, in conformità alle disposizioni dello statuto, i membri di tale organo sono solo cooperati eletti dall'assemblea generale. La durata del mandato di tali membri è determinata nello statuto, al massimo di quattro anni. Nello stesso statuto è prevista o meno la possibilità di rielezione del corpo amministrativo, tuttavia sempre nel rispetto della disposizione di legge che richiede la sostituzione di almeno un terzo dei membri. Lo statuto può anche prevedere la creazione di altri organi e consigli tecnici

38 Cf. G. Mamede, *Direito Empresarial Brasileiro* cit., p. 603.

39 Cf. G. Mamede, *Direito Empresarial Brasileiro* cit., p. 604.

qualora si reputino utili o necessari alla gestione della società. Inoltre, è anche possibile che le organi dell'amministrazione si avvalgano di gerenti tecnici o commerciali che non sono membri della cooperativa.⁴⁰

Gli amministratori, che siano essi eletti o gerenti tecnici o commerciali a contratto, agiscono come rappresentanti della società, in suo nome e con attenzione agli interessi propri e di quelli della collettività di cooperati. Di regola, non sono loro personalmente responsabili per le obbligazioni assunte in nome della cooperativa, a meno che il loro comportamento non sia macchiato da dolo o colpa e causi pregiudizio alla società. In questo caso, è configurabile la responsabilità in solido degli amministratori. L'occultamento della natura della società può avere come conseguenza la responsabilità degli amministratori che hanno preso parte agli atti in questione.⁴¹

Al fine di controllare la condotta degli amministratori, la società cooperativa può avere un "Conselho Fiscal". Questo organo è composto da sei membri, tre effettivi e tre supplenti, tutti cooperati. L'elezione di questi membri si svolge ogni anno in occasione dell'assemblea generale, con la possibilità di rielezione solo di un terzo di loro. È vietato l'accumulo di posizioni in organi di gestione e di sorveglianza.⁴²

Infine, si segnala che l'assemblea generale ha il potere di rimuovere i membri degli organi di amministrazione o di sorveglianza prima della fine del loro mandato. Se la rimozione di tali membri potrebbe causare qualche danno alle attività regolari degli organi di gestione della cooperativa, l'assemblea può nominare amministratori e consiglieri provvisori, fino all'entrata in carica dei nuovi membri permanenti, da eleggere entro trenta giorni.⁴³

3. NUMERI E DATI STATISTICI SULLE COOPERATIVE IN BRASILE

L'importanza delle cooperative nello scenario economico brasiliano è già consolidata. Il numero di società cooperative, di soci e di funzionari e la fatturazione di essi possono essere presi in considerazione, nel presente elaborato, per avere una migliore visione del cooperativismo in Brasile.

I dati statistici sono stati raccolti dalla "OrganizaçãodasCooperativasBrasileiras" (OCB)⁴⁴, del "ServiçoNacional

40 Cf. G. Mamede, *DireitoEmpresarial Brasileiro* cit., p. 605.

41 Cf. G. Mamede, *DireitoEmpresarial Brasileiro* cit., pp. 605-606.

42 Cf. G. Mamede, *DireitoEmpresarial Brasileiro* cit., p. 606.

43 Cf. G. Mamede, *DireitoEmpresarial Brasileiro* cit., p. 606.

44 Vedi, in particolare, il documento della OrganizaçãodasCooperativasBrasileiras, *Panorama do Cooperativismo Brasileiro. Ano 2011, marzo del 2012*, disponibile in <http://www.ocb.org.br/gerenciador/ba/arquivos/panorama_do_cooperativismo_brasileiro_2011.pdf>.

Cf., anche, E. ScheidtNinaut& M.A Matos, *Panorama do Cooperativismo no Brasil*, in

de Aprendizagem do Cooperativismo” (Sescoop), e del “Ministério do Desenvolvimento, Indústria e Comércio Exterior”, in materia di i) numero di cooperative, (ii) numero di soci, (iii) numero di funzionari, e (iv) partecipazione delle società cooperative in esportazioni brasiliane.

3.1. I dati relativi al numero di società cooperative

Secondo i dati forniti dalla OCB, si può visualizzare il numero di cooperative esistenti in Brasile dal 2001 fino al 2011, in relazione al settore economico, alla regione e allo stato della federazione.

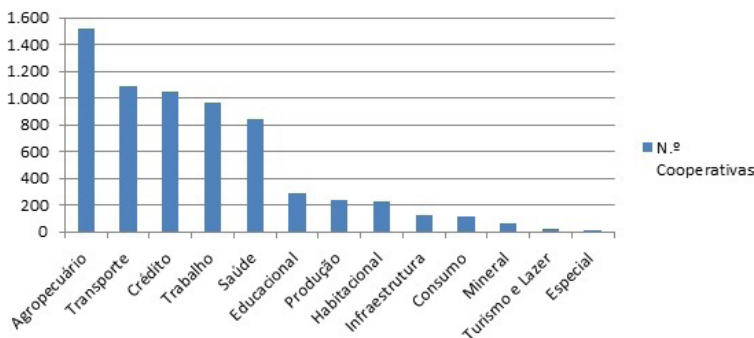
Nel 2011, si registra l'esistenza di 6.568 cooperative in Brasile. Dal 2001, vi è una certa variazione nel numero di società cooperative fino al 2008, quando si è arrivati ad un massimo di 7.682, e, quindi, in diminuzione fino al numero attuale (tabella 1). La riduzione del numero di cooperative non deve essere analizzata in modo negativo, poiché può essere letta come una ricerca di una maggiore competitività nel mercato: le cooperative si riuniscono per guadagnare scala e spazio, espandendo la propria attività, osservando, tuttavia, come si vedrà in articoli successivi, un aumento significativo della quantità di soci e funzionari, ovverossia, la forza di lavoro.

Tabella 1. Totale delle cooperative per anno:

anno	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
totale di cooperative	7.026	7.549	7.355	7.136	7.518	7.603	7.672	7.682	7.261	6.652	6.586

I settori economici che più di altri sono caratterizzati dalla presenza delle società cooperative sono l'agricoltura (1.523), il trasporto (1.088) e il credito (1.047), conformemente a quanto mostrato nella tabella qui sotto:

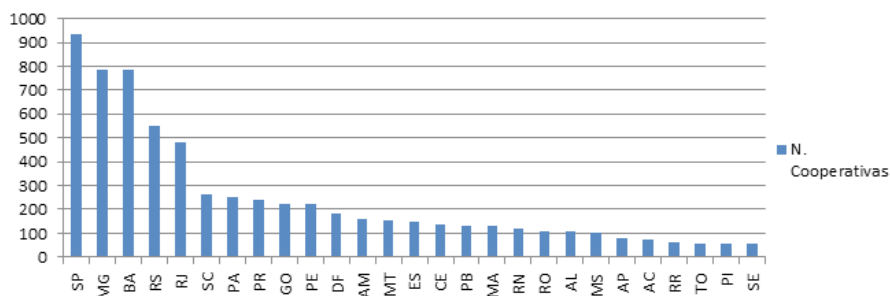
Grafico 1. Numero di cooperative per settore economico (2011)



InformaçõesEconômicas, vol. 38, São Paulo, agosto de 2008, pp. 43-55, per un'analisi macroeconomica dei dati sul settore cooperativo per l'anno 2007.

In fine, per quanto riguarda la distribuzione regionale, si nota che São Paulo è lo stato con il maggior numero di cooperative. Sono 932 le cooperative situate a São Paulo, seguite dalle 785 di MinasGerais, e dalle 783 di Bahia. Questi tre stati, insieme, hanno quasi il 30% del numero di cooperative brasiliane, un dato interessante da considerare.

Grafico 2. Numero di cooperative per stato della federazione (2011)



3.2. I dati relativi al numero dei soci delle cooperative

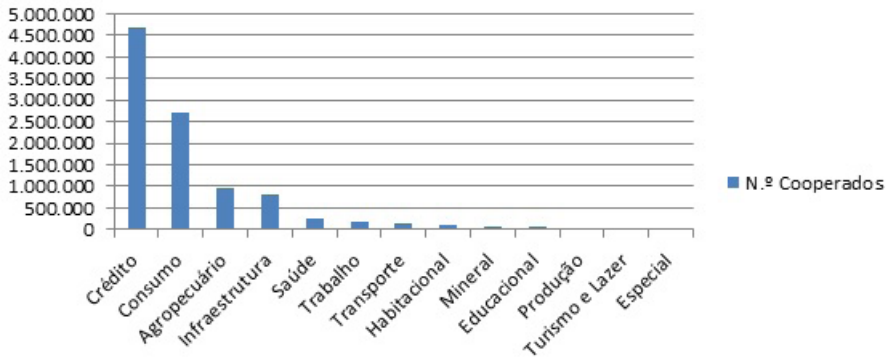
Il dato che più anima coloro che riconoscono la società cooperativa come un importante strumento di mercato è relativo al numero dei soci. Dal 2001, questo numero non ha mai smesso di crescere (grafico 1). Nel 2011, il totale di soci delle cooperative vincolate alla OCB ha superato 10 milioni, con un incremento di 11% rispetto all'anno precedente. In 11 anni il numero è più che raddoppiato.

Tabella 2. Totale di soci per anno:

anno	numero de cooperati	anno	numero de cooperati
2001	4.779.000	2007	7.688.000
2002	5.259.000	2008	7.888.000
2003	5.763.000	2009	8.252.000
2004	6.160.000	2010	9.017.000
2005	6.791.000	2011	10.009.000
2006	7.393.000		

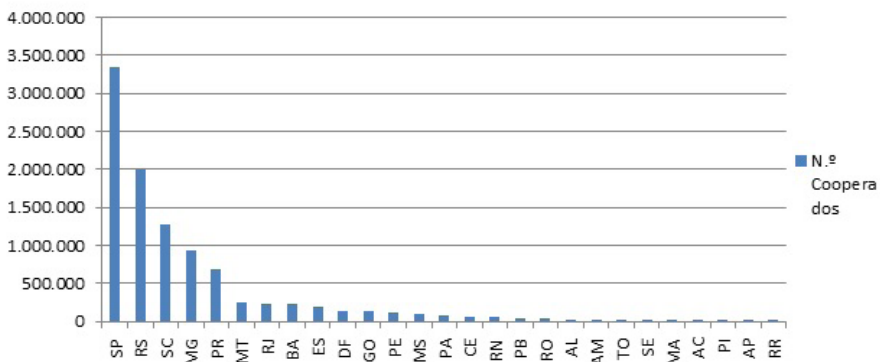
Per quanto riguarda il settore economico, il settore di credito è quello nel quale ci sono più cooperati, essendoci più di quattro milioni di soci, seguito dal settore del consumo, con quasi tre milioni di cooperati, e dal settore agricolo, con un milione di cooperati.

Grafico 3. Numero di soci per settore economico (2011)



Per quanto riguarda la distribuzione regionale, São Paulo appare di nuovo come lo stato leader con riferimento al numero di soci, con tre milioni di membri, che rappresentano, di per sé, il 30% del totale nazionale. Gli stati del Rio Grande do Sul e di Santa Catarina sono, rispettivamente, in 2° e 3° posizione, senza tuttavia riuscire a raggiungere, insieme, il totale di São Paulo. Lo stato di Santa Catarina, tuttavia, è un caso interessante perché ha una popolazione molto più piccola di altre unità federali che le sono dietro nel computo del numero di soci, e in Santa Catarina le cooperative sono responsabile per il 11% del PIB.

Grafico 4. Numero di soci per stato della federazione (2011)

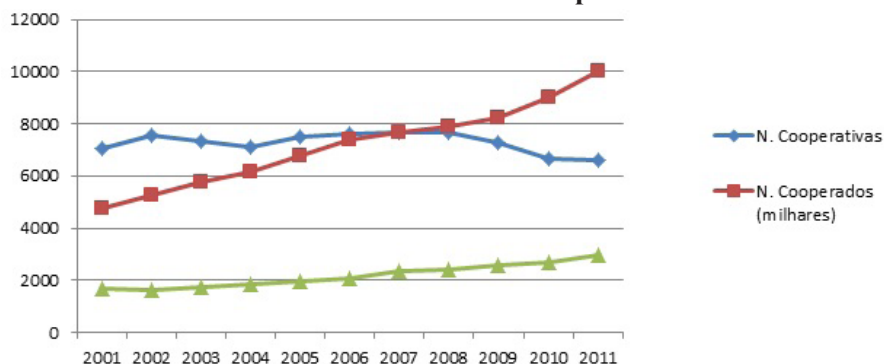


3.3. I dati relativi al numero di funzionari di cooperative

Anche il numero totale dei funzionari di cooperative cresce costantemente, considerando il periodo di analisi, tuttavia con minore intensità rispetto alla crescita del numero dei soci. Nel 2011, ci sono stati più di 296.000 funzionari di cooperative in Brasile. Ancora una volta il

settore agricolo e di credito appaiono nelle prime posizioni: nel primo caso, sono più di 155.000 funzionari, e nel secondo, 34.000. Poi, in secondo piano vi è il settore sanitario, con 67.000 funzionari regolari, circa.

Grafico 5. Numero di cooperative x numero di soci x numero di funzionari per anno



Per quanto riguarda la distribuzione regionale, stranamente, São Paulo, lo stato più ricco e popoloso del Brasile, appare solo al terzo posto, con 48.505 funzionari nelle proprie cooperative. Il leader è lo stato di Paraná, con 65.000 funzionari in cooperative, il secondo è lo stato del Rio Grande do Sul, con 48.755 funzionari.

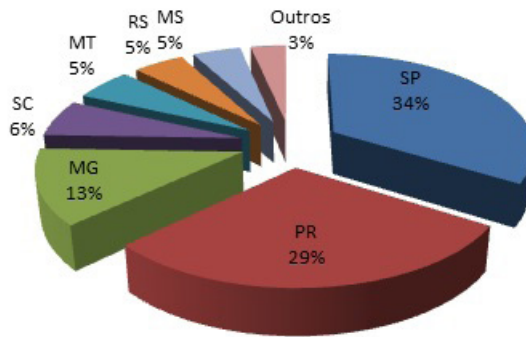
3.4. I dati sulle esportazioni delle cooperative

I dati sulle esportazioni delle cooperative sono stati forniti dal “Ministério do Desenvolvimento, Indústria e Comércio Exterior”, analizzati dal 2006 al 2012. Le cifre sulla fatturazione sono stati forniti da OCB, avendo solo dati disponibili del 2002 al 2007.

Le esportazioni delle società cooperative hanno mostrato una crescita significativa in questo periodo, e gli unici periodi di diminuzione furono del 2011 al 2012, quando l'importo è passato da US\$ 256 miliardi a 242 miliardi, e dal 2008 al 2009. Di fronte al totale nazionale, tale valore è poco meno che 2,5% delle esportazioni brasiliane.

Per quanto riguarda il settore economico, più del 90% del totale riguarda prodotti agricoli, specie dello zucchero e della soia. Per quanto riguarda la distribuzione regionale, São Paulo è il leader di nuovo, con 34% del totale delle esportazioni di cooperative, seguito da Paraná, con 29%.

Grafico 6. Esportazioni delle cooperative per stato della federazione, in percentuale



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

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

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

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

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

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