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PANORAMA OF BRAZILIAN LAW

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

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Ianá Priscilla de Oliveira Silva – Alessandra Marchioni

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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 UFRRJ are leading this important initiative. Today, much more than two decades ago - Brazil, one of the BRIC countries - has become an important player in the international economy and its legal system an important factor in the proper development of international commercial relations. May this effort prosper for years and generations to come.

Jacob Dolinger, 2013

EDITORIAL NOTE

In 1992, a group of prominent Brazilian scholars led by Professors Jacob Dolinger (Universidade do Estado do Rio de Janeiro - UERJ) 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 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.

Although having UERJ as its alma mater, Panorama of Brazilian Law was kept as an independent project. In 2017, for the first time the journal was submitted to and promptly endorsed by Universidade do Estado Rio de Janeiro, which became its home. Now, the editors present this fifth issue of Panorama of Brazilian Law, the first as a part of the Universidade do Estado do Rio de Janeiro's Portal to Electronic Publications, composed by 14 articles covering several branches of the Brazilian legal order, available in the electronic magazine format (www.panoramaofbrazilianlaw.com or www.e-publicacoes.uerj.br/index.php/pbl) which allows a broader perspective for the broadcasting of articles and reaching of a greater number of potential researchers. For this issue, papers written in English, French and Spanish were accepted. 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 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.

We could not fail to mention that, while the fourth issue came in a moment of sorrow, this fifth issue represents hope. Universidade do Estado do Rio de Janeiro has been showing its strength amid the challenges faced by its maintainer - the State of Rio de Janeiro.

Finally, brilliant young souls have joined Panorama of Brazilian Law's staff during the past year, strengthening our belief that knowledge

is the key tool to overcome fear and proving that some battles are worth fighting.

Brazil, June 2018.

Raphael Carvalho de Vasconcelos
Eraldo Silva Júnior

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L'IDENTITÉ MULTICULTURELLE DE LA CONSTITUTION BRÉSILIENNE: UNE LECTURE DE LA CONSTITUTION EN FAVEUR DES MINORITÉS CULTURELLES

THE MULTICULTURAL IDENTITY OF THE BRAZILIAN CONSTITUTION: A READING IN FAVOR OF CULTURAL MINORITIES

Deo Campos Dutra

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Resumé: Notre problématique principale est centrée sur le défi de répondre à la question de savoir comment pouvons-nous mieux accommoder les minorités culturelles, en protégeant leur droit fondamental à la culture au sein des États démocratiques libéraux. Notre effort est d'élaborer une raison juridique qui est fondée sur les droits de l'homme et guidée par une philosophie politique normative. Cette raison juridique, pour sa part, a un objectif principal: elle essaie de construire des propositions substantielles pour que les minorités culturelles puissent être inclues et « accommodées » dans leurs sociétés. Il est donc nécessaire de construire une trajectoire pour l'inclusion de nos minorités culurelles. Nous croyons que cette trajectoire passe par la solidification de l'identité constitutionnelle brésilienne: les droits fondamentaux.

Mots-clés : Identité Constitutionnelle - Constitution Brésilienne de 1988 - Droits Fondamentaux - Multiculturalisme -Minorités Culturelles

Abstract: This paper focus in the challenge of answering the question of how can we better accommodate cultural minorities by protecting their fundamental right to culture in liberal democratic states. Our effort is to develop a legal reason based on human rights and guided by a normative political philosophy. This legal reason, on the other hand, has one main objective: it tries to build substantive proposals so that cultural minorities can be included and «accommodated» in their societies. It is, therefore, necessary to build a trajectory for the inclusion of our cultural minorities. We believe that this trajectory requires the solidification of the Brazilian constitutional identity: the fundamental rights.

Keyword : Cultural identity - Brazilian Constitution of 1988 - Fundamental rights - Multiculturalism - Cultural Minorities

1. Introduction

Les modifications effectuées en Amérique latine au cours des dernières années démontrent le potentiel révolutionnaire que l'inclusion constitutionnelle de la diversité culturelle et le respect de cette diversité possèdent lorsqu'ils sont insérés dans le débat des pays où la pluralité ethnique est une réalité.[1]

Le moment de transformation passé par les États du continent a mené à de profonds changements dans la façon de comprendre l'accommodement culturel au sein de ces pays. Cette distinction a lieu principalement en raison de la différence entre les minorités qui occupent le territoire.

Dans le sillage du multiculturalisme libéral, nous croyons que les différentes minorités méritent un traitement différent[2]. Par conséquent,

1 Voir: César Rodríguez Garavito (ed.) El derecho em América Latina: Un mapa para el pensamiento jurídico del siglo XXI, México, Siglo Veintiuno Editores S.A,201; José Ribas Vieira; Letícia Dyniewicz, Estado Plurinacional na América Latina: diálogo conceitual entre multiculturalismo canadense e teoria pós-colonial. In: José Luis Bolzan de Morais; Flaviane de Magalhães. (Org.). Novo Constitucionalismo Latino-Americano: O Debate sobre Novos Sistemas de Justiça, Ativismo Judicial e Formação de Juízes, 1ed, Belo Horizonte, Arraes, 2014, p. 18-36; Roberto Viciano, Rubén Dalmau, Aspectos generales del nuevo constitucionalismo latinoamericano. In: Corte Constitucional del Ecuador. Corte Constitucional del Ecuador para el período de transición, El nuevo constitucionalismo en América Latina. Latinoamericano, Quito, Editora Nacional, 2010; Rachel Sieder, Multiculturalism in Latin America: Indigenous Rigths, Diversity and Democracy, New York, Palgrave Macmillan, 2002.

2 Selon Danièle Lochak, le mot multiculturalisme, « pointe d'abord une réalité : le pluralissme des sociétés contemporaines, caractérisées par l'existence dans leur sein de groupes très divers – des groupes qui revendiquent la conservation de leur identité et qui réclament souvent une plus grande visibilité ou une meilleure représentation dans l'espace public ». Selon l'auteur « c'est un terme générique qui recouvre toutes les formes de diversité, notamment mais pas exclusivement ethnoculturelles Danièle Lochak, Le Droit et les Paradoxes de l'université, Paris,

nous ne pouvons pas penser à des alternatives telles comme celles qui sont appliquées en Amérique latine pour des réalités comme celles rencontrées par la France, par exemple.

Différemment du grand nombre d'immigrants occupant le débat politique dans le pays européen, il y a des minorités historiques présentes depuis toujours dans les États qui ont été blessées par des années d'exploitation et de génocide en Amérique latine. La situation en Amérique latine en ce qui concerne les minorités, est très grave. Il s'agit d'une exclusion historique - économique et politique - d'un grand nombre d'individus qui, pour diverses raisons, ont vu leur ethnicité devenir un motif de retrait de leur citoyenneté.

Les minorités ethniques d'Amérique latine, en particulier les autochtones, mais aussi les quilombos, ont subi de nombreuses violations de leurs droits les plus fondamentaux et de l'exercice de leur autonomie. Un modèle culturel très assimilationniste et d'exclusion avait en effet été institué, réduisant ainsi l'autonomie de ces peuples. La gravité de la situation exige, nécessairement, des réponses plus incisives à un rééquilibrage possible.

La réalité brésilienne est unique et donc les défis et les réponses que nous visons à offrir les seront également. Toutefois, et en premier lieu, il est important de comprendre que nos propositions peuvent paraître plus difficiles aux yeux de certains lecteurs lorsque nous parlons du Brésil. Elles semblent même impossibles à réaliser avec succès.

Après tout, contrairement au reste du continent, le génocide perpétré contre les nations autochtones et les quilombos a été beaucoup plus efficace, dans la mesure où ces peuples occupent un espace très restreint au sein de la société brésilienne. Ils sont devenus invisibles.

Il est évident que cette constatation n'interdit pas la nécessité de continuer à penser à eux. Bien au contraire. Il est urgent de rationaliser et de travailler la réalité de ce groupe des minorités nationales. Nous voulons offrir aux minorités nationales des options normatives qui leur permettent d'exercer pleinement leur autonomie personnelle à travers

Puf, 2010, p.133. Basiquement, l'argument de multiculturalisme libéral se concentre sur la perspective que la culture est la partie la plus importante pour atteindre pleinement la liberté individuelle; les libéraux doivent donc se préoccuper avec cette protection. De cette manière, « human beings have a right to culture – not just any culture but their own". Voir: Avishai Margalit et Moshe Halbertal, Liberalism and the Right to Culture, Social Research, nº 61, p.491. Voir aussi: Will Kimlicka, Liberalism, Community and Culture, Oxford, Oxford University Press, 1989; Will Kymlicka, Multicultural Citizenship. New York, Oxford University Press, 1996; Will Kymlicka ,Multiculturalism: Success, failure, and the future, Washington, DC: Migration Policy Institute, 2012 et Will Kymlicka, Liberal Multiculturalism as a Political Theory of State-Minority Relations (2017). Acess: https://www.academia.edu/31138581/Liberal_Multiculturalism_as_a_Political_Theory_of_State-Minority_Relations_2017_

le droit culturel.[3] Leur liberté dépend de cela.

Nous voulons également, dans le sillage de républicanisme critique[4], offrir des options qui permettent à ces groupes un processus d'autonomisation, brisant ainsi les liens de l'oppression historique qui les exclut et les criminalise. Nous devons établir des espaces afin que ces personnes puissent vivre de façon autonome et avec une participation active.

Cette conjonction d'objectifs n'est pas une tâche facile. Notre intention n'est pas de revendiquer une série de nouvelles normes ou des changements constitutionnels. Cela ne signifie pas pour autant, que les propositions en ce sens ne contribuent pas de manière positive et souvent décisive au projet. Mais ici, nous avons un autre objectif.

Nous avons l'intention d'offrir un regard qui est extérieur au Droit. Les changements proposés ont tendance à penser au Droit par

3 Déclaration Universelle de 1948

Article 27

1. Toute personne a le droit de prendre part librement à la vie culturelle de la communauté, de jouir desarts et de participer au progrès scientifique et aux bien faits qui en résultent.

2.Chacun a droit à la protection des intérêts moraux et matériels découlant de toute production scientifique, littéraire ou artistique dont il est l'auteur

Pacte International relatif aux droits économiques, sociaux et culturels de 1966

Article 15

1. Les Etats parties au présent Pacte reconnaissent à chacun le droit:

a) De participer à la vie culturelle;

b) De bénéficier du progrès scientifique et de ses applications;

c) De bénéficier de la protection des intérêts moraux et matériels découlant de toute production scientifique, littéraire ou artistique dont il est l'auteur.

2. Les mesures que les Etats parties au présent Pacte prendront en vue d'assurer le plein exercice de ce droit devront comprendre celles qui sont nécessaires pour assurer le maintien, le développement et la diffusion de la science et de la culture.

3. Les Etats parties au présent Pacte s'engagent à respecter la liberté indispensable à la recherche scientifique et aux activités créatrices.

4. Les Etats parties au présent Pacte reconnaissent les bien faits qui doivent résulter de l'encouragement et du développement de la coopération et des contacts internationaux dans le domaine de la science et de la culture

4 Pour Laborde, "my critical republicanism, therefore, neatly converges whit the civic, egalitarian liberalism which claims that identity-related claims should be subjected to the test of egalitarian justice and subordinated to the ideal of inter-ethnic solidarity" De son côté, la dimension stratégique a l'intention d'éviter que la théorie critique du républicanisme ne soit qu'une nouvelle manière de penser idéalement les principes normatifs seraient appliqués dans les sociétés considérées idéales et bien organisées. Le but ici est de réfléchir d'une telle manière à pouvoir penser problématiquement aux principes substantiels et atteindre ainsi les principes pratiques. Voir : Cecile Laborde, Critical Republicanism: The Hijab Controversyand Political Philosophy, Oxford, Oxford University Press, 2008 ; Cecile Laborde, The culture(s) of the republic: Nationalism and Multicultualism in French Republican Thought, Political Theory, vol 29, nº5.

le biais de la Théorie Politique. Le grand défi de cette étude est de créer un cadre qui pourrait influencer une nouvelle interprétation des normes existantes. Nous cherchons un nouveau regard sur les minorités culturelles qui est hors du Droit, mais qui est parfaitement capable d'être incorporé précisément parce qu'il est fondé sur les droits fondamentaux.

Nous croyons que ce travail de construction d'un cadre théorique peut influencer une nouvelle lecture des textes qui sont aujourd'hui interprétés de manière que nous considérons extrêmement assimilatrices, restrictives et dépourvues de préoccupation avec l'importance de la culture comme instrument efficace d'expression des droits les plus fondamentaux des hommes.

Nous ne pouvons pas nier que la Constitution brésilienne avec sa caractéristique[5] réglemente non seulement la culture et les minorités culturelles, mais aussi les indiens. Cependant, dans le sens strict, les normes brésiliennes se traduisent par la protection juridique des droits des minorités nationales[6].

Pour Bonavides, par exemple, c'est justement la constitutionnalisation des droits des groupes dits intermédiaires comme la famille, l'église, l'école et les minorités nationales, entre autres qui "ont contribué à augmenter considérablement la longueur des textes des

5 Paulo Bonavides*, Curso de Direito Constitucional*, São Paulo, Editora Malheiros, 2002, p.73 et Luís Roberto Barroso*, Curso de Direito Constitucional Contemporâneo*, São Paulo, Saraiva, 2010, p. 81. Elle a également appelé longue pour J.J.Canotilho. Voir: J.J, Gomes Canotilho, *Direito Constitucional e Teoria da Constituição*, Coimbra, Almedina, 2003, p. 216

6 Sur a protection de la culture,voir: Art. 215, CF. O Estado garantirá a todos o pleno exercício dos direitos culturais e acesso às fontes da cultura nacional, e apoiará e incentivará a valorização e a difusão das manifestações culturais.

§ 1º O Estado protegerá as manifestações das culturas populares, indígenas e afro-brasileiras, e das de outros grupos participantes do processo civilizatório nacional.

§ 2º A lei disporá sobre a fixação de datas comemorativas de alta significação para os diferentes segmentos étnicos nacionais.

§ 3º A lei estabelecerá o Plano Nacional de Cultura, de duração plurianual, visando ao desenvolvimento cultural do País e à integração das ações do poder público que conduzem àI defesa e valorização do patrimônio cultural brasileiro;

II produção, promoção e difusão de bens culturais;

III formação de pessoal qualificado para a gestão da cultura em suas múltiplas dimensões;

IV democratização do acesso aos bens de cultura;

V valorização da diversidade étnica e regional.

Sur la protection des autochones, voir: Art. 231, CF. São reconhecidos aos índios sua organização social, costumes, línguas, crenças e tradições, e os direitos originários sobre as terras que tradicionalmente ocupam, competindo à União demarcá-las, proteger e fazer respeitar todos os seus bens.

Sur la protection des communautés "quilombolas", voir: Art. 68, ADCT. Aos remanescentes das comunidades dos quilombos que estejam ocupando suas terras é reconhecida a propriedade definitiva, devendo o Estado emitir-lhes os títulos respectivos. Et Decreto Federal nº4887

constitutions et à les rendre ainsi plus longs que la tradition précédente."[7]

Cependant, cette traduction n'est pas entièrement efficace. La simple matérialisation juridique de la bonne intention du législateur reste insuffisante. Il est nécessaire d'aller plus loin. Dans le cas du Brésil, notre proposition a deux moments.

Le premier offre des idées qui, nous croyons, contribueront pour la formalisation juridique d'une société qui se considère multiculturelle. Le deuxième passe principalement par la formalisation d'une nouvelle lecture du texte constitutionnel à la recherche d'une identité fondamentalement liée aux droits fondamentaux et donc l'inclusion des minorités culturelles.

De cette façon, nous proposerons une nouvelle identité pour le texte constitutionnel brésilien concernant sa relation avec la diversité culturelle. Une nouvelle identité préoccupée avec l'inclusion de ces minorités comme des sujets qui méritent une citoyenneté leur permettant d'exercer la liberté de leurs droits culturels. Ce défi est le thème de la dernière partie de ce travail.

Cette nouvelle identité confirme, cependant, un certain nombre de propositions précédentes. Ces propositions, à leur tour, sont compatibles avec notre position de l'adoption de mesures à la fois par le pouvoir législatif par le pouvoir judiciaire et par le pouvoir exécutif.

En somme, nous avons l'intention de démontrer ici que l'adoption d'une série de mesures de caractère inclusif au bénéfice des minorités culturelles sont d'une importance centrale pour la société brésilienne, notamment si elles sont accompagnées d'une nouvelle proposition d'identité culturelle de la constitution brésilienne. Elles peuvent ainsi compléter la dimension multiculturelle et inclusive que nous voulons défendre depuis le début de cette étude.

2. LES PROPOSITIONS JURIDIQUES INITIALES POUR UNE SOCIÉTÉMULTICULTURELLE

Parmi les diverses caractéristiques des Constitutions énumérées, la question la plus étudiée est sans doute celle de savoir quels seraient leurs rôles. Nous considérons importante l›étude des fonctions des constitutions, justement parce qu'elles remplissent certains rôles dans leurs contextes historiques et sociaux[8]. Même si nous ne pouvons pas affirmer que ces fonctions peuvent être exercées en toute plénitude et complexité, nous pouvons identifier un groupe de missions qui sont constamment classées comme communes aux textes constitutionnels dispersés dans le monde occidental.

7 Paulo Bonavides, *Curso de Direito Constitucional*, São Paulo, Editora Malheiros, 2002, p.74

8 Ingo Sarlet, Luiz Marinoni, Daniel Mitidieiro, Curso de Direito Constitucional, São Paulo, Editora Revista dos Tribunais, 2012, p. 72.

D'une manière générale, nous pouvons dire, concomitamment à Schneider, que les fonctions de la Constitution peuvent être comprises dans trois dimensions. La première dimension est démocratique: elle vise la formation de l'unité politique. La deuxième dimension est libérale: elle précise la coordination et la limitation du pouvoir de l'État. La dernière dimension est sociale et responsable pour l'établissement des conditions de vie.[9] Ces fonctions, selon Bercovici, sont interconnectées. La Constitution, par conséquent, ne pourrait être comprise que comme un tout.[10]

Des auteurs tels que Klaus Stern, Otto Depenheurer et Gomes Canotilho ont également cherché à énumérer un ensemble de fonctions aux textes constitutionnels. Ces auteurs ont identifié les fonctions les plus diverses pour la Constitution comme la limitation juridique et le contrôle du pouvoir; la légitimité et la légitimation de l'ordre juridique et constitutionnel; la stabilité; la garantie et l'affirmation de l'identité politique; la reconnaissance et la garantie de la liberté et des droits fondamentaux ; l'imposition de programmes et de tâches de l'État, entre autres.[11]

Pour Konrad Hesse, l'une des fonctions les plus importantes de la Constitution est l'établissement des principes fondamentaux de l'ordre de la communauté. Le texte constitutionnel a alors toujours besoin d'être incomplet par le fait que "la vie qu'elle [la Constitution], comprend comme régulière est une vie historique, donc soumise à des changements historiques (...) Si la constitution veut donner lieu à la résolution de plusieurs situations critiques historiquement mutantes, son contenu devra nécessairement demeurer ouvert au temps". D'autre part, la constitution ne doit pas laisser les principes fondamentaux de l'ordre de la communauté indéterminés[12].

Pour Hesse, ces principes fondamentaux doivent régir la formation de l'unité politique et l'établissement des tâches de l'État. Grâce à la mise en place de ces principes fondamentaux, la fonction de la stabilité est pour Klaus Stern inhérente aux Constitutions, puisque ces dernières établissent un ordre fondamental qui, en dépit d'être ouverts au changement, comme l'a souligné Hesse, à travers des rénovations ou des mutations, cherchent à assurer une durabilité, autrement dit un

9 Hans Peter Schneider, *La Constitución – Función y Estructura in Democracia y Constitución*, Madrid, Centro de Estudios Constitucionales, 1991, p.39

10 Gilberto Bercovici, *Constituição e política: uma relação difícil*, Lua Nova, São Paulo, n. 61, 2004, p.10

11 Ingo Sarlet, Luiz Marinoni, Daniel Mitidieiro, *Curso de Direito Constitucional*, São Paulo, Editora Revista dos Tribunais, 2012, p. 72

12 Konrad Hesse, *Temas fundamentais do Direito Constitucional*, São Paulo, Saraiva, 2009, p.89

ordre fondamental de caractère durable.[13]

Par conséquent, et dans le sillage de Depenheuer, l'intention d'établir cette stabilité finit par faire de la Constitution une garantie et affirmation de l'identité politique et juridique d'un pays[14]. Cette identité, à son tour, finit par différencier les sociétés entre elles à partir du moment où ce symbole est forgé dans le processus constituant. Dans une perspective politique, la Constitution agit comme un élément intégrant de la société. Ainsi, complète Troper et Hamon, la Constitution peut être comprise comme un élément de l›intégration nationale et de production d›une citoyenneté commune.[15]

Voilà pourquoi nous devons évoquer ici la proposition du constitutionnaliste portugais J.-JI Canotilho. Selon Canotilho, la Constitution a en effet également l'inclusion multiculturelle comme fonction principale. Pour l'auteur portugais, la fonction sociale de la Constitution et de l'État est d'unir et intégrer les personnes, les croyances, les cultures, les groupes et les ethnies. En raison de l'apparition des phénomènes du pluralisme juridique et du multiculturalisme, Canotilho pense que la théorie constitutionnelle doit ajouter comme une des nouvelles fonctions de la loi fondamentale la tâche de "structurer et d'assurer un système pluraliste constitutionnelle".[16]

Cette position est en lien avec le courant constitutionnel brésilien qui est connu sous le nom de constitutionnalisme démocratique. Pour ce groupe d'auteurs, théoriciens influents du texte brésilien de 1988, le compendium juridique a une ouverture constitutionnelle caractéristique, c'est-à-dire « l'ouverture à d'autres contenus, à la fois normatifs (droit communautaire), normatifs supplémentaires (habitudes et coutumes) et objectifs normatifs (valeurs et postulats moraux) "[17].

Il est important de noter que l'ouverture constitutionnelle répond à une attente urgente décrite par Peter Häberle, celle de sociétés modernes éminemment plurielles : "sans la participation de toutes les forces de la communauté politique, nous ne pouvons pas concrétiser la Constitution"[18] nous dit Häberle.

Même si l'auteur allemand n'a pas travaillé spécifiquement sur la question de la diversité ethnique, nous croyons que celle-ci peut

13 Klaus Stern, *Derecho del Estado de La Republica federal Alemanha*, Madrid, Centro de Estudios Constitucionales, 1987, p. 226

14 Ingo Sarlet, Luiz Marinoni, Daniel Mitidieiro, *Curso de Direito Constitucional*, São Paulo, Editora Revista dos Tribunais, 2012, p. 72

15 Michel Troper et Francis Hamon, *Droit constitutionnel*, 34º edition, Paris, LGDJ, p.48

16 J.J, Gomes Canotilho, *Direito Constitucional e Teoria da Constituição*, Coimbra, Almedina, 2003, p. 1451

17 Gisele Cittadino, *Pluralismo, Direito e Justiça Distributiva,* Rio de Janeiro, Lumen Juris, 2004, p.17

18 Idem . 31

être incluse comme une partie importante de cette pluralité sociale qui a le devoir d'être observée pour la réalisation effective de la Constitution. D'ailleurs, pour l'auteur, la Constitution est l'expression du développement culturel d'un peuple, c'est-à-dire, la présentation culturelle de ce peuple, un miroir de son héritage culturel.[19]

Comme nous le savons, Häberle concentre ses efforts dans l'étude de nouvelles possibilités d'interprétation constitutionnelle. Dans cette démarche, il construit l'idée que "le peuple est également un élément pluraliste dans l'interprétation présente sous forme de légitimation dans le processus constitutionnel: comme un parti politique, comme une opinion scientifique, comme un groupe d'intérêt, comme un citoyen."[20]

Pourquoi nous ne pouvons pas penser au peuple incluant l'élément des groupes ethniques minoritaires? Rien de plus cohérent avec la réalité multiculturelle que nous vivons tous les jours. Nous ne pouvons pas défendre une constitution ouverte préoccupée avec la réalisation des droits fondamentaux si elle-même ne protège pas le pluralisme ethnique existant au sein de sa société dans ses différentes sphères.

Dans la mesure où nous voulons promouvoir une ouverture constitutionnelle et défendre une société ouverte, l'inclusion des minorités nationales comme élément structurant de ce peuple est une étape tout à fait légitime dans le processus de l'exécution des droits fondamentaux au sein des États.

Si pour Haberle, la société ouverte "se développe aussi par des formes raffinées de médiation du processus public et pluraliste de la politique et de la pratique quotidienne, notamment par le respect des droits fondamentaux»[21], il est nécessaire d'inclure les groupes ethniques minoritaires dans ce processus. Cette inclusion contribuerait à la réalisation de ce que Müller a aussi appelé "domaine normatif".[22]

En somme, l'inclusion des minorités ethniques comme les agents de l'interprétation de la Constitution contribuerait seulement, selon Gisele Cittadino, à effectuer "la réalisation normative" qui, à son tour, "n'a lieu que par l'intermédiaire d'une interprétation qui va au-delà du texte de la norme juridique et atteint une partie de la réalité sociale comme *praxis* qui comprend le processus législatif, le rôle des

19 Stefan Theil, *Constitutions as culture: Two insights from Peter Häberle's "The rationale of constitutions from a cultural science viewpoint*" U.K. Const. L. Blog, 2015 Disponible sur: http://ukconstitutionallaw.org

20 Peter Häberle, *Hermenêutica Constitucional: A sociedade aberta dos intérpretes da Constituição*, Porto Alegre, Sergio Fabris Editor, 2002, p.37

21 Idem, p. 36

22 Friedrich Muller, *Direito, Linguagem e Violência – elementos de uma teoria constitucional*, Porto Alegre, Sergio Fabris Editor, 1995

organismes gouvernementaux, l'administration de la justice, etc. "[23]

Cette compréhension peut être la première étape pour inverser le désavantage historique de la participation politique des groupes minoritaires. Pour que leurs droits soient effectivement observés, il est important de considérer que ce n'est qu'avec l'autonomisation de ces groupes à travers des mécanismes qui augmentent leur participation politique que nous pouvons penser à une intégration effective.

Dans ce sens, et pour garantir les droits que le texte constitutionnel a énuméré, il est urgent d'établir des "mécanismes pour que les groupes minoritaires augmentent leurs possibilités de participer aux structures du pouvoir constitué, comme des représentants dans le Congrès National, mais aussi d'autres pouvoirs, comme dans le Pouvoir Judiciaire (forums spécialisés) et le Pouvoir Exécutif (ministres, secrétariats, conseils, etc.)"[24].

En guise d'exemple, nous pouvons exposer des propositions qui pourraient contribuer pour cette inclusion. Dans une dimension limitée au Pouvoir Judiciaire, par exemple, et malgré les dernières manifestations restrictives de la Cour supérieure brésilienne, il est compréhensible que les minorités ethniques soient parfaitement capables d'être incluses en tant que sujets d'un processus d'ouverture constitutionnelle avec des instruments spécifiques, comme le mandat de sécurité collectif [25], l'action directe en inconstitutionnalité ou déclaratoire de constitutionnalité[26], par exemple.

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23 Gisele Cittadino*, Pluralismo Direito e Justiça Distributiva,*, Rio de Janeiro, Lumen Juris, 2004, p.30

24 M. Bartolomé, Procesos Civilizatorios, pluralismo cultural y autonomias étnicas, en América Latina, In: M. Bartolomé et A. Barabas et al, Autonomias étnicas y Estados Nacionales, México, Conaculta, 1998, p. 171

25 Art. 5º Todos são iguais perante a lei, sem distinção de qualquer natureza, garantindo-se aos brasileiros e aos estrangeiros residentes no País a inviolabilidade do direito à vida, à liberdade, à igualdade, à segurança e à propriedade, nos termos seguintes: LXX - o mandado de segurança coletivo pode ser impetrado por:

a) partido político com representação no Congresso Nacional;

b) organização sindical, entidade de classe ou associação legalmente constituída e em funcionamento há pelo menos um ano, em defesa dos interesses de seus membros ou associados;

26 Art. 103. Podem propor a ação direta de inconstitucionalidade e a ação declaratória de constitucionalidade:

I - o Presidente da República;

II - a Mesa do Senado Federal;

III - a Mesa da Câmara dos Deputados;

IV - a Mesa de Assembleia Legislativa ou da Câmara Legislativa do Distrito Federal;

V - o Governador de Estado ou do Distrito Federal

VI - o Procurador-Geral da República;

VII - o Conselho Federal da Ordem dos Advogados do Brasil;

VIII - partido político com representação no Congresso Nacional;

Telle pourrait être l'une des actions résultant de l'expansion de la compréhension de la pluralité normalement adoptée par les constitutionnalistes. Les progrès seraient certainement insérés dans la perspective d'une nouvelle lecture qui comprendrait le sens de la diversité ethnique et l'expression consacrée de la " pluralité politique".

Cette expansion des légitimés agirait, d'une certaine manière, dans le cadre d'une série de mesures qui pourraient apporter un nouveau regard au droit brésilien. Cette physionomie est marquée par l'expression de l'inclusion effective des minorités ethniques dans le processus démocratique, mais cette fois devant les tribunaux.

La participation politique des groupes minoritaires, une fois habilitée par le texte constitutionnel et profitant de l'activisme judiciaire qui prévaut au sein de notre Cour suprême[27], serait renforcée par l'ouverture d'un véritable boulevard juridique et politique ayant pour objet l'inclusion dans l'ordre du jour des débats publics brésiliens des demandes des minorités ethniques, silencieuses pendant des siècles, en raison de l'exploitation économique et des préjugés raciaux et sociaux.

Cette amplification a aussi un sens politique. Comme nous le savons, la Cour suprême du Brésil présente une dimension politique dans la mesure où la compétence la rend nécessairement responsable pour "déclarer le sens et la portée des règles juridiques, notamment la fonction judiciaire de la tutelle de la Constitution." Par conséquence, cette fonction "traduit (nécessairement) une action politique ou au moins une action de répercussion politique inexorable."[28] Le débat dépasserait donc le domaine juridique.

Notre proposition possède cette perspective politique. Nous comprenons que la participation directe des groupes minoritaires dans le processus de la juridiction constitutionnelle est d'abord "l'ajout de l'idée de démocratie comme l'accès aux droits constitutionnels dotés d'implications positives sur la configuration de la forme et de la substance de la vie sociale"[29].

Nous cherchons ici le « citoyen démocratique plein », répondant à des droits historiquement niés à ces groupes. L'individu concerné, conséquence logique du processus démocratique national est avant tout, "un sujet constitué par des droits dont le plein exercice exige son attention et ses énergies politiques et cognitives pour faire mouvementer

IX - confederação sindical ou entidade de classe de âmbito nacional.

27 Luiz Werneck Vianna; Marcelo Burgos et. P. Salles, *Dezessete anos de judicialização política*, Tempo Social, v. 19, p. 39-85, 2007

28 Cittadino, 2004, p.62

29 Renato Lessa, *A constituição, experimento de filosofia política*, In: Ruben George Oliven, Marcelo Ridenti et Gildo Marçal Brandão, A constituição de 1988 na vida Brasileira, São Paulo, Editora Hucitec, 2008, p.389

les mécanismes de juridiction constitutionnelle."[30]

Enfin, l'inclusion de ces groupes en tant que sujets actifs du débat constitutionnel brésilien serait également, dans une approche alignée aux Droits de l'homme, la recherche de l'insertion de " dispositifs (qui) visent à consolider dans l'ordre juridique un droit qui est, avant tout, un droit à la parole."[31]

Dans le même sens de la quête du citoyen démocratique plein, en ce qui concerne le Pouvoir Exécutif, il est impérative, par exemple, l'opportunité d'autonomies territoriales pour les communautés autochtones et les quilombos. Ces autonomies territoriales doivent être conçues en considérant la construction d'une série de mesures visant à leur fournir une autonomie administrative et permettant l'apparition de véritables districts territoriaux autonomes dans l'État brésilien.[32]

De même, l'un des défis à relever est la manière avec laquelle l'administration brésilienne a besoin de rompre avec une culture fondée sur "la vie urbaine blanche" et de se récréer en prenant pour base des politiques publiques plus proches de la culture des groupes concernés. Par exemple, nous ne pouvons pas penser à des perspectives "institutionnelles et compartimentées (...) de catégories professionnelles, syndicales, religieuses, sociales" qui s'affrontent avec "la réalité holistique, intégrée et système de la vie autochtone."[33] L'État doit surmonter la formation de sa bureaucratie, au risque de ne pas atteindre la structure bureaucratique nécessaire pour la réalisation de la justice multiculturelle dans le pays.

Une des propositions également liée à la question de l'élargissement de la représentation démocratique serait la création d'un parlement des minorités. Ce parlement, qui serait nécessairement démocratique, englobant et non partisan, permettrait l'expression des minorités ethniques dans ses plus divers aspects et fonctionnerait comme l'espace légitime de ces groupes, formalisant une expression inter-partisane directe avec l'Assemblée Législative et avec le Pouvoir Judiciaire ainsi que la formalisation d'un groupe de pression sociale.

L'apparition de cet espace démocratique de la représentation n'empêcherait certainement pas la continuité du processus d'expansion de l'inclusion, par des partis représentés au Congrès National, d'un certain nombre de sièges pour ces groupes.

30 Idem, p. 389

31 Ilka Boaventura Leite, *Os Quilombos e a Constituição Brasileira,* In: Ruben George Oliven, Marcelo Ridenti et gildo Marçal Brandão, A constituição de 1988 na vida Brasileira, São Paulo, Editora Hucitec, 2008, p.283

32 Gersem Baniwa, *A consquista da cidadania indígena e o fantas da tutela no Brasil contemporâneo*, In: Alcida Rita Ramos, Constituições Nacionais e Povos Indígenas, Belo horizonte, Editora UFMG, 2012, p.218

33 Idem, p. 218

Après tout, comme nous pouvons le voir, peu importe la différence des caractéristiques, toutes les minorités souffrent d'une même invisibilité sociale. Les rendre visibles est un élément fondamental du processus d'inclusion. Il est toujours important de souligner que cette inclusion est plus qu'une question ethnique. C'est une question d'éthique et de morale. Comme le rappelle bien Oliven, cité par Leite "si nous ne parvenons pas à garantir les droits des minorités, notre pays ne sera jamais une société pleinement démocratique."[34]

Cette nouvelle fonction d'inclusion multiculturelle va également au-delà de l'intégration de ces groupes dans le débat sur la lecture correcte du texte constitutionnel par des normes infra-constitutionnelles. Cette fonction inclusive du texte constitutionnel commence son travail plus tôt encore. Parmi ces objectifs, poursuit Canotilho la charte doit 'interdire les organisations qui opèrent contrairement, soit dans le sens d'"anéantir" ou de "restreindre", au pluralisme idéologique et au multiculturalime.

En conséquence, une difficulté émerge. La Constitution devrait-elle contenir une "clause de protection des minorités ethniques"? Cette clause entraînerait-elle nécessairement l'ouverture d'un ordre juridique et constitutionnel pour les structures juridiques qui sont spécifiques à ces minorités?

Selon l'auteur, la réponse à la première question est clairement positive. Un État constitutionnel et démocratique, même s'il est dirigé par ceux qui ont été choisis par la majorité, possède aussi comme une caractéristique substantielle, la garantie des droits fondamentaux des minorités. La deuxième question présente un degré de difficulté plus élevé.

Pour Canotilho, ce questionnement aborde en effet la question de savoir "si un État territorial moderne doit à nouveau être remplacé (ou complété) par la personnalisation d'un ordre juridique et surtout si elle peut être « *hiperinclusiva »* (dénomination de l'auteur) accueillant des groupes stratégiques fondamentalistes ou des enclaves traditionalistes anti-libérales.[35]

En adoptant une perspective multiculturelle et pluraliste du rôle de la constitution, Canotilho avance sensiblement dans le projet d'accommodement de la diversité culturelle dans les États démocratiques de droit.

C'est avec une conclusion réussie sur le sujet que l'auteur expose une considération importante. Selon lui, la Constitution "est l'espace du jeu du paradoxe de la tolérance". Ce paradoxe se pose lorsque "la tolérance indique un pluralisme limité, voire la tolérance totale, typique d'un pluralisme compréhensible, et peut recevoir l'égalité radicale tous

34 Idem, p. 284

35 J.J, Gomes Canotilho, Idem, p. 1452

les concepts, même ceux d'intolérance maximale", comme des groupes néo-nazis ou des terroristes religieux et politiques.[36]

Ces préoccupations soulevées par l'auteur, bien qu'elles soient importantes et compréhensibles, ne causent plus vraiment d'inquiétude pour la plupart des chercheurs. La théorie politique a déjà traité le thème de manière exhaustive. Il y a, depuis le début du processus d'autonomisation des groupes minoritaires, l'établissement de normes qui limitent la liberté d'action de tels groupes minoritaires.

Dans le cas du Brésil, la limitation se trouve dans le propre texte constitutionnel. Elle vaut pour l'ensemble des droits qui protègent la dignité des habitants du pays. Les droits fondamentaux, au même temps qu'ils établissent une série de garanties et de normes pour le libre exercice de la culture de ces groupes, limitent leurs manifestations à une congruence avec ces mêmes droits.

Le multiculturalisme libéral a déjà montré, à plusieurs reprises, qu'il n'y a pas de place au sein de sa proposition normative pour ce que nous appelons l'illibéralisme. Les droits fondamentaux sont donc la pierre principale qui limite et conduit l'exercice des cultures minoritaires dans les États démocratiques de droit.[37]

Mais est-ce que la seule inclusion de nouveaux personnages dans le processus de juridiction constitutionnelle ou l'établissement de nouvelles normes dans le texte principal ou dans des textes infraconstitutionnels du pays peuvent-ils vraiment être des outils suffisamment efficaces dans le processus d'intégration des minorités culturelles afin d'établir une nouvelle perspective juridique de la diversité ethnique au Brésil?

Comme nous le savons, les progrès dans la positivation du droit des Indiens et des Noirs, en particulier avec la Constitution de 1988 et la Convention 169 de l'OIT ont été significatifs mais, ils se sont montrés inoffensifs en ce qui concerne leur efficacité. Il reste encore beaucoup à faire. [38]

Dès lors, même si nous considérons ces actions importantes, nous croyons qu'elles présentent une force contributive moindre que ce que nous souhaiterions. Il est essentiel de progresser d'une manière plus profonde dans le processus d'accommodement culturel[39].

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36 J.J, Gomes Canotilho, Idem, p. 1452

37 Will Kymlicka, *Multicultural Citizenship*, Oxford, Oxford University Press, 1995.

38 Marcilene Silva, *A emergência de novos sujeitos de direito em um país de modernidade inconclusa*, In: Liliana Jubulit, Alexandre Melo Franco Bahia et José Luiz Quadros de Magalhães, Direito à Diferença, São Paulo, Editora Saraiva,2013 p.203

39 Kymlicka propose alors le remplacement de l'idée d'un État ethnoculturellement neutre pour un nouveau modèle d'État libéral démocratique, qu'il appelle de "modèle de construction nationale" . Ce modèle aurait comme objectif l'exécution d'une "societal culture". Il chercherait la promotion d'un sens commun d'appartenance et le libre accès aux institutions,

Dans ce sens, nous suivons la position de Baniwa qui s'étend à tous les groupes minoritaires. Selon l'auteur, "pour faire progresser la garantie des droits des autochtones au Brésil, il est également nécessaire de construire une nouvelle ingénierie politique autochtone, fondée sur des principes conceptuels, juridiques, politiques et administratifs garantis dans la Constitution fédérale actuelle."[40]

Pour cela, nous proposons une nouvelle perspective juridique et politique de la lecture du texte constitutionnel. Comme indiqué précédemment, une des principales fonctions de la loi supérieure des pays est d'établir leur identité politique et sociale. Cette identité, à son tour, donne la possibilité d'établir un processus efficace de l'intégration nationale.

En ce sens, nous croyons qu'il est important d'établir une nouvelle identité constitutionnelle pour la Constitution brésilienne. Une identité qui s'engage dans la diversité ethnique de son peuple avec la voix de ses minorités culturelles et le respect des droits fondamentaux de chaque citoyen. Cette identité apporte des valeurs claires sur l'importance de l'autonomie individuelle et la culture est un élément fondamental de ce processus de découverte et de construction de l'identité de l'individu, une identité qui permet l'exercice d'une véritable citoyenneté démocratique.

En considérant donc que cette nouvelle facette n'est à aucun moment incompatible avec les engagements déjà pris par le texte ci-dessus, nous pouvons influencer dans la construction d'une nouvelle manière de comprendre juridiquement la diversité culturelle dans notre pays: une façon multiculturelle de lire la loi brésilienne qui commence par le texte constitutionnel.

3. L'IDENTITÉ MULTICULTURELLE DE LA CONSTITUTION

indépendamment de l'origine culturelle de l'individu.Par "societal cultural", l'auteur comprend une culture concentrée dans un territoire, centrée sur une langue commune et utilisée par une grande partie des institutions sociales dans la vie publique et dans la vie privée. Il y a dans la « societal cultural« plus que des religions ou des habitudes sociales communes; il y a une langue en commun et des institutions sociales en commun. Pour Kymlicka, les « societal cultural » des démocraties libérales sont inévitablement pluralistes et se composent de tous les types de personnes, chacune avec sa conviction et ses croyances personnelles garanties par l'État qui défend la liberté individuelle mais qui, d'un autre côté, voit cette diversité limitée par la nécessité de cohésion linguistique et institutionnelle. Plus de details, voir: Will.Kymlicka,. Liberalism, Community and Culture. Oxford, Oxford University Press, 1989.Reimpressão: 2010 etWill Kymlicka Multicultural Citizenship: A Liberal Theory of Minority Rights. Oxford: Oxford University Press, 1996. p.76

40 Gersem Baniwa, *A consquista da cidadania indígena e o fantasma da tutela no Brasil contemporâneo*, In: Alcida Rita Ramos, constituições Nacionais e Povos indígenas, Belo horizonte, Editora UFMG, 2012, p.225

BRÉSILIENNE: UNE LECTURE PROPOSÉE DE LA CONSTITUTION EN FAVEUR DES MINORITÉS CULTURELLES.

Le terme "identité constitutionnelle" est l'objet de nombreuses questions parmi les chercheurs et il n'y a pas encore un accord raisonnable sur ce qu'il veut exactement exprimer. Son origine est liée à la Grèce antique, en particulier à Aristote et à sa conception que l'identité d'un État n'est pas liée à ses caractéristiques physiques, mais plutôt à ses constitutions.[41]

Pour certains auteurs considérés sceptiques l'idée de chercher à trouver une identité constitutionnelle n'est qu'une manière engagée avec un point de vue particulier, qui n'est pas objectif, de trouver un ensemble de documents textuels et historiques par lesquels les normes fondamentales de la constitution peuvent être tirées et, par conséquent, guidées dans leur application.[42]

Selon Bogdandy, le mot identité est un terme problématique. Il oscille "entre l'être et le devoir être, entre la description et l'exigence." Originaire du terme latin "idem", le mot possède, dans sa plus ancienne branche, le sens des relations de l'unité et de la comparaison. Dans le même sens, le terme est également utilisé pour désigner les caractéristiques essentielles d'un être humain, d'un peuple ou d'un système juridique. Ici, il est considéré comme le fondement de la preuve d'une unité et égalité.[43]

Plusieurs conceptions de l'identité constitutionnelles sont travaillées aujourd'hui en recherchant, par exemple, si le texte adopte un système parlementaire ou s'il a opté pour un système unitaire ou fédéral de l'État. La relation entre le texte constitutionnel et la culture dans laquelle il opère, la relation avec d'autres identités telles que l'identité nationale, religieuse ou idéologique sont aussi considérés des objets d'études sur l'identité constitutionnelle.[44]

Toutefois pourquoi finalement est-il nécessaire de comprendre l'identité d'une constitution? Si nous comprenons que la constitution a des effets directs et immédiats dans le processus de construction d'une

41 Michel Rosenfeld, *Constitutional Identity*, In: Michel Rosenfeld et András Sajó, (ed) The Oxford Handbook of Comparative Constitutional Law,Oxford, Oxford University Press, 2013, p. 756

42 Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, Harvard Law Review, Vol. 97, No. 2,1983,p. 440

43 Armin von Bogdandy, *Identidad Constitucional Exploración de un Fenónemo Ambiguo com ocasión de la política de identidade europea de lege lata y lege ferenda*, Revista Española de Derecho Constitucionall, n. 75, 2005, p.14

44 Michel Rosenfeld, *The identity of the constitutional Subject: Selfhood, Citizenship, Culture and Community*, London, Routledge, 2010, p.27

identité sociale dans la mesure où ses principes concrets servent de fondement à l'appartenance au groupe et ses dispositions d'exploit[45], comprendre l'identité constitutionnelle, c'est identifier quel est le sens que cette constitution veut conférer à ce groupe.

Un autre rôle de l'identité constitutionnelle est de contribuer au fonctionnement de la démocratie, la transparence, l'État de Droit et l'efficacité d'un système politique qui, en raison de ces qualités, forme l'identité sociale d'un pays[46]. Comprendre l'identité constitutionnelle d'un pays est, tout d'abord, comprendre leurs engagements juridiques et sociaux.

En ce sens, nous pouvons dire qu'identifier le sujet de la constitution, c'est mettre à jour une identité qu'elle contient et contribuer ainsi de manière significative à rendre claire la légitimité et sa valeur pour la société qui l'a produite.

D'une manière générale, nous pouvons dire que trois sens généraux sur l'identité constitutionnelle se démarquent. Le premier est que l'identité constitutionnelle découle de l'existence d'une constitution. Les politiques publiques qui ont une constitution diffèrent de celles qui n'en ont pas. Le deuxième est le fait que les contenus d'une constitution fournissent des éléments différents d'identité. Une constitution fédérale, par exemple, dispose de différents types de politiques qu'une constitution unitaire.

Le troisième sens est lié au contexte de la constitution. Le contexte dans lequel la constitution est insérée semble fonctionner d'une manière significative pour déterminer son identité. En conséquence, nous pouvons voir que les différentes cultures configurent différents droits fondamentaux pour leurs citoyens.[47]

Selon Michel Rosenfeld, une identité constitutionnelle, ainsi qu'une identité nationale peuvent être considérées comme appartenant à une identité collective commune ("collective self"). Cette identité collective, à son tour, peut démontrer, selon l'auteur, un "sameness" ou un "selfhood"[48]. Selon ses mots, la "constitutional identity can be constructed on the basis os sameness or of selfhood, or more precisely, based on dynamic interaction between projections of semeness and images of selfhood. Moreover, the interaction in question may times evoque complementarity and at other times contradiction."[49]

45 Armin von Bogdandy, 2005, p. 19

46 Manfred Zuleeg, *What holds a Nation Together?,* The American Journal of Comparative Law, n45, 1997, p. 522

47 Robert Post, *The Supreme Court, 2002 term-Forwaerd: Fashioning the Legal Constitution: Culture, Courts and Law,* Harvard Law Review, 8, 2003, p. 117

48 Michel Rosenfeld, *The Identity of The constitutional Subject: Selfhood, Citizenship, Culture, and Community*, London, Routledge,2010, p.27

49 Michel Rosenfeld, *Constitutional Identity,* In: Rosenfeld et András Sajó, (ed) The Oxford

L'identité constitutionnelle moderne, poursuit l'auteur, est distincte de l'idée d'identité nationale. Même si les deux sont apparues à la même époque et elles sont produits du même esprit des Lumières, elles ne se confondent pas. Ces deux communautés imaginaires, pour utiliser la création de Benedict Anderson, peuvent parfois, présenter la même identité ou des identités très proches. Mais cette approche n'est pas nécessairement un fait accompli[50].

Tandis que l'identité constitutionnelle transcende le simple fait du constitutionnalisme ou d'une constitution particulière, elle émerge dans le contexte d'un processus dynamique qui doit constamment tisser conjointement les deux faces de cette identité (son « sameness » et son « selfhood »).

Pour Michel Troper, l'identité constitutionnelle est en ce sens le résultat d'un processus d'extraction de certains principes qui peuvent être postulés comme essentiels et différents des autres normes constitutionnelles[51]. Ces principes, à leur tour, peuvent être considérés comme la base pour la protection de l'intégrité de la constitution lorsqu'elle affronte les dangers qui peuvent exterminer des caractéristiques essentielles qui relient la loi supérieure avec la population ou la nation qu'elle sert. [52]

L'identité et la culture constitutionnelle sont les deux éléments qui composent ce processus de formation d'identité constitutionnelle et ainsi, "constitucional law and culture are locked in a dialectical relationship, so that constitucional law both arises from and in turn regulates culture."[53]

Ici, une mise en garde doit être exprimée. Le processus de formation constitutionnelle est naturellement incomplet, précisément car, même si une identité existante est complètement stable, elle doit s'ajuster au présent. Ce présent, à son tour est un présent inconnu et dans une large mesure, il présente un grand contingent de besoins et d'aspirations de générations qui ne sont même pas encore nées.[54]

Pour garder ce processus d'adaptation continue et d'ajustement requis, nous avons des instruments. Les amendements sont un premier moyen de produire une nouvelle identité constitutionnelle. Ils peuvent

Handbook of Comparative Constitutional Law,Oxford, Oxford University Press, 2013, p. 757

50 Benedict Anderson, Comunidades Imaginárias, São Paulo, Companhia das Letras, 2008;

51 Idem, p.758

52 Michel Troper, *Behind the Constitution? The principle of Constitutional Identity in France* In: András Sajó and Renata Uitz (ed) Constitutional Topography:Values annd Constitutions, Eleven International Publishing ,2010, p. 212

53 Michel Rosenfeld, *Constitutional Identity*, In: Rosenfeld et András Sajó, (ed) The Oxford Handbook of Comparative Constitutional Law,Oxford, Oxford University Press, 2013, p. 758

54 Michel Rosenfeld, *The Identity of The constitutional Subject: Selfhood, Citizenship, Culture, and Community,* London, Routledge,2010, p.26

servir comme un puissant mécanisme de ce changement, mais leur inclusion doit être explicite dans leur objectif[55]. L'interprétation constitutionnelle a également ce rôle de produire la nouvelle identité constitutionnelle.

Nous devons donc comprendre la constitution non seulement comme un simple texte mais aussi comme un "tout juridique" plus complexe. Si nous suivons la théorie de Dworkin, l'identité constitutionnelle doit aussi être comprise comme constituée par cet ensemble de valeurs, principes et règles. Ici, le rôle de l'interprétation devient centrale, car c'est l'acte d'interpréter le texte constitutionnel qui doit trouver cet ensemble dans lequel est formée la norme constitutionnelle et par conséquent, lui confère son identité.[56]

Cette tâche, bien sûr, n'est pas facile. Interpréter le texte constitutionnel, comme certains auteurs le soulignent, c'est nécessairement recourir à des arguments politiques et moraux, puisque le texte se réfère généralement à ce type de norme.[57]

Parallèlement, une identité déjà établie peut remplir ou façonner cette interprétation. Ainsi, "in some cases the constitutional adjudicartor deliberately appeals to constitutional identity to guider her interpretation; in other cases, the adjudicator may be (...) influenced (..) by factors rooted in constitutional identity."[58]

Dans ce sens, le processus de construction constitutionnelle (constitution-making) exige une rupture constante avec le passé et propose des politiques futures contre les politiques précédentes. Cet acte de négation, à son tour, exige une rupture avec les conceptions politiques d'identité collective qui prévalent aujourd'hui. En résumé, "it is not enough to overthrow the ancient régime, it is also necessary to differentiate the constitutional "we" from the preconstitutional and extraconstitutional "we"[59].

Cependant, nier l'ancienne identité constitutionnelle est nécessairement répudier quelque chose qui appartient à tous à ce moment-là et, en créant quelque chose de nouveau, nous courons le risque que cette nouvelle création soit incompatible avec certaines parties du passé de l'identité qui peuvent produire le chaos au gouvernement.[60]

55 Rosalind Dixon, *Amending Constitutiong Identiy*, Public Law and Legal Theory Working Papers nº 332, 2010, p. 12

56 Ronald Dworkin, *Levando os Direitos a Sério*, São Paulo, Martins Fontes, 2007

57 José Luis Martí, *Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People*, p. 6 voir: https://www.academia.edu/5355495/Two_different_Ideas_of_constitutional_identity

58 Michel Rosenfeld, *Constitutional Identity*, In: Rosenfeld et András Sajó, (ed) The Oxford Handbook of Comparative Constitutional Law,Oxford, Oxford University Press, 2013, p. 771

59 Idem, p.203

60 Mark Tushnet, *How Do Constitutions Constitute Constitutional Identity?,*International

La solution à ce problème serait dans le processus de création de récits qui intègrent successivement des points de rejet et d'identification. Ici, en utilisant la théorie psychanalytique, Rosenfeld estime que le processus de formulation d'une nouvelle identité constitutionnelle se déroule de la même manière qu'un individu qui, à travers son passé, trouve des structures et des possibilités qui l'aident à façonner le présent et guider les expériences futures.

Pour Tushnet, "Rosenfeld shows how constitutional arrangements can expressly reject some potential identities, transform the rejected possibilities, and reincorporate them into the polity."[61] Tushnet, à son tour, suggère que ce processus se réalise à travers un dialogue politique constant où l'action conjointe se produit à la fois dans les rues et dans les espaces de représentation démocratique. Le choix du sens de la constitution sera donc toujours au-delà de la volonté finale des juristes, mais dans la main du peuple.[62]

L'identité constitutionnelle nous permet ainsi de fournir des liens qui sont essentiels entre la constitution et son environnement. Pour Jacobsohn, la fonction essentielle de l'identité constitutionnelle traite de la disharmonie constitutionnelle. Cette disharmonie peut apparaître dans le texte de la constitution et le contexte des changements historiques ou des défis politiques.[63]

Identifier cette disharmonie est la première étape vers un travail d'adaptation des dissonances qui permet, dans un processus dialogique, de surmonter cette disharmonie elle-même.[64]

Fondamentalement, nous considérons le rôle et la place de l'identité constitutionnelle comme étant déterminés par le processus de médiation dialectique des conflits et des tensions les plus complexes entre l'identité et la différence au sein de chaque État. À la fin, l'objectif est d'établir quels sont les derniers engagements politiques du texte juridique.

Ce thème est d'une importance fondamentale pour notre travail. Depuis le début, nous avons l'intention de souligner l'importance pour le Brésil de repenser son identité et donc repenser la façon dont ses minorités sont traitées.

Malgré le fait que le Brésil est un pays très métissé, cette information ne peut pas masquer l'existence du fait du multiculturalisme dans l'État brésilien. Il existe donc une disharmonie entre notre réalité

Journal of Constitutional Law,, Vol. 8 No. 3,2010, p. 673

61 Mark Tushnet, 2010, p. 673

62 Mark Tushnet, *Taking the Constitution Away from the Courts*, Princeton, Princeton University Press, 2000, p.181–182.

63 Gary Jacobsohn, *Constitutional Identity,* Harvard, Harvard University Press, 2010, p.13

64 Gary Jacobsohn, *The Disharmonic Constitution*, Voir: http://uchv.princeton.edu/constitutionalism/Jacobsohn.pdf

et la manière dont le droit la voit.

Nous affirmons l'existence du multiculturalisme au Brésil, précisément parce que, malgré le vrai génocide vécu par les minorités, nous trouvons encore de solides vestiges de groupes minoritaires avec des cultures qui n'ont pas été assimilées par le *melting-pot* qui s'est formé dans le pays.

Dans le même temps, le processus d'assimilation des cultures indiennes et noires par la culture dominante n'empêche pas que des faisceaux de ces mêmes cultures, comme les religions d'origine africaine, résistent encore courageusement dans le pays, même s'ils sont l'objet de dangereux actes de violence en raison d'intolérance religieuse et ethnique.

Penser à l'identité constitutionnelle brésilienne signifie donc réfléchir sur ce qui serait le pavais, le noyau juridique qui pourrait relever le défi d'assurer l'inclusion des individus vivant dans une société qui est de fait multiculturelle, mais extrêmement assimilationniste.

L'identification de ce noyau, cette identité, nous permet de fournir un fondement juridique qui nous aiderait à souligner un certain nombre de propositions principales pour l'inclusion des groupes minoritaires ethniques, le principal défi de l'inclusion au Brésil.

Ces principes, ainsi que l'identité constitutionnelle, seraient la source d'une base engagée pour l'inclusion de l'homme dans le respect de l'exercice de sa culture qui n'est rien de plus qu'une manière pertinente d'exécuter son autonomie personnelle.

Nous considérons le modèle de formation de la Constitution brésilienne comme ce que Rosenfeld a appelé " modèle convenu". Ce modèle, selon les mots de l'auteur, "requires reliance on a symbol of unity which can be perceived differently by various parties to constitutional negotiation while at the same time projecting an aura of continuity amidst profound, even radical, change."[65]

Comme en Espagne, la nouvelle Constitution brésilienne a été forgée à travers une grande alliance nationale qui avait l'intention d'inaugurer un nouveau moment démocratique dans le pays, surmontant les années brumeuses de totalitarisme qui ont suivi après 1964.

Pour éviter des ruptures traumatiques, un vaste processus de négociation entre les forces conservatrices et progressistes a été mis en place et après plusieurs accords et désaccords, un nouveau modèle de texte constitutionnel jamais vu jusqu'alors dans l'histoire constitutionnelle du pays a été décrit.[66] L'intention était de trouver un

65 Michel Rosenfeld, *The Identity of The constitutional Subject: Selfhood, Citizenship, Culture, and Community,* London, Routledge, 2010, p.198

66 Adriano Pillati, *A Constituinte de 1987-1988 - Progressistas, Conservadores, Ordem Econômica e Regras do Jogo*, Rio de Janeiro, Ed. Lumen Juris - Ed. PUC-Rio, 2008;

équilibre démocratique.[67]

Mais quelle serait alors l'identité de la Constitution brésilienne? Quel serait enfin le résultat de ce pacte national? D'après notre expérience, la réponse n'est pas difficile à réondre. Plusieurs auteurs ont répondu à cette question sans même aborder la clé conceptuelle de l"identité constitutionnelle".

Cet équilibre a été trouvé dans la constitution des citoyens de 1988, quand elle définit clairement la valeur de l'homme et la promotion des droits fondamentaux comme son identité. Gisele Cittadino précise sur ce point :

> *"il n'y a pas de doute que le système de droits fondamentaux est devenu le noyau de base de l'ordre constitutionnel brésilien. Pour la première fois dans l'histoire brésilienne une Constitution a défini les objectifs fondamentaux de l'État et elle a donc guidé la compréhension et l'interprétation de l'ordre constitutionnel par le critère du système des droits fondamentaux. En d'autres termes, la dignité humaine traduit le système des droits constitutionnels et elle est considérée comme la valeur essentielle qui donne un sens à la Constitution Fédérale."*[68]

Pour José Afonso da Silva, tout comme la Constitution Portugaise de 1976 et la Constitution Espagnole de 1978, également des exemples de formation constitutionnelle convenue, la Constitution Brésilienne de 1988 apporte une nouvelle idée dans le Droit. Tous ces textes constitutionnels montrent " que ces Constitutions ont le sens de protection des droits fondamentaux de l'homme à travers la construction d'un nouveau type d'État: l'État Démocratique de Droit"[69].

Ainsi, ces textes sont conformes au mouvement du constitutionnalisme du XXe siècle, qui confère aux droits fondamentaux le rôle de "syntaxe de la liberté dans les Constitutions."[70]

Quoi qu'il en soit, nous extrayons du texte constitutionnel brésilien que le constituant a visiblement l'intention de chercher dans les "principes fondamentaux" la qualité de normes qui sont le fondement et l'information principale de l'ensemble de l'ordre constitutionnel. Ces

67 José Afonso da Silva, *O Constitucionalismo Brasileiro: Evolução institucional*, São Paulo, Malheiros, 2011 ,p.82

68 Cittadino, 2004, p.13

69 José Afonso da Silva, *Um pouco de Direito Constitucional Comparado*, São Paulo, Malheiros, 2009, p.60

70 Paulo Bonavides*, Curso de Direito Constitucional*, São Paulo, Malheiros, 2002, p.540

principes comprennent, notamment, les normes définies de droits et garanties fondamentales, considérées comme noyau formel et matériau de la Constitution Brésilienne.[71]

Il est évident, par conséquent, l'engagement de l'État démocratique de droit brésilien comme un État "de l'ouverture constitutionnelle fondée sur les principes de la dignité humaine."[72] L'homme et ses droits est donc le noyau de ce texte.[73]

Les droits fondamentaux consacrés dans ce contexte d'élaboration de la constitution et appréhendés comme formant l'identité constitutionnelle de la Constitution peuvent, à leur tour, être compris comme ayant deux fonctions.

La première, considérée objectivement par Peces Barba-Martínez, agirait comme une extension de la norme fondamentale matérielle d'identification des normes. Ici, les droits fondamentaux ont une fonction de continuité et d'actualisation de la norme fondamentale. Ainsi, "les droit fondamentaux constituent une partie de la norme fondamentale matérielle d'identification ou de définition de normes" qui développent et effectuent les valeurs supérieures que la Constitution possède. Dans ce cas, "la fonction des droits est liée au contenu possible et aux limites des autres normes de l'ordre juridique. Elle se situe dans le champ de l'interprétation, de la production et de l'application de ces normes"[74].

Une deuxième fonction est subjective. Les droits fondamentaux agiraient comme la positivation des revendications morales justifiées. Ces revendications morales sont justifiées dans la mesure où l'autonomie et l'indépendance morale, appelée par l'auteur "liberté morale" sont possibles. En somme, "les droits fondamentaux intègrent une moralité publique qui cherche à faire en sorte que, dans la vie sociale et à travers le Droit, les personnes titulaires des droits exercent leur moralité privée et choisissent librement leurs projets de vie."[75]

Cette fonction, à son tour, est divisée en quatre grandes dimensions. Les trois premières sont des subdivisions qui composent le consensus de la culture juridique sur l'étendue des droits comme espace de manifestation de la moralité publique. La fonction de promotion et

71 Ingo Sarlet, *Dignidade da Pessoa Humana e Direitos Fundamentais na Constituição Federal de 1988*, Porto Alegre, Livraria do Advogado, 2010, p.71

72 Sur le theme "Dignité humanie", voir: Stephanie Hennette-Vauchez, *A human dignitas? Remnants of the ancient legal concept in contemporary dignity jurisprudence*, International Journal of Constitutional Law, 2011, vol. 9, n°1, p. 32

73 Carlos Roberto Siqueira Castro*, A constituição Aberta e os Direitos Fundamentais*, Rio de Janeiro, Forense, 2003, p. 19

74 Gregorio Peces-Barba Martínez, *Théorie générale des droits fondamentaux*, Paris, LGDJ, 2004, p. 376

75 Idem, p. 383

la fonction participative sont les fonctions de garantie ou de protection.

Une quatrième dimension existe pour garantir juridiquement à l'individu la possibilité d'avoir une conscience individuelle. Ainsi, dans les cas où la moralité publique qui a été évaluée positivement n'a pas laissé le libre choix à la morale privée de se manifester, il existe une alternative appelée par des auteurs "objection de conscience".[76]

Ainsi, pour Peces Barba-Martinez, "les trois premières fonctions agissent dans le sens du consensus du plus grand nombre afin de rendre possible l'autonomie ou l'indépendance morale, alors que la quatrième, s'oppose à ce même consensus mais vise la même finalité". L'objectif final est toujours d'assurer la liberté de choix.[77]

L'engagement du texte constitutionnel à adopter une identité qui est entièrement alliée aux droits fondamentaux de l'individu, rend notre constitution obligatoirement sensible aux droits des minorités ethniques.

Il n'est donc pas possible de penser à une identité constitutionnelle engagée à la valorisation de l'homme et sa dignité si l'exercice de son expression culturelle, certainement l'un des domaines les plus solides des droits fondamentaux, n'est pas protégé.

Le texte constitutionnel lui-même garantit le plein exercice des droits culturels et l'accès à tous les types de source de la culture brésilienne ; il soutient aussi toutes les formes d'expression culturelle. Cet engagement signifie, spécialement, la promotion et la défense du droit fondamental de l'exercice de la liberté dans la sphère culturelle. Le texte constitutionnel protège, par conséquent, chaque expression culturelle et les manifestations culturelles les plus diverses, y compris le droit de diffusion de la culture particulière.[78]

Lorsqu'une identité constitutionnelle intrinsèquement liée à la valorisation de l'homme et à sa dignité est identifiée, nous commençons dès lors le processus de compréhension de l'importance de la construction de l'autonomie de l'individu par l'expression de son identité culturelle.

En somme, nous comprenons qu'en identifiant l'identité constitutionnelle brésilienne, nous renforçons l'idée de l'engagement initial et fondateur du système juridique brésilien en faveur des droits fondamentaux. De cette façon, et dans le sillage des normes internationales, nous reconnaissons le droit à la culture comme partie intégrante de la liste des droits fondamentaux, ce qui est cohérent avec une pensée des droits des minorités culturelles comme véritables droits pour la société brésilienne.

En conséquence, il est important de traiter l'intégration des

76 Idem, p. 383

77 Idem, p. 384

78 Jose Afonso da Silva, *Curso de Direito Constitucional Positivo*, São Paulo, Malheiros, 2003, p. 321

minorités culturelles, ici comprise comme ouverture d'une liste complexe d'actions des plus différents pouvoirs en faveur de l'adaptation culturelle de ces groupes, comme un élément clé du droit brésilien.

Il faut donc faire un nouveau pas dans cette direction. Il est important de penser à des critères normatifs qui peuvent contribuer de manière significative à ce que cette nouvelle identité constitutionnelle plurielle soit effectivement exercée. Ils surviennent, d'abord et avant tout, en tant que guides pour que les interprètes du texte constitutionnel exercent l'application de normes déjà établies ou formulent de nouvelles réponses à des demandes qui ne sont pas encore exprimées.

Nous espérons que leur apparition pourra contribuer pour que la sphère de l'identité constitutionnelle liée aux droits des minorités ethniques puisse être consolidée et incorporée d'une manière efficace à la réalité du droit brésilien.

Nous croyons que, associés à la nouvelle prise de conscience de l'importance du multiculturalisme pour comprendre le texte constitutionnel et son identité, ces critères peuvent former un corps d'arguments convaincants pour l'accommodement de la diversité culturelle au Brésil.

Ces critères apparaissent comme un premier projet qui vise à orienter la manière dont la Constitution brésilienne doit être lue pour que son identité multiculturelle soit respectée. Dans la lignée de Maldonado et du constitutionnalisme en Amérique latine, nous proposons quelques moyens normatifs qui, nous le reconnaissons, sont loin de résoudre la complexité du problème des minorités nationales au Brésil.

D'autre part, nous espérons que ces moyens serviront de niveau normatif engagés pour l'autonomie de l'individu par l'exercice de sa culture en articulation avec l'identité constitutionnelle brésilienne.

L'intention ici est de construire un premier projet normatif pour aider à identifier la Constitution brésilienne dans ce nouveau cadre multiculturel, fondé sur le caractère promoteur de la dignité humaine.

Il convient de noter que ce premier effort de délimitation est naturellement incomplet et qu'il reste encore beaucoup à ajouter afin de rendre ces arguments encore plus forts normativement. Quoi qu'il en soit, le but ici est d'initier un processus de réflexion et non pas d'offrir un groupe argumentatif finalisé.

D'abord, nous suggérons comme premier critère, celui qui propose que l'État ne soit pas être neutre par rapport aux cultures qui y vivent. Comme bien le souligne Kymlicka, la neutralité de l'État est un instrument qui réaffirme les inégalités entre les cultures qui y cohabitent.[79]

D'autre part, il doit être impartial. L'État ne doit pas imposer

79 Will Kymlicka, *Estados, Naciones Y Culturas*, Córdoba, Editora Almuzara, 2004, p. 75

une perspective culturelle à ses citoyens; engagé pour son identité multiculturelle, il doit reconnaître et accueillir toutes les cultures qui y habitent.[80]

Selon Maldonado, "La politique de l'indifférence bénigne de l'Etat face à la culture est seulement un façon d'assombrir la protection et la promotion des traditions de la majorité à travers des institutions et des pratiques de l'État ." [81]

Ainsi, nous ne pouvons pas considérer certaines perspectives morales ou politiques qui sont acceptées pour toutes les cultures qui peuvent entrer en conflit.

L'État ne doit donc pas choisir de protéger ou de promouvoir l'une des nombreuses perspectives culturelles existantes dans son territoire. La prévalence de la culture chrétienne dans le calendrier officiel d'un État laïc qui comprend , par exemple, des religions d'origine africaine et autochtone, revient à une fausse reconnaissance qui peut- être aussi nuisible que son absence. [82]

Ainsi, il est essentiel que l'État corrige les politiques qui sont discriminatoires et renforcent l'invisibilité sociale de ces groupes pour promouvoir un retour à l'impartialité de leur perspective culturelle, respectant ainsi l'identité multiculturelle.

Le deuxième critère normatif est la maximisation de l'autonomie gouvernementale des groupes minoritaires, en particulier les communautés autochtones et quilombos. Ici, le critère normatif est l'autonomie des groupes qui choisissent de ne pas être assimilés et qui maintiennent leur culture et leur vie loin de la culture dominante. Il est impératif de rompre avec la tradition de la tutelle qui, même avec les changements constitutionnels, oriente encore notre relation avec les communautés telles que les autochtones.[83]

L'identité constitutionnelle brésilienne, en reconnaissant l'importance de la culture pour le bien-être de l'individu nous impose une nouvelle et critique réflexion sur la nécessité de nous renseigner sur l'importance et la valeur de la diversité face à des coutumes qui choisissent de ne pas participer au processus d'inclusion sociale.

Le troisième critère normatif est alors la considération du droit que ses membres possèdent de «sauter dehors», autrement dit, les membres des groupes minoritaires doivent toujours avoir la possibilité de quitter leurs communautés.[84].

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80 Daniel Bonilla Maldonado, *La Constitución Multicultural*, Bogotá, Siglo del Hombre Editores,2006, P.271

81 Idem, p. 271

82 Charles Taylor, *Multiculturalism: Examining the Politics of Recognition*, Princeton, Princeton University Press, 1994,p. 32

83 Will Kymlicka, *Estados, Naciones Y Culturas*, Córdoba, Editora Almuzara, 2004, p. 85

84 Maldonado, 2006, p. 281

Tous les individus de ces groupes peuvent choisir de vivre leur vie dans le contexte culturel qu'ils veulent et doivent avoir une garantie que la société multiculturelle valorise, avant tout, le choix particulier de chacun à vivre selon leur propre conscience pour atteindre son autonomie aussi pleinement et efficacement que possible. Si par hasard l'expression de l'autonomie d'un individu n'est pas compatible avec la culture dans laquelle il est né, l'État doit construire des conditions qui permettent de lui offrir la possibilité de réaliser son droit fondamental à la liberté, en lui accordant le droit de choisir à ne pas appartenir à un groupe ethnique existant.

Le droit de «sauter dehors» doit donc être l'un des critères qui guident l'identité multiculturelle de la Constitution brésilienne. À leur tour, la constitution a "un système de droit" – qui n'a aucune liaison avec un héritage culturel et dont la fonction est d'assurer l'autonomie morale des individus. C'est–à-dire qu'elle assure également l'intégrité de chacun dans les contextes sociaux et culturels dans lesquels l'identité est formée.[85]

Comme quatrième critère, nous proposons un ensemble minimum de "standards moraux" pour fonder les relations entre les minorités ethniques et la majorité sociale. Ces standards visent à la protection de la dignité humaine. Nous croyons que les valeurs choisies par le texte constitutionnel comme fondamentales pour la société brésilienne sont assez solides pour ne pas permettre d'exceptions pour la protection de la dignité, même si celles-ci étaient guidées ou justifiées par l'exercice de la culture personnelle du sujet.

Ainsi, les valeurs qui sont inter-culturellement acceptées, comme la préservation de la vie, l'interdiction de la violence, du travail esclavagiste ou de toute autre violation de la Charte des droits fondamentaux inclus dans le texte constitutionnel, sont des instruments de construction d'une identité constitutionnelle suffisamment importants pour justifier une intervention dans une éventuelle autonomie individuelle et territoriale des minorités ethniques[86].

Nous savons que cette orientation normative sera confrontée à un certain nombre de défis dans son application, précisément parce que les valeurs considérées déterminantes pour la culture occidentale peuvent être interprétées de différentes manières par certaines minorités ethniques. De toute façon, il est fondamental que nous fassions cette option. Et notre choix ici est clairement engagé en faveur des droits fondamentaux.

85 Gisele Cittadino*, Liberdade, Identidade e Direito: Sobre a indelével marca humana em Philip Roth*, In: André Karam Trindade, Roberta Magalhães Gubert e Alfredo Copetti Neto. (Org.). Direito e Literatura. Ensaios Críticos, 1ed, Porto Alegre, Livraria do Advogado Editora, 2008, v. 1, p. 133

86 Maldonado, 2006, p. 280

Les controverses et les questions qui seront soulevées devront être examinées avec soin par le corps judiciaire, mais sans renoncer à l'aide importante des chercheurs qui comprenne d'une manière plus complète et attentive les caractéristiques culturelles des minorités ethniques qui peuvent être impliquées dans les épisodes possibles de conflit culturel.

Enfin, le cinquième et dernier critère normatif, consiste dans la nécessité de s'orienter vers la coexistence des différentes cultures[87]. Il faut effacer le silence existant entre les groupes culturels et la population majoritaire, ainsi que donner une voix aux peuples minoritaires. Il s'agit d'un engagement de plein dialogue interculturel que l'État doit assumer avec ses peuples.

Nous devons comprendre que toute relation culturelle est intégrée dans un processus qui est fondamentalement dynamique et qui doit être traité comme tel. Les voies de communication entre les différents groupes culturels et l'État doivent être pleinement ouvertes pour que l'inclusion sociale des groupes culturels puisse se faire d'une manière continue, en respectant les changements sociaux les plus divers.

Les dialogues culturels, à leur tour, doivent être contextualisés et doivent prendre en compte les aspirations et les nécessités des parties impliquées. Ces parties doivent être reconnues comme égales dans ce processus et accepter qu'aucun moyen de compréhension culturelle personnelle peut être considéré comme plus légitime qu'un autre.

Si nous voulons reconnaître et accommoder les communautés de minorités ethniques dans notre pays, nous devons interpréter la tension entre l'unité et la diversité culturelle de manière à ce que le droit à l'autonomie gouvernementale et l'intervention de l'État dans leurs affaires intérieures soient minimisés et apportent le plus grand respect possible à la différence [88]. Le respect à la différence, la valeur de l'autonomie, l'autorisation d'exercer le droit fondamental à une vie épanouie dans sa culture sont des prérogatives que chaque État doit assurer à ses citoyens, des garanties qui sont encore plus importantes lorsque le texte principal de son système juridique érige la préservation des droits fondamentaux comme une identité. Les minorités ethniques brésiliennes sont porteuses de ces droits fondamentaux et l'État brésilien doit permettre à ces groupes, déjà bien décimés et exploités, de vivre sous une forme entière et autonome.

C'est donc à l'État de s'engager. S'engager à assurer la liberté de l'existence au son sens le plus complet. Vivre sa culture, expérimenter les contradictions et bénéficier du respect de sa dignité, permettent une forme d'existence entière et autonome. Aucun État de droit démocratique ne doit négliger cette obligation envers ses citoyens.

87 Voir Maldonado, *op. cit. p. 286*

88 Maldonado, 2006, p. 282

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LE COMBAT AU ESCLAVAGISME CONTEMPORAIN DANS LA PERSPECTIVE DE LA VICTIME: ÉTUDE DE CAS POUR COMPARER QUALITATIVEMENT LA RESPONSABILITÉ DANS LES SPHÈRES DU DROIT DU TRAVAIL ET CRIMINELLE[1]

THE FIGHT AGAINST CONTEMPORARY SLAVERY FROM THE PERSPECTIVE OF THE VICTIM: A CASE STUDY FOR QUALITATIVE COMPARISON OF ACCOUNTABILITY IN THE LABOR AND CRIMINAL SPHERES

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Résumé: Cet article vise à analyser les mécanismes pour combattre l'esclavagisme à travers la perspective de la victime, en ce qui concerne les mesures de répression, protection et compensation. Pour cela, on compare deux cas de ressemblance maximale d'exploitation du travail dans des conditions d'esclavagisme contemporain, mais avec des resultats divers, lequels ont cherché, respectivement, la responsabilisation parmi la repression criminelle ou parmi l'sphère de la Justice du Travail. À partir des résultats obtenus, on espère déterminer les meilleures stratégies pour agir en faveur des victimes, au millieu du Bureau de Défenseurs Publiques Fédéraux du Brésil.

1 Traduit par Gabriel Mendes Francisco de Araújo

Mots-clés: esclavagisme contemporain – victime – protection – indemnité – répression criminelle – responsabilisation au Droit du Travail

Abstract: This article aims to analyze the mechanisms to combat slave labor from the perspective of the victim, with regard to repressive, protective and compensation measures. To this end, we will compare two most similar cases of contemporary slavery, though with different outcomes, in which we sought, respectively, accountability by criminal prosecution and labor responsibility. From the results achieved, we intend to evaluate the best working strategies for the victims, through the sponsor of the Public Defender Office.

Keywords: contemporary slavery – victim – protection – compensation – criminal prosecution – labor accountability

1. INTRODUCTION

Malgré le progrès de la reconaissance de l'existance de l'esclavagisme contemporain au Brésil, à partir des anées 90, et l'intensification des actions d'inspection du travail par l'État au cours des 20 dernières anées, avec la croissance des sauvetages des travailleurs victmes de ce type d'exploitation, il faut encore faire attention à la victime elle-même au moment d'implementer des mesures contre le travail forcé au Brésil.

Actuellement, au poitn de vue administratif et du droit du travail, l'intervention d'État en faveur des victimes d' exploitation du travail forcé se concentre sur la quête du paymente des crédits salariaux, des sommes provenues de la rupture du contrat de travail, et des indemnisations qui dérivent des préjudices moraux supportés, parmi l'essai de résolution extrajudiciaire amicale, outre le recueil des fonds de l'assurance-chômage.

Si il n'y a pas d'accord extrajudiciaire, la recherche de l'indemnité en faveur des victimes peut se produire à travers la responsabilisation à la Justice du Travail et par la responsabilité pénale.

On projet, donc, d'évaluer laquelle d'entre ces deux trajectoires judiciaires de sanction – au champ du droit du travail ou pénal – est la plus efective en ce qui concerne la payement des indemnités aux victimes. On souligne aussi que, en face du même fait – l' exploitation de l'esclavagisme -, les victimes peuvent reclamer la réparation du dommage au moyen d'indemnité pécuniaire, aussi bien à la Justice du travail qu'à la sphère criminelle (lesquelles sont indépendantes et peuvent même résulter des indemnités cumulatives par le même fait). Cependant, même si la victime a la possibilité de reclamer par les deux

chemins l'indemnité visée, il faut réfléchir que le parcours de chaque option cause d'exposition et de détresse, de manière que, consciente des consequences liées à chaque façon de bataille juridique, elle puisse choisir librement entre intenter une action devant la Justice du Travail ou être assistante d'accusation à une procédure pénale, ou les deux.

Dans la sphère du droit du travail, à cause de l'absence d'une discipline sur l'externalisation d'activités principales, l'effective compensation aux victimes dépend encore d'une reconaissance jurisprudentielle favorable à la responsabilisation structurelle et d'une prévision de procédures plus rapides et plus efficaces relatives à la gestion des procès judiciaires liées au travail forcé.

Criminellement, il y a peu de cas oú les victimes se manifestent comme assistants d'accusation aux respectives procès, puisque, de toute façon, cette participation processuelle, en plus d'éprouvant (soit en raison de l'exposition inhérente à l'immage de l'assistant d'accusation criminelle, soit en raison de la plus longue durée du procés pénal comparé au procés du travail), peut faire obstacle à l'effectif payement de l'indemnité, étant donné les limitations de la responsabilité criminelle.

À partir d'une méthodologie qualitative d'étude de cas, on analysera deux cas d'espèce, auxquels la Defense Publique de l'Union est intervenu en faveur des victimes. Il s'agit de la méthodologie d'étude de cas appelé *Most Similar Different Outcomes* (MSDO), parmi laquelle on identifie deux cas de ressemblance maximale qui présentent des résultats divers em relation à la variable indépendante – l'effective compensation aux victimes – selon une variable dépendante - la trajectoire processuelle parcourue, à la Justice du Travail ou criminelle (DE MEUR *et all*, pp. 67-69).

Dans les deux cas choisis, on a constaté l' exploitation du travail forcé en milieu urbain, à l'industrie textile, relative à l'externalisation de l'activité principale, et l'absence d'accord extrajudiciaire afin de payer les crédits salariaux et les sommes provenus de la rupture du contrat de travail aux travailleurs sauvés.

La différence entre les cas consiste dans le fait que, au premier cas, on a parcouru la voie de la responsabilisation criminelle, alors que, au deuxième, on a focaliser sur la responsabilité au Droit du Travail.

En comparant ces cas d'espèce, on évaluera les différentes strategies d'intervention en faveur des victimes, avec de résultats distincts par rapport à l'effective compensation aux victimes. Il sera démontré, finalement, que la recherche de la responsabilisation à la Justice du Travail est plus efficace pour que la victime d' exploitation du travail forcé ait quelque possibilité de recevoir l'indemnité résultante de la violation de droits supportée, si on la compare avec le procès criminel.

2. LE SAUVETAGE DE TRAVAILLEURS VICTIMES D' EXPLOITATION DU TRAVAIL DANS DES CONDITIONS D'ESCLAVAGISME

L'État, à travers son pouvoir de police, promeut d'operations de fiscalisation du travail. Ces opérations sont déclenchées par l'Inspection du Travail et sont acompagnées par d'autres entités publiques avec attribuition institutionnelle pour fiscaliser l'esclavagisme, comme le Ministère Public du Travail, et pour assister juridiquement les victimes sauvées, comme le Bureau de Défenseurs Publiques Fédéraux du Brésil. Une foi constatée l'existence de travail dégradant, ou la soumission à journées exhaustives, la restriction de locomotion en raison de dettes ou de rétention de papiers, c'est configurée l'exploitation de l'esclavagisme, avec le sauvetage immédiat des victimes, la résiliation indirecte des contrats de travail et le rachat de trois tranches de l'assurance-chômage, conformément à la Loi 10.608/2002.

Dans ce contexte, il est important de souligner que, souvent, notamment dans l'exploitation du travail forcé en milieu urbain, la châine de production est fragmentée, avec des successives employeurs sous-traités, jusqu'à arriver aux travailleurs victimes de cette violation de Droits de l'Homme. La fragmentation de la châine de production sert à masquer les fraudes liées au travail, de maniére à exempter le preneur du service de la responsabilité face à l'exploitation de l'esclavagisme. Ainsi, une fois que le contrôle de la production par le preneur du service est révélé, avec l'imposition d'objectifs de production, la fixation de prix, l'établissement de délais e le contrôle de la qualité des produits acquis, au moyen des successifs intermédiaires sous-traités, ce preneur final du service est également responsabilisé et verbalisé pour la fiscalisation du travail.

Aprés la citation de l'entreprise débitrice, il y a la possibilité de solution amiable extrajudiciaire pour le paiement des sommes salariaux et des indemnisations qui dérivent des préjudices moraux supportés par les travailleurs, ce qui est fait parmi l'*Engagement de Code de Conduite* (TAC) officialisé par le Ministère Public du Travail ou par le Bureau de Défenseurs Publiques Fédéraux du Brésil. De nombreux droits du travail de travailleurs sauvés au cours d'opérations de fiscalisation ont été assurés et sont devenus efficaces extrajudiciairement, de façon agile, par la conclusion de TAC.

Toutefois, il n'est pas toujuors que l'employeur de l'exploitation du travail dans des conditions d'esclavagisme souhaite arriver à une solution amiable, ce qui suscite les hypothèses de procédure judiciaire pour garantir les droits des victimes dans les sphères criminelle et de la Justice du Travail.

L'entité publique chargé de deffendre les interêts des travailleurs victimes du travail forcé est, dans toutes les sphères, le Bureau de Défenseurs Publiques Fédéraux du Brésil.

Dans ce sens, la Défense Publique est l'entité de l'État qui a l'objectif de déffendre les interêts des nécessiteux de manière générale, ayant comme fonction institutionnelle l'orientation juridique et la défense des nécessiteux, à tous les niveaux, de façon intégrale e gratuite, conformément à l'article 134 de la Constituition Fédérale, et à l'article 4, I, Loi Complémentaire 80/94.

Particulièrement, entre le rôles institutionneles de la Défense Publique, selon l'article 4, XI, de la Loi Complémentaire mentionné, se trouve celui d'exercer la défense des interêts inviduels et collectifs de groupes sociaux vulnérables qui méritent la protection spécial de l'État, parmi lesquels on peut conclure que les victimes du travail forcé font partie.

Étant donné l'interpretation jurisprudentielle consolidée par le Suprême Tribunal Fédéral[2], selon lequelle la compétence pour poursuivre en justice et juger le crime prevu à l'article 149 du Code Pénal appartient à la Justice Fédéral, l'attribution pour défendre les interêts des victimes dans les respectifs procédures appartient au Bureau de Défenseurs Publiques Fédéraux du Brésil. L'institution fédéral a aussi compétence d'ester en justice devant la Justice du Travail (d'après l'article 14 de la Loi Complémentaire 80/94) et même dans l'injonction de mandamus, dans la procédure d'habeas corpus, ou dans la procédure en annulation d'acte administratif à cause d'éventuel abus commis par les autorités fédéraux responsables de la fiscalisation du travail ou de l'enquête criminelle.

Dans un premier moment chargé d'assister ceux qui étaient en situation de vulnérabilité social et qui cherchaient le service d'assistance juridique integrale et gratuite da l'Institution, à partir du renforcement des liens interinstitutionels entre les organismes au esclavagisme, le Bureau de Défenseurs Publiques Fédéraux du Brésil a commencé à accompagner d'opérations de fiscalisation de l'Inspection du Travail, d'abord à la ville de São Paulo (à partir de 2010), et, ensuite, a étendu sa participation officielle e institutionnalisée aux interventions des groupes mobiles de fiscalisation partout au Brésil, depuis l'année de 2015.

Dans ce contexte, le Bureau de Défenseurs Publiques Fédéraux du Brésil a déjà intervenu dans un grand nombre de cas, en faveur des interêts des victimes de l'exploitation de l'esclavagisme, soit pour satisfaire la prétension de réception du paymente des crédits salariaux et de sommes provenues de la rupture du contrat de travail par voie

2 RE 459510/MT, rel. orig. Min. Cezar Peluso, red. p/ o acórdão Min. Dias Toffoli, 26.11.2015.

extrajudiciaire, soit pour défendre ses interêts judiciairement, dans les sphères criminelle, civile et de la Justice du Travail.

3. LA RESPONSABILITÉ AU DROIT DU TRAVAIL

Dans la sphère du Droit du Travail, il peut être élaboré una châine productive afin d'essayer déconnecter la main-d'oeuvre esclave de son bénéficiaire final. Notre modèle d'externalisation fragile, facilement dénaturé, rend possible que la responsabilité par la violation des Droit de l'Homme reste limitée aux entreprises intermédiaires fréquemment, lesquelles sont, cependant, absolument remplaçables, ce qui permet la perpétuation de la pratique d'explorer le travail forcé dans la châine de production, en utilisant d'autres intermédiaires et d'autres travailleurs.

Ce modèle frauduleux d'externalisation, dans lequel est viable la sous-traitance de l'activité pricipale, favorise notablement le preneur du service, permettant que la fragmentation de la châine productive soit une activitá lucrative, dans la mésure oú tente d'éloigner la responsabilité qui découle du Droit du Travail du bénéficiaire final, même dans un contexte d'exploitation du travail dans de conditions d'esclavagisme.

En utilisant de subterfuges comme l'externalisation de l'activité principale, les entreprises qui explorent le travail forcé échapent souvent des accusations, compte tenu de l'utilisation des sous-traitances successives dans la châine de production pour masquer la fraude, um aspect courant de l'esclavagisme contemporain (BALES, 1999, p. 143).

Les normes en vigueur sur l'externalisation se trouvent à l'Énoncé 331 du Tribunal Supérieur du Travail, qui declare la responsabilité seulement subsidiaire du preneur des services en cas de violation des obligations de la relation de travail. En conséquence, la responsabilité par le payement d'indemnité aux victimes, au champ du Droit du Travail, a tendance à se limiter à l'entreprise intermédiaire la plus proche du prestataire de services, n'étant que subsidiaire la responsabilité du preneur final. La norme, à partir d'une interprétation *a contrario sensu* de son item III[3], permet de conclure qu'il serait impossible l'externalisation de l'activité principale, mais il ne s'occupe pas expressément des sous-traitances susseccives dans la châine de production. Uniquement en cas d'externalisation illicite le lien va se former directement avec le preneur des services (incise I, de l'Énoncé 331 du TST mencione).

Pour clarifier cette question, le Tribunal Supérieur du Travail a

3 *In verbis*: III - Não forma vínculo de emprego com o tomador a contratação de serviços de vigilância (Lei nº 7.102, de 20.06.1983) e de conservação e limpeza, bem como a de serviços especializados ligados à atividade-meio do tomador, desde que inexistente a pessoalidade e a subordinação direta.

adopté la thèse selon laquelle il y a la possibilité de responsabilisation a partir de la subordination structurelle, en oposition à la responsabilité subsidiaire, dans le cas oú le service fourni dépend, objectivement, de la structure organisationnelle de l'entreprise qui prend ce service[4]. La téorie de la subordination structurelle est appliqué couramment dans le contexte des externalisation successives de l'activité principale insérée à la châine de production, afin de chercher la responsabilisation du preneur final du service au champ du Droit du Travail par l'utilisation du travail forcé.

Cependant, le résultat des procés du travail est encore très dépendant de l'avis de chaque magistrat et de chaque chambre des respectifs tribunaux sur la possibilité de responsabiliser de façon objective le preneur final du service, découlant de la soumission structurelle à la châine productive. En plus, même si la responsabilité du preneur final est reconue, la lenteur des procès peut nuire à son efficacité, surtout lorsqu'il s'agit de victimes d'exploitation de l'esclavagisme que, compte tenu de sa condition de grande vulnerabilité sociale, sont plus susceptibles de désister de la procédure, soit par se sentir menacés, soit par d'offertes extrajudiciaires de payement pour éviter la condamnation de l'entreprise en raison de l'utilisation de main-d'oeuvre esclave.

Par ailleurs, pour compromettre le progrès jurisprudentiel en faveur des travailleurs dans le contexte de l'externalisation, le Projet de Loi de l'Externalisation (PL 4.330-I/2004 e PLC 30/2015) a été repris. Ce projet concerne les contrats d'externalisation et les relations de travail qui en déculent, rendant licite l'externalisation de l'activité principale.

4. LA VICTIME COMME ASSISTANTE D'ACCUSATION AU PROCÈS CRIMINEL

La choix de la voie criminelle pour d'indemnisation de travailleurs n'est pas une nouveauté à l'hitoire de l'ordre juridique brésilien. Em cas d'accident du travail, au début du XXe siècle, la responsabilité de l'employeur et, par consequént, le payment de ç'indemnité dépendaient de l'ouverture d'une enquête policière provoquée par le travailleur. C'esr pourquoi *"em vez de se assumir o acidente como inerente ao processo do trabalho, e com o custo integrante da acumulação industrial, este surge no âmbito dessa lei mais como um privilégio social"* (BARBOSA, 2008, p. 249). Il en va de même pour la responsabilisation criminnelle de la personne physique qui occupe le premier niveaux à la châine de production relative à l'exploitation de l'esclavagisme, laquelle devra supporter le payement des indemnités aux victimes sauvées, même si

4 TST - RR: 15191620105150002 1519-16.2010.5.15.0002, Relator: Augusto César Leite de Carvalho, Data de Julgamento: 29/05/2013, 6ª Turma, Data de Publicação: DEJT 07/06/2013.

la pratique implique l'exploitation en réseau, por d'autres personnes physiques et juridiques.

Au point de vue de la repression criminnelle, la responsabilisation atteint, au maximum, la personne physique immédiatement liée aux travailleurs victimes d'exploitation du travail force. Toutefois, ce personne physique, quoique hiérarchiquement supérieure aux victimes sauvées, couramment n'est qu'un travailleur vulnerable, également exploité au bord des successives externalisations dans la châine de production, étant ainsi, une victime de plus du schema facilité par les structures juridiques déficitaires qui permitent ce type de violation aux Droits de l'Homme. La fraude au droit du travail perpétrée par le preneur final du service, parmi um modèle commercial établi sur une châine productive apparemment régulière, comprend la constitution d'entreprises individuelles, au nom d'un des travailleurs, pour l'émission de note de credit aux entreprises intermédiaires. Alors, promue une opération avec le sauvetage de travailleurs tenus en esclavagisme, le travailleur au nom de qui est constitué l'entreprise individuelle finit par être la seule condamné criminellement, avec l'exclusion de responsabilité penal des principaux responsables per l'exploitation du travail force – qui peut être fruit de certes pratiques de gestion aujourd'hui (CRANE, 2013).

Puisqu'il n'est pas possible de responsabiliser criminellement les personnes juridiques, la fragmentation de la châine productive, typique du modèle d'esclavagisme contemporaine, entraîne l'impunité des vrais bénéficiaires de cette violation aux Droits de l'Homme.

Dans sa conclusion sur les mécanismes pour combattre l'esclavagisme contemporain, Kevin Bales (1999, p. 238) propose que les lois focalisent sur la punition de la conspiration et de ceux qui tirent profit de l'esclavagisme, ce qui n'arrive pas au système de répression brésilien, dans lequel la punition pèse sur les niveaux le plus vulnérables de la châine, de façon décroissante, faisant obstacle à la responsabilisation de ceux qui sont vraiment culpables, ceux qui tirent le plus grand profit.

Avec l'avènement de la Loi 11.719/2008, l'article 387, IV, du Code de Procés Pénal a été changé, conférant au juge criminnel la compétence pour, à la désicion pénale condamnatoire, fixer la valeur minimum pour la réparation des dommages provoqués par l'infraction, en considérant les pertes supportées par les offensés, ce qui avant était différé au moment de la action civile *ex delicto*. Avec la nouvelle rédaction du dispositif legal, et la possibilité de définir l'indemnité de la victime dans la phase d'information judiciaire, l'activité de l'assistant d'accusation gagne plus d'importance, pouvant participer de toute l'instruction, en première instance, afin de fixer les paramètres pour la stipulation de la valeur minimum d'indemnité provenante des

dommages (en règle générale, de nature d'indemnisation) supportés à cause du délit.

Avec ça, la procédure pénale brésilienne, au lieu d'être restrainte à la punition de l'agent, tourne son regard vers la victime, dans le sillage des procès des courts internationaux de Droits de l'Homme, parmi lesquels la victim e sa famille visent à découvrir la vérité des événements et à l'indemnité pour les souffrances endurées.

Pourtant, étant donné la limitaton de la responsabilisation criminelle, qui n'atteint que la personne physique de l'employeur immédiatement supérieur, eventuelle condamnation criminelle au payement d'indemnité aux victimes peut être inefficace, une fois que le condamné est habituellement um travailleur aussi vulnérable.

De toute façon, la défense des interêts des victimes d'exploitation du travail forcé peut impliquer la participation au procés criminelle, en qualité d'assistant d'accusation, assisté par le Bureau de Défenseurs Publiques Fédéraux du Brésil.

Ce rôle est approprié à la protection de droits de l'Homme sous l'angle de la victime, impliquant le devoir de l'État d'enquêter sur les violations et de responsabiliser ses auteurs.

Le Bureau de Défenseurs Publiques Fédéraux du Brésil peut demander son habilitation comme assistante d'accusation, selon l'article 268 du Code de Procès Pénal, parmi l'audition du Ministère Public Fédéral (article 272, CPP).

Le fondement de l'intervention du Bureau de Défenseurs Publiques Fédéraux du Brésil comme assistenante d'accusation peut entraîner, en plus de la demande d'assistance juridique par la victime elle-même, éventuel participation antérieure à l'accompagnement de démarches ou d'opérations qui fondent l'enquête criminelle, à partir de la représentation de l'Institution dans des commissions pour l'éradication du travail forcé ou dans des comités interinstitucionnels de lutte contre le traite des personnes, avec une importante contribution à l'phase de d'information judiciaire criminelle. En effet, dans le combat au crime organisé, spécialement lorsqu'il s'agit de la protection aux victimes, la répression est plus efficace quand les organes publics entrainés au combat contre le traite des personnes agissent en réseau, de manière coordonnée. Autrement, la lenteur du procès judiciaire empêche que la répression criminnelle atteigne un résultat utile à l'interêt des victimes.

L'assistent d'accusation peut aussi demander de mésures de précaution de protection, ainsi que de production anticipée de preuves. Si la victime se sent menacée ou gêné, c'est d'habitude de demander que son audition soit réservée, occasion à laquelles l'accusé sera retiré de la salle d'audition, conformément à l'article 201, § 4º, et à l'article 217, les deux du CPP.

En cas de ménace, il est possible que les informations sur

l'endroit et le témoignage de la victme soient gardés secret (article 201, § 6º, CPP). Dans ce cas, les informations sont exclus des dossiers de l'affaire et maintenus dans d'enveloppe distinct, au secrétariat judiciaire.

Pendant la phase d'information judiciaire, outre la recherche de preuves pour la condemnation, l'assistant d'accusation devra instruire le procès avec d'informations pour attester les pertes supportées par les victimes et fournir la base pour l'établissement de l'indemnité.

Lorsque la condamnation criminelle devient définitive, avec la prévision de payement d'indemnité aux victimes, le titre exécutoire judiciaire devra être exécuté parmi le procédure civile, selon l'article 475-N, II, combiná avec l'article 652, les deux du Code de Procès Civile.

Il faut noter, dans ce point, alors, qu'une éventuelle lenteur au procédure criminal, avec la declaration de prescription par rapport à la peine criminelle, peut atteindre l'indemnité prévue, puisque elle est un effet secondaire de la condemnation, ce qui rend possible à la victime prendre la voie restante de l'action civile publique. Pour prendre cette voie, toutefois, il doit être respecté le délai de prescription de trois ans prevu à l'article 206, §3º, V, do Code Civil, avec possiblité d'interruption de la prescription au cours du déroulement de la procédure criminelle, conformément l'article 202, paragraphe unique, de la même loi. Pour garantir un résultat utile de l'exécution du titre exécutoire judiciaire dans le sphère civile, il est possible de demander le blocage de biens et la saisie *online*, ainsi que le percement inverse du voile corporatif.

5. ÉTUDE DE CAS DE RESSEMBLANCE MAXIMALE ET LES RÉSULTATS DIVERS EM FONCTION DE LA TRAJECTOIRE PROCÉDURAL DES VICTIMES

En face des deux possibilites de trajectoire procédural pour chercher l'indemnité désiré – par la voie du procès criminel ou du procès du travail – il est importante que la victime ait conscience de la probabilité d'obtenir effectivement l'indemnité par les dommages supportés dans chaqu'une de ces sphères, pouvant, de cette façon, choisir librement entre l'un ou l'autre chemin, ou les deux.

A partir de l'utilisation d'une méthodologie qualitative d'étude de cas de ressemblance maximale, mais avec de résultats différents (MSDO), il seront analisés deux cas d'espèce d'esclavagisme contemporain, pour comparer l'intervention dans les sphères criminelle et du travail, ayant comme but l'effective compensation aux victimes pour la souffrance supportée.

D'abord, il faut noter que la ressemblance maximale se vérifie par le fait que les deux cas impliquent la configuration de travail forcé en milieu urbain, à l'industrie textile, dans un contexte d'externalisation et

sous-traitances successives dans la châine de production, considérant que les victimes étaient d'immigrants boliviens qui travaillaient dans d'ateliers de couture clandestins. Le premier cas concerne la marque de vêtement *Collins* et, le deuxième cas, la marque *M. Officer*. Dans les deux cas, la configuration de l'esclavagisme a résulté de journée de travail exhaustive et de conditions dégradantes à l'environement de travail . Il faut souligner aussi, dans les deux cas, une autre caractéristique de l'esclavagisme contemporain (par opposition au esclavagisme ancien), la distance croissante entre le travailler réduit au esclavagisme et son maître (BALES, 1999, p. 237), puisque les entreprises bénéficiaires finales de l'exploitation du travail seraient inaccessibles aux travailleurs sauvés, ce qui fait obstacle à la responsabilisation et compensation aux victimes. La choix des cas a retombé, donc, sur les cas typiques et représentatifs en termes d'exploitation du travail dans de conditions d'esclavagisme (SEAWRIGHT *et all,* p. 299).

Le cas *Collins* a commencé avec la fuite de 6 travailleurs d'un atelier de couture à la zone nord de la capitale de São Paulo, en novembre 2009, administré par un couple de boliviens, qui, à son tour, récevait les demandes de fabrication par la marque *Collins*. Face à la journée de travail exhaustive à laquelle ils étaient soumis, dans de conditions dégradantes, outre les ménaces fréquentes qu'ils recevaient et la restriction de locomotion, ces travailleurs ont fuit la captivité et dénoncé les faits à la policie civile. Ensuite, ils ont été dirigés vers le Bureau de Défenseurs Publiques Fédéraux du Brésil, Institution qui les a assisté parmi l'inclusion au Programme de Protection aux Victimes et Témoins Ménacés - PROVITA/SP, l'intervention au procès criminel comme assistant d'accusation et le fait d'intenter de poursuites devant la Justice du Travail, de nature individuelle ou collective. Pour la comparation qualitative par rapport au deuxième cas, il seront examinés de plus près les conséquences des procédures criminelle et individuelle à la Justice du Travail.

Après le déroulement de l'enquête policière à la Police Civile de l'état de São Paulo, le dossier a été envoyé au Ministère Public, qui a dénoncé les propriétaires du atelier de couture, ce qui a donné lieu au procès numéro 0013715-59.2009.4.03.6181, qui est resté originellement au 7ème secrétariat criminel de la 1ère subsection judiciaire de São Paulo. Ensuite, le Bureau de Défenseurs Publiques Fédéraux du Brésil est entré à la procédure, afin de représenter les interêts des travailleurs victimes d'exploitation du travail forcé. À ce moment-lá, il faut noter que, d'entre les 6 travailleurs qui ont fuit l'atelier de couture, seulement 5 d'elles ont rejoint le PROVITA et manifesté leur interêt de participer à la procédure criminelle. Devant la nécessité d'audition de témoins le plus rapidement possible, il a été réalisé d'audience de production anticipé de preuves, le 9 decembre 2009. Après la production anticipé de

preuves, les victimes sont rentrées à son pays d'origine (Bolivie), étant donné que seule un d'entre elles est retournée au Brésil – justement par le même schéma de traite de personnes qu'à la première fois, mais pour travailler dans un autre atelier de couture clandestin, pour une autre marque de vêtement.

La procédure criminelle a eu encore deux audiences, fixées à dates proches et réalisées dans le premier semestre de 2010: la première pour continuer l'audition des témoins d'accusation et de défense (le 18 janvier 2010) et la deuxième pour réaliser les interrogatoires (le huit avril 2010). Aprés le délai probatoire, il y a eu le démembrement du procès, afin de permettre le jugement indépendant de la dénonce relative au crime de ménace, ce qui a créé le procès nº 0001828-44.2010.4.03.6181.

Le procès démembré, relatif au crime de ménace, de toute manière, provenant du même cas, a eu sa sentence pénale de condamnation prononcée le 28 juillet 2011, bien qu'elle n'ait pas établi l'indemnité aux victimes, aux motif que les victmes avaient déjà cherché d'indemnité devant la Justice du Travail. Le 24 juin 2013, l'arrêt qui changeait la sentence a été rendue pour établir la valeur minimum de réparation par les dommages supportés de R$ 5.000,00 (cinq mille reais) à chaque victime, ce qui a donné lieu à la procédure d'exécution de titre judiciaire nº 0008301-56.2014.403.6100, qui s'est déroulée à la 12ème secrétariat civel de la 1ère subsection judiciaire de São Paulo, en faveur de la seule victime qui on a gardé contact avec après toutes ces années. Cependant, les auteurs du crime, qui ont repondu à l'accusation en liberté, n'ont pas été détectés au moment de l'exécution de la peine et, comme fugitifs de la Justice, ils n'ont pas été trouvés pour être cités du procès d'exécution du titre judiciaire en faveur da la victime non plus. De même, aucun bien au nom des débiteurs n'a pas été trouvé pour remplir la prétention d'indemnité.

Par rapport à la procédure criminelle principale, quant au crime de travail forcé, la sentence pénale a été prononcé le 05 mai 2011, en condénant le détenteur du atelier de couture à 4 ans et 6 mois de réclusion et à 45 jours-amende, par le crime prevu à l'article 149 du Code Pénal. Au moment du recours d'appel, la condamnation a été augmentée et délimitée à 6 ans de réclusion, outre le payement de 30 jours-amende. Toutefois, dans ce procès principal, il n'y a pas eu l'établissement d'indemnité aux victimes d'exploitation de l'esclavagisme.

La condamnation est devenue définitive la 29 octobre 2014, ce qui a condiut le Bureau de Défenseurs Publiques Fédéraux du Brésil à intenter une action civile *ex delicto* devant la Justice Civel avec l'objectif d'obtenir la réparation par la souffrance supportée (procèdure nº 0007155-43.2015.4.03.6100), au decours de laquelle, ainsi qu'au procès démembré, il n'a pas été possible de citer l'auteur du crime afin d'établir l'indemnité à la victime et d'executer la sentence.

En résumé: em dépit de la condamnation judiciaire définitive, dans la sphère criminelle, d'exploitation du travail dans des conditions analogues au esclavagisme, les victimes, habilitées comme d'assistantes d'accusation, qui ont participé à la phase d1information judiciaire (malgré la détresse émotionnelle, psychologique et les risques inhérents à cette fonction, surtout lorsqu'il y a de ménaces), plus de six ans après les faits, n'ont pas reçu aucune indemnité en conséquence du crime. En fait, elles difficilement recevront quelque valeur liée à la condamnation criminelle, puisque elle se limite à la personne physique des propriétaires du atelier de couture condamnés par le crime dans le cas présent, employeurs immédiats des victimes, lesquels étaient aussi de travailleurs au son propre atelier de couture et qui n 'ont pas de moyens pour payer l'exécution.

Dans la sphère de la Justice du Travail, en 2010, le Bureau de Défenseurs Publiques Fédéraux du Brésil a promu la réclamation individuelle en faveur de cette victime (procédure nº 00001345-20.2010.502.0050), laquelle, au premier degré, a été partiellement accuellie, juste pour condamner l'employeur immédiat. Néanmoins, au deuxième degré, le 11 septembre 2014, la sentence a été changée pour condamner solidairement l'entreprise preneuse du service et la propriétaire de la marque *Collins*. Cette décision n'est encore définitive, de sorte que jusqu'ici il n'y a pas eu aucun payement à la victime dans le champ de la Justice du Travail. Pourtant, une fois que la condamnation de la personne juridique bénéficiaire finale soit confirmée, les chances d'efficacité de l'exécution augmentent considérablement.

Dans le deuxième cas d'espèce – cas *M. Officer* – la trajectoire institutionelle parcourue par le pouvoir public a été différente, parce que plus focalisée sur la responsabilisation au droit du travail par la subordination structurelle. Le cas a commencé avec l'opération de fiscalisation promue par l'Inspection du Travail à São Paulo, le 6 mai 2014, acompagnée par le Bureau de Défenseurs Publiques Fédéraux du Brésil, le Ministère Public du Travail et de répresentants de la Comission Parlementaire d'Enquête d'État du Travail Forcé. L'intervention, réalisée dans um atelier de couture à la zone est de la capitale de São Paulo, a eu comme conséquence le sauvetage de 6 travailleurs des conditions d'esclavagisme, en raison de journée exhaustive et de conditions de travail inhumaines. À l'occasion du sauvetage, le Ministère Public du Travail a promu une mesure de précaution de production anticipée (procédure nº 0001157-45.2014.502.0031) pour l'audition des témoignages des travailleurs, étant installée d'audience judiciaire par la Justice itinérante de combat contre le travail forcé du Tribunal Régional du Travail de la 2ème Région. Après l'échec d'une tentative de solution amiable pour le payement du montant dû aux travailleurs, le Bureau de Défenseurs Publiques Fédéraux du Brésil a intenté une

action conservatoire pour bloquer les sommes salariales et provenues de la rupture du contrat de travail des travailleurs sauvés, ce qui a été accueilli à titre liminaire (procédure nº 0001148-65.2014.502.0037). Ensuite, une poursuite a été déposé (em faveur de 4 d'entre le 6 travailleurs, une fois que 2 d'entre eux ont désisté d'intenter l'action) contre l'entreprise bénéficiaire du service et l'entreprise intermédiaire, conservée la décision liminaire pour bloquer les sommes salariales et provenues de la rupture du contrat de travail.

Pourtant, l'entreprise contre laquelle a été déposée la poursuite a presenté une demande en mandamus devant le Tribunal Régional du Travail de la 2ème Région (procédure **nº 1000764-02.2014.502.0000),** obtenant ainsi une décision liminaire pour suspendre les effets de la décision prononcé au premier degré.

Dans l'action à la Justice du Travail, l'audience de conciliation, instruction et jugement a été réalisé le 20 août 2014, avec seule un des travailleurs sauvés. Malgré le contact du Bureau de Défenseurs Publiques Fédéraux du Brésil avec les autres travailleurs, ils ont décidé de ne pas être exposés en audience judiciaire, parce que ils avaient peur d'être affectés de façon négative en raison de la mesure adoptée contre les employeurs. Pour cela, l'action à la Justice du Travail a cessé d'exister par rapport aux autres travailleurs sauvés.

Il faut noter que, dans ce cas d'espèce, l'audience a été fixée **à une** date proche, puisque le juge a entendu que le cas demandait une marche rapide. Cependant, une fois qu'il n'y a pas disposition legal de déroulement prioritaire des procédures qui impliquent l'exploitation du travail forcé, dans d'autre cas d'espèce intenté contre le même employeur, la première audience, celle de tentative de conciliation, a eu lieu un an après le début du procès, et la deuxième, celle d'instruction et jugement, six mois après.

En ce sens, face à la réalité de ménaces fréquentes et de la peur de dénoncer, caractéristiques courrantes des victimes de travail forcé, il faut remarquer que la procédure ordinaire d'action individuelle à la Justice du Travail – dans laquelle, en vertu de l'article 844 de la CLT, il est nécessaire la présence du plaignat à l'audience judiciaire – n'est pas la l'idéal pour l'efficacité du procès qui est lié à l'exploitation de l'esclavagisme. La procédure la plus appropriée pour ces types de cas, oú il y a d'opération de fiscalisation promu par le pouvoir public, serait celle de l'action publique, pour la protection de droits indivuduels homogènes des travailleurs sauvés. Ce type d'action peut être promu par le Bureau de Défenseurs Publiques Fédéraux du Brésil, conformément à l'article 4, VIII, de la Loi Complementar 80/94, qui possède l'attribution institutionelle pour cela. Avec ça, les attributions pour la tutelle collective sont divisées institutionellement entre le Bureau de Défenseurs Publiques Fédéraux du Brésil et le Ministère

Public du Travail, de façon que la Défense se concentre sur les interêts des travailleurs sauvés (utilisant la tutelle collective même pour mesures d'urgence, à la place d'actions individuelles avec de grands risques d'être éteintes) et le Ministère Public se concentre à l'action publique contre le bénéficiaire final, en questionnant le modèle d'exploitation du travail de toute se châine de production qui utilise le travail forcé comme mécanisme de gestion.

Le 17 novembre 2014, la sentence d'accueil a été prononcée, reconaissant le lien d'emploi des travailleurs avec les deux entreprises employeurs, ainsi que la responsablité solidaire pour le payement des crédits du travail, face à la responsabilité structurelle dans la châine de prodction, étant établi d'indemnité par le dommage moral supporté à cause de l'exploitation du travail forcé de R$ 100.000,00 (cent mille reais). La décision n'est encore définitive et ne pourra être exécuté qu'après d'acquérir force de chose jugée.

Il est important de souligner que l'entreprise titulaire de la marque *M. Officer* avait déjà été découverte en exploitant de travailleurs dans des conditions d'esclavagisme au cours d'une opération de fiscalisation du Ministère du Travail et d'Emploi realisé le 13 novembre 2013. **À partir de cette opération, ils ont été aussi m**is en place du procès devant la Justice du Travail et de la procédure d'enquête criminnelle. L'action à la Justice du Travail, qui commencé le 05 mai 2014, se passe devant le 26ème secrétariat du travail de São Paulo, dejá à la phase de jugement (procédure **nº 0000982-66.2014.502.0026)**. L'enquête policière nº 0254/2014-3, à son tour, a été archivée par le Ministère Public Fédéral, selon la compréhension d'absence de confirmation des auteurs et du contenu délictueux, et, par conséquent, l'absence d'élements pour attester la configuration du crime et pour faire une dénonce (procédure **nº 0012175-97.2014.403.6181).**

Il est donc conlclu que, outre la rapidité de la procédure à la Justice du Travail par rapport au procès criminel (considérant que la dénonce criminelle sera faite et que le procès criminel sera instauré), les chances de garantir l'efficacité de l'exécution par la voie du procès à la Justice du Travail et, en conséquent, la compensation de la victime, à cause de la possibilité de la condamnation solidaire du bénéficiaire final de l'exploitation du travail forcé, sont réelles.

6. CONCLUSION

Entre les mécanismes judiciaires de combat contre l'esclavagisme, il n'y a pas des mesures essentiellement dédiées aux interêts des victims sauvés du travail forcé.

L'assistance à la victime finit par être fournie par des entités de la société civile, dans la mesure de leurs possibilités structurelles

et financières, étant absolument nécessaire que l'État assume son attribution d'assister juridiquement ce groupe vulnérable, ce qui doit être fait institutionnellement, à partir de l'intervention du Bureau de Défenseurs Publiques Fédéraux du Brésil, pas seulement en faveur de ceux qui cherchent les services de l'Institution, mais aussi parmi de recherche active, au moyen d'accompagnement d'actions de fiscalisation e de l'avencement des sauvetages.

À partir de l'analyse qualitative comparative de deux cas de ressemblance maximale, mais avec des résultats divers (MDSO), dans lesquels on a cherché à satisfaire les interêts des victimes judiciairement, on constate quelques facteurs qui illustrent l'inefficacité des processus inhérents aux procés du travail et criminel, en ce qui concerne la protection et l'effective compensation aux victimes.

Dans la sphère du Droit du Travail, pour que la configuration de travail forcé atteigne l'effectif payement d'indemnité aux travailleurs sauvés, il faut avancer dans la régulation légale de l'externalisation, en particulier en ce qui concerne à l'interdiction incontestable de l'externalisation de l'activité principale. La manque de réglementation rend la jurisprudence contradictoire quant à la responsabilisation au droit du travail du preneur du service dans les cas oú il y a des sous-traitances successives dans la châine de production, jusqu'à l'exploitation du travail forcé. Outre l'incertitude quant à la reconnaissance de la responsabilité structurelle, la procédure de l'action individuelle du travail – soit par la lenteur, soit par l'exposition en raison du besoin de la présence physique de la victime aux audiences – ne favorise pas la protection des victimes d'exploitation, en particulier dans les cas oú il y a des ménaces, ni le résultat utile du procès.

Pourtant, si il n'y a pas obstacles au procès du travail, et dans le cas de jugement favorable au travailleur, parmi la reconaissance de la responsabilité structurelle du preneur final de service, cette voie s'avère la plus effective, dans la perspective de la victime, en ce qui concerne à recevoir l'indemnité souhaitée. Les facteurs qui, par la voie de la Justice du Travail, facilitent l'efficacité de la condamnation sont la possibilité de responsabilisation de la personee juridique béneficiaire finale, ainsi que la rapidité du jugement de la procédure du travail en général et la tendance à décider d'acuellir les demandes des travailleurs.

La victime d'exploitation de l'esclavagisme qui souhaite recevoir d'indemnité parmi le procès criminel, à son tour, doit parcourrir un chémin plus longue et s'exposer plus, avec le risque de perdre l'efficacité dans deux moments, à l'occasion de la prescription de la prétention punitive ou de la prétention de l'exécution. Il faut noter, par ailleurs, qu'à la procédure criminelle règne le principe *in dubio pro reo*, ce qui peut faire obstacle à la configuration du dommage susceptible d'être indemnisé, dans la perspective de la victime, qui n'occupera pas

la même position privilégiée qu'elle occupe au procès du travail. De plus, lo procès criminel a la limitation de n'atteindre que la personne physique de l'employeur immédiat, qui n'a acune capacité de supporter les coûts de l'indemnité provenue de sa responsabilisation criminelle exclusive, en particulier dans le contexte de l'esclavagisme en milieu urbain, comme mécanisme de gestion, qui implique des sous-traitances successives dans la châine de production.

À partir de la méthodologie d'analyse qualitative de ressemblance maximale et des résultats distincts (MDSO), il faut identifier la variable responsable par les différences à la production du résultat souhaité, à savoir l'effective indemnisation par le dommage supporté (DE MEUR *et all*, p. 83). Il est conclu alors que, dans les cas de ressemblance maximale analysés, la variable dépendante reflétée dans la trajectoire processuelle parcourue par la victime (au procès du travail ou criminel), est responsable de la production des résultats distincts quant à la variable indépendante, qui est l'effective réparation du dommage. Par la voie du procès du travail, les valeurs de l'indemnité par les préjudices moraux supportés sont souvent plus significatives, outre la chance plus grande de les recevoir effectivement, puisque la condamnation peut atteindre la personne juridique du bénéficiaire final du travail forcé. Par la voie du procès criminel, comme la condamnation n'atteint que la personne physique de l'employeur immédiat (premier lien dans la châine de production, souvent pauvre), outre la valeur établie comme réparation du dommage être plus basse, l'efficacité de son exécution est plus faible, soit par la manque de biens pour satisfaire l'exécution, soit par le risque de la prétention exécutoire être prescrite.

Sendo assim, considerando a excessiva exposição e desgaste para as vítimas inerentes à busca, pela via judicial, de indenização em decorrência da exploração do trabalho escravo, deve-se ponderar que há melhores perspectivas quanto à efetividade do recebimento de valores por meio do processo trabalhista, em relação ao processo criminal.

De ce fait, considérant l'exposition excessive et la détresse des victimes inhérentes à la recherche d'indemnité en raison de l'exploitation de l'esclavagisme par la voie judiciaire, il faut considérer qu'il y a des meilleures perspectives quant à l'efficacité de l'établissement d'indemnité au procès du travail qu'au procès criminel.

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LES DEFIS DU DROIT INTERNATIONAL PUBLIC CONTEMPORAIN

CHALLENGES OF CONTEMPORARY PUBLIC INTERNATIONAL LAW

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Résumé: Les discours purement rhétorique par les États ne seront retranchés des relations internationales, comme le prouve lorsque la participation de l'individu dans ces relations est le fait efficace. En fin de compte, il y a encore de nombreux obstacles à des préjugés politiques et juridiques. Par conséquent, le principe de la prévalence des droits de l'homme est apparue comme une véritable ligne directrice du comportement de l'État, que ce soit au niveau international, que ce soit en interne. En raison du principe de la prévalence des droits de l'homme sont nés en droit international, ce qui lui donne le statut de primate norme sur le droit interne, comme le montre. La primauté du droit international sur le droit national résulte de la force obligatoire des normes créées par les sujets DIP dans la société internationale. Cependant, la nature juridique de ce principe était au-delà des règles « typiques » du droit international, on a vu que sa pertinence normatif axé sur les besoins historiques et sociaux pour protéger les droits de l'homme soulevées à la catégorie des jus cogens. Il a été démontré que la force probante signifie l'imposition au-delà de la volonté des Etats comme le manque d'intérêt des États à l'égard des droits de l'homme reste visible à travers les nombreuses condamnations dans les tribunaux internationaux des droits, sans parler des plaintes aux organes compétents.

Mots-clés: Droit International Public - Principe de la prévalence des droits de l'hommec - Jus cogens

Abstract: The merely rhetorical discourses uttered by the states will only be extirpated from international relations, as has been proved, when the participation of the human person in these relations is actually effected. As has been seen, there are still many obstacles to political and legal bias. To this end, the principle of the prevalence of human rights has emerged as a true guideline of state behavior, whether in the international sphere or in the domestic sphere. Because the principle of the prevalence of human rights was born in international law, this gives it the status of primacy over domestic law, as demonstrated. The primacy of international law over domestic law stems from the mandatory force of the rules created by IPD subjects in international society. Although the legal nature of this principle went beyond the «typical» norms of international law, it was found that its normative relevance driven by the historical and social need to protect human rights has elevated it to the category of ius cogens. It has been shown that co-operation means imposition beyond the will of States since the lack of interest of States in the field of human rights has been visible through numerous condemnations in the International Courts of Human Rights, not to speak of denunciations to the competent organs.

Keywords: Public International Law - Principle of the prevalence of human rights - Jus cogens

1. INTRODUCTION

En société, on agit conformément à la nature, aux nécessités, aux intérêts, aux passions etc. La vie humaine a besoin de se trouver sous l'impulsion d'une force motrice. Cette force mise en mouvement engendre les dynamiques sociales. Vivre en société est plus qu'un simple désir humain, étant quelque chose d'inhérent à sa condition. L'existence de l'autre est toujours témoignée en tout modèle de vie humaine (ARENDT, 2012, p. 37). La graduation des espaces sociaux est pertinente pour comprendre les complexités propres à chaque cadre relationnel. Du noyau le plus élémentaire du vivre ensemble humain (famille) au plus complexe (société internationale), les conduites considérées les plus remarquables dans ce vivre ensemble passent par quelque réglementation.

Les règles de coexistence ou les portées de conduite sont des créations culturelles, autrement dit, elles ne naissent pas des lois naturelles. Il y a plusieurs processus qui servent de base à l'adaptation sociale, comme l'étiquette, par exemple, la mode, la religion, la politique etc. Pour la présente recherche, le droit assume un rôle primordial, plus particulièrement, le droit international. Dans la ligne selon laquelle le droit produit des normes de nature impositive afin de modeler les

dynamiques sociales et apporter des réponses aux interruptions des expectatives, le droit international agit de la même façon, mais dans un espace encore plus pluriel, en raison des différences de nature, des besoins, des intérêts et des passions en jeu.

La société internationale perçue dans les moules actuels a été classiquement construite par l'action des États, bien que l'on ait ou voir cela depuis l'Antiquité. Ainsi, la société internationale moderne surgit-elle entre États, et le droit de réguler les relations d'État est notamment européen (VALLADÂO, 1961, p. 27-28). Ici, il y a le droit international disposé selon la volonté des monarques absolutistes, et étranger aux affaires domestiques, car limité par la notion de souveraineté pleine. L'indépendance des États-Unis, suivie par celle des colonies espagnoles et portugaises en Amérique, ainsi que les Guerres Mondiales, la création et le renforcement des Nations Unies et le mouvement de décolonisation de l'Afrique constituent des faits transformateurs du contenu et de la forme du droit international.

Dans la forme, le droit international est alors codifié, migrant des sources traditionnelles coutumières vers les textes pactisés. De nouveaux défis apparaissent découlant de la positivation des normes internationales. L'absence de consensus ou l'incertitude quant au degré d'engagement dans une cause déterminée créent la distinction entre *hard law* et *soft law*. Les traités internationaux s'insèrent dans la première catégorie, puisqu'une fois ratifiés ils réclament l'observance obligatoire de la part des parties contractantes, lesquelles seront responsabilisées si elles se détournent de la conduite escomptée. Quant aux positionnements, déclarations, codes de conduite, accords amiables, connus comme *soft law*, ils apparaissent comme mode d'entamer les dialogues autour de thèmes qui suscitent davantage de divergences, mais qui ne sont pas régis par le *pacta sunt servanda* (VARGAS, 2013, p. 172).

Pour ce qui est du contenu, le traitement cruel infligé à certains groupes d'être humains par des régimes autoritaires, les assassinats en masse tels les génocides au Rwanda et dans l'ancienne Yougoslavie, ainsi que l'exploitation économique des peuples orientaux et africains, ont sucité la construction d'un nouvel axe d'équilibre du droit international : la personne humaine. Cet illuminisme juridique du XXe siècle a rayonné dans tout l'ordre international et pénétré dans les ordres nationaux, installant de nouveaux fondements dans les Constitutions des États dits démocratiques. Le processus d'humanisation du droit des minorités, au sein du discours en faveur des différences, de la mémoire et de l'identité, marque aussi le contexte actuel du droit international. Les mouvements, pacifiques ou violents, pour la reconnaissance des droits élémentaires et la participation croissante des indicateurs et des actes internationaux dans la vie des États, peuvent à première vue

projeter une nébuleuse d'idées et un système international chaotique.

L'idée de chaos est surmontable, au fur et à mesure que s'établit une orientation claire à la raison existentielle des États et de l'ordre international lui-même. Le motif de l'existence repose sur la protection de la personne humaine. Tous les défis théoriques, législatifs, politiques, doivent être orientés par la protection et l'attribution de pouvoir à la personne humaine par (et dans) le droit des gens. Le droit international exige la primauté sur les ordres nationaux, puisqu'il est centré sur l'être humain. Face à cela, la négation de la personnalité juridique internationale de l'être humain est insoutenable, tout comme la mitigation de l'accès aux cours internationales. En outre, il faut revenir sur l'analyse critique des abstractions, tels que les droits humains, leurs fondements et caractéristiques, en quête de quelque chose de plus tangible aux réalités humaines d'aujourd'hui.

Juridiquement, la prévalence des droits humains se présente comme une norme internationale impérative, en raison de la centralité de la personne humaine, et elle impose le primat du droit international sur les normes juridiques nationales. L'expression prévalence des droits humains fait retentir la clameur historique de ceux qui désirent la paix et la réalisation des capacités humaines en situation de dignité. Cette prévalence nait au sein impératif du droit international, cherche à se consolider dans la jurisprudence internationale et incide sur les États, leur imposant les réformes essentielles.

2. LA PRIMAUTE DU DROIT INTERNATIONAL PUBLIC

La personnalité juridique internationale de l'être humain s'inscrit dans la perception de la communauté mondiale. Il est pertinent de rappeler la distinction entre les associations humaines qui ont pour but la conservation des volitions d'autrui, représentant des personnes ayant une vie réelle et organique (communauté), et celles qui représentent des personnes ayant une vie virtuelle et mécanique (société). Dans une société, les personnes se trouvent juxtaposées et sont indépendantes les unes des autres, alors que dans une communauté il existe un lien d'intimité et de dépendance (TONNIES, [S.d], p. 97).

Au sein d'une communauté, circulent des citoyens du monde qui s'identifient par l'humanité elle-même, et non plus par l'ethnie, la race, le genre, la croyance, la nationalité etc. Le projet occidental d'étendue de l'*american way of life* comme modèle imposé (par libre adhésion ou par agression) à tous les peuples dressait la bannière de l'universalité. Peu à peu, il s'est mis à afficher sa face violente et arbitraire, souillant les idées qui reconnaissaient en chaque être humain de la Terre un élément essentiellement égal susceptible d'être présenté comme justificatif au renforcement des droits humains. Le droit à la

différence entre alors dans les discours officiels de groupes qui, pour une multitude de raisons, désirent rompre avec ce projet occidental.

Dans les cénacles des intellectuels et des représentants d'États, les débats entre idées universalistes et idées relativistes se popularisent. Les défenseurs du multiculturalisme cheminent anachroniquement quand ils discutent si les droits humains et le droit à la différence seraient comme l'eau et l'huile (même mélangées, elles ne se dissolvent guère l'une dans l'autre) ou si, en fait, elles feraient partie d'une même substance. Plutôt que de penser l'universel, qui a déjà des relents d'entreprise en perdition, il conviendrait de se pencher sur le commun. Ni l'universel, ni l'uniforme : le commun. La primauté des droits humains ouvre, par le biais du consensus, un espace idéal à la construction d'une communauté internationale fondée sur un noyau dur de droits humains qui, sitôt étendus, réclament des réformes urgentes, aussi bien dans l'ordre international que dans les ordres nationaux. Le premier point est de la voir comme norme première, composante d'un ordre prévalent.

2.1 Prévalence des Droits humains à partir de la primauté du droit international public.

Les droits humains sont en intime rapport avec le droit international, et leur prévalence renvoit, nécessairement, à la notion de primauté de l'ordonnance juridique internationale. De manière planifiée, il se trouve trois questions formelles principales qui impliquent le droit des gens : a) la première concerne l'existence du droit international, car il lui manque des éléments caractérisateurs de ce que l'on nomme le Droit ; b) la seconde s'occupe de la perception de deux ordres complètement distincts, qui ne se mêlent pas, chacun réglant des rapports propres ; c) la troisième soutient la prévalence du droit international sur le droit interne (SORTO, 2013, p. 148).

Parmi les auteurs qui nient le DIP, se trouve Hart. Selon Hart, le droit est un ensemble de règles primaires et secondaires. Celles qui sont primaires réglementent des conduites, alors que les secondaires prévoient le recours officiel à la force en cas de désobéissance. Face à ce concept, Hart se demande si le droit international possède de telles caractéristiques (HART, 1961, p. 263).

Le chapître X de *Le Concept de Droit* est consacré à la critique de l'existence du droit international, signalant le manque de législation internationale, de tribunaux dotés de juridiction compulsive et de sanctions centralement organisées. Pour l'auteur, l'absence d'institutionnalisation renvoie les États à la forme simple de structure sociale (règles primaires d'obligations). La carence de règles secondaires de changement et d'adjudication qui créent une législation

et des tribunaux, ainsi que de règles unificatrices qui indiquent les sources, ne passe pas par la portée ou par l'applicabilité, mais découle de l'existence même de l'impérativité (HART, 1961, p. 263-266). Le problème de Hart c'est que l'existence doit, au moins, rendre une conduite obligatoire, l'idée d'obligation et de devoir étant éloignée de la « probabilité de subir une sanction ou un châtiment sous menace en cas de désobéissance ». L'obligation des règles n'est pas limitée par la menace de subir une sanction.

Il convient de souligner que l'absence d'une autorité centrale internationale – comprise comme hierarchiquement supérieure, régulatrice et ordonnatrice de la conduite de tous, sans pour autant n'être jamais régulée ni ordonnée par les autres – n'implique nullement l'inexistence d'une autorité en soi. Les normes juridiques internationales attribuent des pouvoirs à un sujet ou à un organe déterminé pour appliquer, réguler et surveiller les conduites sociales. Sans l'existence d'autorités, il est impossible d'atteindre la protection des biens publics et, dans le droit international, atteindre une protection concrète de la personne humaine. Hart utilise la notion classique de quelques éléments constitutifs de l'État pour fausser le caractère juridique des normes internationales. L'autorité est un élément formel de l'État, et la réalisation du droit postule la nécessité de celle-là. (PORRÚA PEREZ, 1999, p. 297-298).

L'autorité se manifeste concrètement dans les décisions de caractère général, créatrices de droit positif, et dans les décisions de caractère particulier prises dans chaque cas concret (PORRÚA PEREZ, 1999, p. 305). Toutefois, soutenir l'existence d'une autorité internationale centrale c'est considérer que toutes les normes de droit international seraient globalement applicables. Il est erroné de confondre le caractère international des normes avec l'application globale. Le droit international a cette identité parce que c'est un droit créé par plus d'un sujet de droit international. Il peut être exclusivement appliqué dans un cadre particulier (ex. : Pacte de San José de Costa Rica, qui incide dans le cadre de l'OEA).

En fait, il est quelque peu inutile de s'attarder davantage sur les négateurs du DIP, car les idées ici présentées dépassent la simple notion d'existence du DIP et établissent un point de départ par la suite, dans la prémisse de suprématie de l'ordre international. Cependant, la critique de Hart sert à clarifier certains points quant au caractère obligatoire du DIP, d'autant qu'il existe divers courants sur ce thème. De manière générale, la doctrine internationale présente deux visions pour ce qui est du fondement du DIP : volontariste et objectiviste. Dans la théorie de l'autolimitation (Georg Jellinek), de la volonté collective (Triepel), du consentement des nations (Hall, Oppenheim) et de la délégation du droit interne (Max Wenzel), le fondement du droit international part de

la volonté des États. Mais dans la théorie de la norme-base (Kelsen), des droits fondamentaux des États (Grotius, Wolff, Pillet, Rivier), dans la théorie sociologique (Duguit, Georges Scelle), dans le droit naturel (Louis Le Fur), dans la théorie de la nécessité (Bentham), de la nationalité (P. Stanislaw Mancini), du *pacta sunt servanda* (Anzilotti), le caractère obligatoire du droit international réside dans un élément situé au-dessus des États, et c'est pourquoi ils sont objectivistes.

Les théories volontaristes se fondent sur la philosophie hegelienne de centralité de la volonté des États. Aucune ne contribue au renforcement et à la centralité de l'être humain dans l'ordre international. Des fondements trouvés hors du cadre de la volonté des États qui ne se transforment pas en obstacles à la reconnaissance de la personne humaine en tant que sujet de droit international, le *pacta sunt servanda* représente la force obligatoire du droit international. Ce principe général de droit puise ses racines dans la religion. Anzilotti écrit en 1902 que le fondement du droit n'est pas et ne saurait être un concept légal, car il existe un point dans le processus d'établissement d'une norme en une autre où cesse le droit. Donc, le fondement ultime du droit est davantage un concept moral qu'un principe légal. Dans l'édition de 1923 de *Corso di diritto internazionale*, Anzilotti adopte, avec quelques adaptations, l'idée kelsenienne du *pacta sunt servanda* comme fondement du DIP (GAJA, 2013, p. 127).

Anzilotti défend la norme du *pacta sunt servanda* comme fondement du droit international, sans s'attacher nécessairement à la théorie pure du droit de Hans Kelsen. Bien que la vision d'Anzilotti soit importante pour démontrer un fondement cohérent au DIP, il convient de souligner qu'il représente l'idée dualiste de Triepel sur le rapport entre les normes de droit international et les normes de droit interne. Le courant dualiste passe au large de la saisie de pouvoir de la personne humaine dans la société internationale, puisqu'il la laisse encerclée dans les ordres juridiques internes.

La théorie de la norme-base pour expliquer la force obligatoire du droit international a été développée par Hans Kelsen. A un certain moment, Kelsen cible le *pacta sunt servanda* comme *Grundnorm* (norme fondamentale) de la pyramide normative. La théorie kelsenienne sur le rapport entre les normes de DIP et de droit interne démontre la primauté de celle-là sur cette dernière et configure une contribution remarquable à la protection de la personne humaine et à l'effectivité des droits humains.

Il y a deux courants qui tracent les caractéristiques du rapport entre le droit international et le droit interne : le courant dualiste et le courant moniste. Les idées de Heinrich Triepel représentent la vision dualiste du rapport entre les normes de droit international et celles de droit interne. Bien qu'il n'écarte pas la possibilité que le droit

international évolue pour reconnaître d'autres groupes situés au sein des États en tant que sujets de droit international (1966, p. 13), Triepel est incisif quand il affirme que le droit interne et le droit international forment des ordres juridiques distincts en raison des rapports qu'ils réglementent. Il incombe au droit international de régler les relations entre États ; c'est pourquoi eux seuls sont sujets de droit international sous le prisme de Triepel. Et il incombe aux normes de droit interne de régir les relations entre personnes humaines, en plus de créer le droit qui réglemente le rapport de l'État avec ses administrés (1966, p.10).

Dans la mesure où l'on se trouve en présence d'ordres séparés et totalement indépendants, le dualisme nie le conflit entre normes de droit international et normes de droit interne. Chaque droit se doit de garantir, par le truchement de ses propres sources, la réalisation des conduites escomptées. Pour ce qui est de l'assimilation du droit international par le droit interne, il y a là une bifurcation dans la doctrine dualiste (ou pluraliste). Par rapport à la technique de l'incorporation, on peut : exiger l'édition d'une loi interne distincte pour l'incorporation du traité dans l'ordre juridique national (dualisme radical), vision liée à la perception de Triepel selon laquelle il n'y a point assimilation, mais reproduction des normes juridiques internationales ; ou dispenser l'absence de nécessité de cette loi spécifique, car l'incorporation se produit moyennant un *iter* de procédé complexe, par le biais d'une approbation du Congrès et d'une promulgation de l'Exécutif (dualisme modéré). Cela étant, selon les dualistes, ratifier un traité ne fait qu'irradier ses effets sur le plan international, étant nécessaire un acte juridique interne de reproduction ou d'assimilation pour que les normes internationales produisent des effets dans l'ordre d'État.

Dans la ligne moniste, avec primauté de l'ordre interne, se trouvent Wenzel, les frères Zorn, Decencière-Ferrandière et Korovin. Dans le monisme où il y a primauté du droit international, se trouve celle que l'on nomme École de Vienne (Hans Kelsen, Alfred Verdoss, Kunz), aux côtés d'auteurs tels que Duguit, Politis, Mestre et Mosler.

La doctrine moniste soutient qu'il existe un rapport mutuel entre les deux systèmes. Ce sont deux complexes de normes de type dynamique, comme l'ordonnance juridique internationale et une ordonnance juridique d'État. Ils forment un système unitaire, mais l'une de ces ordonnances se présente subordonnée à l'autre, parce que l'une contient une norme qui détermine la production des normes de l'autre et, conséquemment, celle-ci trouve en celle-là son fondement de validité. Dans le monisme, immédiatement après la ratification ou l'adhésion, les traités irradient leurs effets juridiques sur le plan international et national, concomitamment. Il se produit une incorporation automatique des normes venues des traités dans l'ordre d'État.

Les monistes ne nient pas la possibilité de conflit entre les

normes juridiques de droit international et celles de droit interne. De cette situation émergent deux solutions : monisme avec primauté du droit international et monisme avec primauté du droit interne. Ce dernier manifeste une forte influence de la notion hegelienne d'État caractérisé par la souveraineté absolue. L'autolimitation de l'État réduit le droit international à une représentation externe du droit d'État. Le droit international reste au service des États (JELLINEK, 2000, p. 354). Ce courant est également adopté par Georges Burdeau qui souligne la valeur juridique des déclarations de droit comme étant des énoncés de droit positif, mais restreint sa possibilité d'imposition (dans le sens de création de droit) à l'activité de l'autorité législative interne (BURDEAU, 1961, p. 21-22).

Dans le dualisme, l'être humain n'est qu'un objet de réglementation du droit international. Dans le monisme avec primauté du droit interne, il y un droit international dépendant du droit interne, réfuté comme droit autonome, un droit d'État, simplement. La critique de ces visions doit être claire. Aucune des deux n'est capable de donner de l'impulsion à l'évolution du droit international en tant qu'espace d'action de la personne humaine dans la société internationale en qualité de sujet. Toutes deux rendent non-viable dans la pratique ce que les droits humains ont déjà reconnu : la centralité de l'être humain dans l'ordre international.

On trouve un refuge dans le monisme avec primauté du droit international. En cas de conflit entre normes internes et normes internationales, celles de droit international doivent prévaloir. Son principal défenseur est Hans Kelsen. Pour lui, le droit international définit ce qu'est un État dans le sens juridique international, règle sa conduite et détermine le domaine territorial de cet État, autrement dit, la sphère de validité spaciale de l'ordre juridique d'État, sous laquelle il peut apparaître revêtu de sa qualité d'appareil de coercition. L'ordre juridique interne ne pourra établir d'actes de coercition spécifiques que pour l'espace de validité qui lui est juridico-internationalement réservé ; ces actes de coercition peuvent ainsi juste être d'État sans offense au droit international. Selon ce doctrinaire, ce n'est qu'ainsi qu'est juridiquement possible la coexistence dans l'espace de pluralité d'États, c'est-à-dire, de pluralité d'ordres coercitifs.

> *[...] si l'on part du Droit international comme un ordre juridique valable, le concept d'État ne peut être défini sans référence au Droit international. Sous cet angle, il est un ordre juridique partiel, immédiat en face du droit international, relativement centralisé, ayant un domaine de validité territoriale et temporelle juridico-internationalement limité et,*

> *relativement à la sphère de validité matérielle, ayant une prétention à la totalité (Totalitätsanspruch) à peine limité par la réserve du Droit international (KELSEN, 1999, p. 239).*

Il s'agit de la thèse qui résulte de la pyramide de normes exposée dans la *Théorie Pure du Droit* par Hans Kelsen. Le droit international et le droit interne forment une unité logique, il est donc impossible, du point de vue purement juridique, que deux systèmes juridiques aient une validité côte à côte (TRIEPEL, 1966, p. 18). Il n'existe pas de frontières entre le droit international et le droit interne, et les différences sont relatives, car le processus stipulé par chaque droit de création et d'exécution possède un degré de centralisation et décentralisation moindre ou majeur (CÂMARA FILHO, 1949, p. 90-91).

Le droit international détermine le cadre de validité et la raison de validité des ordres juridiques nationales. La norme de base du droit international sera aussi la dernière raison de validité des ordres juridiques nationales (KELSEN, 1995, p. 437). À la recherche de ce fondement, Kelsen affirme que les sentences prononcées par une Cour Internationale (normes ayant davantage de base dans la hierarchie de l'ordre international) se basent sur les traités qui ont créé la Cour Internationale ; quant aux traités, ils sont fondés sur la norme générale qui oblige tout État à agir en accord avec les traités célébrés : *pacta sunt servanda*. Le droit international coutumier se développe sur cette base et forme la première étape de l'ordre juridique international. Ensuite, a lieu la formation d'accords internationaux et, dans un troisième moment, apparaissent les normes créées par les organes établis par les traités internationaux (1995, p. 439-440).

La marque de la primauté du droit international réside dans le fait qu'il reste en elle tout le fondement d'existence et de validité des ordres d'État[1], compte tenu que les normes juridiques internationales peuvent réglementer n'importe quelle matière, donc également celles qui sont réglementées par le droit interne (KELSEN, 2000, p. 498). La critique de Hart consiste dans l'affirmation kelsenienne de trouver des

1 Exemple: pour être reconnu en tant que sujet de droit, l'État doit remplir le support de fait prévu hypothétiquement dans les normes juridiques de droit international. L'article 1º de la Convention sur les Droits et Devoirs des États, signée lors de la Septième Conférence Internationale Américaine, célébrée à Montevideo en 1933, définit que : « L'État en tant que personne de Droit International doit remplir les exigences suivantes : I – Population permanente ; II – Territoire déterminé ; III – Gouvernement ; IV – Capacité d'entrer en relations avec les autres États ». La pratique internationale ajoute un élément de plus : la finalité établie dans sa Constitution. Il s'agit de l'élément social. Pour qu'un État existe et qu'il soit une personne de droit international, il doit remplir ces présupposés (support de fait) imposés par les normes de droit international.

similitudes entre le droit interne et le droit international, et est répondue par la « norme de base » - règle de reconnaissance – qui valide les autres règles du système et en fait un système unique (HART, 1961, p. 287).

La question de l'absence de centralité dans l'application de la sanction est dépassée par Kelsen sans affecter la position de primauté du droit international. La sanction se révèle concept central dans la théorie kelsenienne du droit. C'est la clause qui sanctionne qui attribue aux normes le caractère de juridicité. La centralisation d'État différencie l'ordre interne des ordres supranationaux et internationaux. L'ordre international est essentiellement décentralisé.

> *S'il est possible de décrire le matériel qui se présente comme Droit international de telle façon que l'usage de la force par un État contre un autre ne puisse être interprété que comme délit ou sanction, alors le Droit international est Droit dans le même sens que le Droit national (KELSEN, 2005, p. 468).*

Bien qu'il n'existe pas d'autorité unique, il y a toutefois le monopole du droit international pour appliquer les sanctions. C'est le droit international qui dira si un acte de guerre nationale sera considéré comme délit ou sanction internationale. La sanction du droit international est mise en rapport avec le degré d'interférence nationale dans les intérêts internationalement protégés d'autres États. Le délit, la représaille et la guerre sont des niveaux d'interférence que le droit international réglemente ; c'est pourquoi « la décentralisation de l'application du Droit n'empêche pas que l'acte coercitif en tant que tel soit strictement monopolisé » (KELSEN, 2005, p. 482).

Dans la position moniste internationaliste, il y a le Français Léon Duguit, qui, dans son analyse du Traité de Versailles (1919), renforce l'idée selon laquelle il reviendrait à l'OIT de développer une législation uniforme sur le travail. De cette façon, la législation internationale posséderait une force impositive et première sur les dispositions françaises concernant la législation du travail (DUGUIT, s/d, p. 160-161).

Pontes de Miranda (1970, p.45) affirme que le Droit des Gens est un ordre normatif supérieur à l'État, d'où il retire sa personnalité et existence normative. Hors de l'ordre international, l'État ne demeure que dans sa dimension sociologique. La reconnaissance de l'existence de l'État se produit dans l'ordre supranational, selon les normes de droit international. Quant à l'ordre d'État, l' « être » État est organisé moyennant les normes constitutionnelles.

La primauté du droit international sur le droit interne découle

de la force obligatoire des normes créées par les sujets de DIP dans un espace plus large que les territoires d'État – la société internationale. La tradition n'établit pas de hiérarchie entre les normes juridiques internationales, étant donné l'absence d'une autorité centrale semblable à la figure de l'État dans l'ordre interne. Toutefois, si hiérarchie signifie action de soustraire fondement et validité d'une norme d'une autre norme supérieure (et elle signifie cela même), il y a des normes juridiques internationales dont l'essence est si importante pour la conservation de l'humanité que sa force normative dépasse la formalité d'adhésion par les sujets de DIP. Ce sont des normes impératives.

Il s'agit d'une construction audacieuse au sein d'un système classiquement pensé et sédimenté dans la volonté des États, considérés comme étant les « réels » sujets de DIP. Le but de l'ordre international est de créer un cadre de protection de la personne humaine et de répandre ces règles sur les ordonnances nationales. Il est indéfendable de lui attribuer un objectif plus grand, bien que les actes internationaux continuent encore à être réglés selon les intérêts de l'État. Ici, le droit international (sens objectif) devient anachronique aux faits historiques qui ont prouvé l'insuffisance de l'action des États dans la protection de la vie humaine. C'est pourquoi quelques normes internationales méritent une observation impérative des sujets de DIP, spécialement les États, et doivent se positionner comme fondement des autres normes internationales, ainsi que des normes juridiques internes. L'engagement ne provient plus d'accords envers d'autres sujets de droit international, mais d'engagement envers la protection de toute vie humaine.

La prétention à étendre cette caractéristique à toutes les normes juridiques internationales serait utopique. Et ce parce que pas toutes les normes juridiques internationales ne se rapportent à l'essentialité de la vie humaine. Elle ne se tourne que vers les normes dont les effets attribuent à la personne humaine des pouvoirs susceptibles d'exiger la réalisation de prestations de qui a (de par la loi) le devoir et les facultés d'agir pour satisfaire ses intérêts, car cela lui sert au défi de développer ses potentialités en une existence digne. Cet ensemble normatif constituent les droits humains. Ainsi, les normes impératives se trouvent-elles inscrites dans une catégorie plus grande de normes juridiques internationales qui émanent des droits subjectifs dans sa charge d'efficacité (droits humains). La prévalence des droits humains est la norme de cette grandeur, mais il faut, avant d'approfondir davantage cette affirmation, considérer certains points relatifs aux droits humains.

2.2 Traits remarquables de la primauté des droits humains

Parmi les normes de *jus cogens*, se trouve la prévalence des droits humains. La primauté des droits humains donne impulsion à la reconnaissance des droits humains intangibles et, conséquemment, à la construction du noyau dur des droits humains. La prévalence sert de fil directeur à l'identification des normes impératives de DIP, tout comme elle empêche l'involution des droits humains déjà déclarés. Un autre point important, qui sera développé dans le prochain item, est la centralité de la personne humaine dans l'ordre international devant la personnalité juridique internationale de l'être humain. Même devant le renforcement des Organisations Internationales et de certaines collectivités non nationales, il y a longtemps que la société internationale est réglée selon la volonté et l'action des États comme « réels » sujets de DIP. Tout cela est caractéristique sous la perspective internationale.

Sous la perspective positiviste interne, la prévalence des droits humains se retrouve parmi les commandements apportés par l'article 4 de la Constitution Fédérale de 1988. Les Constitutions brésiliennes antérieures ne présentaient pas de dispositif semblable à celui-là, bien qu'il soit possible d'observer des préceptes rémanents dans toutes ces Constitutions, comme par exemple le principe de l'indépendance nationale[2]. Celle de 1988 innove, au moins en ce qui concerne la rédaction constitutionnelle choisie et, principalement, le contenu préliminaire, entendu ici comme une certaine notion de substance concédant une direction normative. Il suffit de lire le *caput* de l'article 4 pour comprendre (immédiatement) que le principe de la prévalence des droits humains possède comme destin premier la réglementation de la République Fédérative du Brésil dans ses relations internationales.

Les relations internationales dont traite l'article 4 ne doivent pas être confondues avec la science des Relations Internationales. L'article se penche sur la régulation des conduites de l'État par le biais d'un système normatif-coactif (objet des sciences juridiques), alors que les RI voient les rapports de pouvoir parmi divers acteurs sociaux et politiques à partir de la faveur et de l'intérêt comme « monnaie d'échange » (objet des sciences politiques) (CASTRO, 2012, p. 280). De plus, sous l'aspect juridique, l'État est sujet, tandis que pour les RI il est acteur, c'est-à-dire, possédant entière capacité d'influence directe ou indirecte dans la politique internationale à la lumière des Kfpi[3] (CASTRO, 2012, p. 429). Les sujets internationaux sont « liés à l'*ethos* dans le champ de la légalité et de la légitimité ». Soumis et sujets à l'ensemble de normes juridiques en vigueur dans un système international déterminé

2 Il ne serait pas cohérent de penser que le concept d'indépendance nationale présent dans la Constitution Impériale de 1824 est le même que celui qui se trouve dans la Constitution Fédérale de 1988. Les contenus sont rénovés par la nouveauté constitutionnelle face aux changements sociaux.

3 Capitales de force-pouvoir-intérêt.

(CASTRO, 2012, p. 430).

Outre le principe de la prévalence des droits humains, la Constitution Fédérale apporte explicitement dix principes : a) indépendance nationale ; b) auto-détermination des peuples ; c) non-intervention ; d) égalité entre les États ; e) défense de la paix ; f) solution pacifique des conflits ; g) répudiation du terrorisme et du racisme ; h) coopération entre les peuples pour le progrès de l'humanité ; i) concession d'asile politique. En tout, donc, dix principes explicites et, parmi les implicites, il y en a un assez évident dans le paragraphe unique concernant la recherche de l'intégration économique, politique, sociale et culturelle des peuples de l'Amérique Latine, dans le but de former une communauté latino-américaine d'États.

Du modèle classique de Constitution jusqu'au modèle le plus garantiste, l'organisation de l'État et la réglementation des droits et des libertés de la personne humaine ont toujours été matière constitutionnelle. Dans le constitutionnalisme contemporain, ces droits remplissent deux fonctions : subjective et objective. La fonction subjective implique la protection des libertés individuelles. La fonction objective assume une dimension institutionnelle. À travers celle-ci, ses contenus doivent fonctionner comme directives pour les finalités constitutionnellement proclamées (PÉREZ LUÑO, 2004, p. 19-22).

Les chartes constitutionnelles plus analytiques ne se contentent pas de réglementer la division de l'État, dans le sens de n'établir que ses compétences. Elles vont au-delà. En positivant, par exemple, les principes de coexistence pacifique entre les sujets de la société internationale, les Constitutions normativent la politique étrangère de leurs pays. Les représentants d'un État décident comment celui-ci devra s'insérer dans la société internationale, conjugant idéaux et intérêts. Au Brésil, par exemple, lors de sa prise de fonction présidentielle du premier mandat, le Président Lula affirmait que l'action diplomatique de son gouvernement serait orientée par « une perspective humaniste », servant d' « instrument de développement national » et, tournée vers ce développement et la paix, la politique étrangère chercherait à « réduire le hiatus entre nations riches et nations pauvres, promouvant le respect de l'égalité entre les peuples et la démocratisation effective du système international » – en lignes générales (BARRETO, 2012, p. 7).

Au premier coup d'oeil, on peut penser que les actes d'État délimités par la recherche de ressources de pouvoir relèvent du libre choix de ceux qui le représentent. Il n'en est rien. La souveraineté populaire qui donne naissance au pacte constituant et au principe démocratique qui en découle, et les fonde, a une influence importante dans le processus de constitutionnalisation des relations internationales. La démocratie est l'une des principales causes de la réglementation normative et constitutionnelle des relations étrangères (DALLARI, 1994,

p. 13). Elle fonde la nécessité d'écarter le caractère obscur qui marquait historiquement les relations d'État. Le pouvoir qui émane du peuple lui assure le droit de savoir et de participer aux choix de son État, et même de les contrôler. Ainsi, l'ordonnance juridique brésilienne a-t-elle constitutionnalisé les relations internationales en dépit de la résistance historique que manifeste la politique étrangère à la participation et au contrôle démocratique. L'élargissement du traitement constitutionnel des relations étrangères est une caractéristique des Constitutions modernes.

L'abordage purement administrativiste de cette réglementation affirme que la Constitution Fédérale remplit la fonction d'établir des règles de procédés et de paradigmes devant être en vigueur « [...] parallèlement au déploiement d'initiatives subordonnées à la politique étrangère du gouvernement », assurant la viabilité de surveillance de la part de la société (DALLARI, 1994, p. 16). Elle se matérialise devant l'inexistence ou le manque d'importance de l'orientation effective légale (BROTÓNS, 1984, p. 13). Antonio Ramiro Brotóns identifie dans la fixation de jalons normatifs de la gestion politique étrangère, dans l'établissement de limites à la politique étrangère et dans la formulation de stimuli tournés vers l'orientation de la politique étrangère, afin d'atteindre les buts proposés, les trois fonctions de cette constitutionnalisation (1984, p. 93-103).

Ce qui intéresse ici c'est la fonction normative de l'article 4 de la Constitution Fédérale – de manière générale – ciblant la prévalence des droits humains qui ne se lie pas seulement à l'organisation de la gestion politique étrangère. La prévalence des droits humains qui régit la République Fédérative du Brésil dans ses relations internationales doit être travaillée au-delà de sa perspective purement administrativiste.

Les principes des relations internationales, tels qu'ils se trouvent dans le texte constitutionnel, manifestent le processus de consolidation et d'évolution de la démocratie au Brésil. Toutefois, ils révèlent indéniablement une référence à la Déclaration de 1970. Il s'agit de la Déclaration Relative aux Principes du Droit International Régissant les Relations Amicales et la Coopération entre États Conformément à la Charte de l'ONU. Cette Déclaration, dans sa partie générale, souligne que ses principes sont liés entre eux et constituent des normes de base de droit international. Elle renforce aussi l'importance des États à internaliser ces précepts (TRINDADE, 1981, p. 52-80).

Dans les antécédents historiques de la Déclaration de 1970 se trouvait le phénomène de la décolonisation. L'indépendance conquise par divers peuples, créant de nouveaux États, a modifié profondément les relations internationales. Ce phénomène a donné de l'impulsion à la normatisation de ces principes. L'évolution du concept de coexistence pacifique de tous les États a également contribué à la Déclaration en

question. Il convient encore de souligner qu'elle n'est pas apparue comme un amendement à la Charte de l'ONU, mais comme une interprétation de ses principes à la lumière des finalités proposées par les Nations Unies (TRINDADE, 1981, p. 52-80).

La Déclaration de Principes de Droit International relative aux Relations Amicales et à la Coopération entre États conformément à la Charte de l'ONU a été adoptée le 24 octobre 1970, dans la Résolution 26/25 (XXV), par l'Assemblée Générale Plénière présidée par M. Edvard Hambro (Norvège), à l'occasion de la séance commémorative du vingt-cinquième anniversaire des Nations Unies. Dans un passage du discours de M. Hambro, on peut subtilement percevoir une mention aux idées contraires à la Déclaration de 1970[4].

> *[...] As a man of law I am particularly happy to have just announced the adoption of the Declaration on Principles of International Law concerning Friendly Relation and Co-operation among States in accordance with the Charter of the United Nations. This marks the culmination of many years of effort for the progressive development and codification of the concepts from which basic principles of the Charter are derived. The Assembly will remember that when we first embarked upon these efforts many doubted that it would be acceptable to all the various political, economic and social systems represented in the United Nations. Today those doubts have been overcome. In a sense, however, the work has just begun. We have proclaimed the principles ; from now on we must strive to make them a living reality i the life of States, because these principles lie at the very heart of peace, justice and progress*[5].

4 Disponible sur : http://untreaty.un.org/cod/av1/ha/dpilfrcscun/dpilfrcscun.html. Accès le 20/07/2014.

5 En qualité d'homme de droit, je suis particulièrement heureux car je viens d'annoncer l'adoption de la Déclaration des Principes de Droit International relatifs aux Relations d'Amitié et de Coopération entre les États, conformément à la Charte des Nations Unies. Ceci marque le point culminant de nombreuses années d'effort pour le développement base de cette Charte. L'Assemblée se rappelle sans doute que, quand nous avons entrepris ces efforts, beaucoup ont douté qu'il serait possible d'obtenir un résultat acceptable aux divers systèmes politiques, économiques et sociaux représentés aux Nations Unies. Aujourd'hui, ces doutes ont été surmontés. En un certain sens, cependant, le travail ne fait que commencer. Nous avons proclamé les principes ; dès maintenant, nous devons redoubler d'efforts pour les transformer en réalité vivante dans les États, car ces principes sont au coeur de la paix, de la justice et du

Avec davantage d'emphase, le président norvégien de l'assemblée Générale de l'ONU a affirmé l'importance de mener ces principes déclarés à la réalité (de fait et juridique) de tous les États. Les débats dans cette sphère – nommée effort dans le champ de la codification et du progressif développement du droit international – ont migré de la Sixième Commission de l'ONU à l'agenda provisoire de l'Assemblée Générale lors de la 17e séance, par la Résolution 1.686 – XVI, le 18 décembre 1961, intitulée « Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations ». Sitôt reconnue l'importance des sept principes de droit international sur les relations amicales et la coopération entre États (Résolution 1.815 – XVII, du 18 décembre 1962), des études ont été entamées pour les développer et les codifier. C'est pour cette raison que l'Assemblée Générale a créé la Commission Spéciale de 1964 (Résolution 1.966 – XVIII, du 16 décembre 1963).

À partir de 1966 jusqu'en 1969, la Commission Spéciale s'est réunie annuellement[6]. Les rapports présentés par la Commission révélaient une discordance quant à la signification des principes, spécialement en quoi consisterait le recours à la force[7]. A la fin des débats, l'Assemblée Général a adopté la Déclaration retenant les principes suivants : a) principe selon lequel les États doivent éviter dans

progrès. (Traduction de l'auteure).

New York, du 8 mars au 25 avril 1966 ; Genève, du 17 juillet au 19 août 1967 ; New York, du 9 au 30 septembre 1968 ; New York, du 18 août au 19 septembre 1969 (présentant les rapports respectifs à l'Assemblée Générale – A/6.230, A/6.799, A/7.326 et A/7.619).

Les rapports de la Commission Spéciale de 1964 n'ont pas été trouvés sur le site officiel de l'ONU. Ce n'est que par le biais de *Netherlands School of Human Rights Research* qu'il a été possible d'accéder aux textes originaux. Disponible sur : http://invisiblecollege.weblog.leidenuniv.nl/2010/03/03/special-committee-on-principles-of-inter. Accès le 26/07/2012. progressif et la codification des concepts d'où dérive chaque principe de base de cette Charte. L'Assemblée se rappelle sans doute que, quand nous avons entrepris ces efforts, beaucoup ont douté qu'il serait possible d'obtenir un résultat acceptable aux divers systèmes politiques, économiques et sociaux représentés aux Nations Unies. Aujourd'hui, ces doutes ont été surmontés. En un certain sens, cependant, le travail ne fait que commencer. Nous avons proclamé les principes ; dès maintenant, nous devons redoubler d'efforts pour les transformer en réalité vivante dans les États, car ces principes sont au coeur de la paix, de la justice et du progrès. (Traduction de l'auteure).

6 New York, du 8 mars au 25 avril 1966 ; Genève, du 17 juillet au 19 août 1967 ; New York, du 9 au 30 septembre 1968 ; New York, du 18 août au 19 septembre 1969 (présentant les rapports respectifs à l'Assemblée Générale – A/6.230, A/6.799, A/7.326 et A/7.619).

7 Les rapports de la Commission Spéciale de 1964 n'ont pas été trouvés sur le site officiel de l'ONU. Ce n'est que par le biais de *Netherlands School of Human Rights Research* qu'il a été possible d'accéder aux textes originaux. Disponible sur : http://invisiblecollege.weblog.leidenuniv.nl/2010/03/03/special-committee-on-principles-of-inter. Accès le 26/07/2014.

leurs relations internationales le recours à la force contre l'intégrité territoriale ou l'indépendance politique de n'importe quel État ou de n'importe quelle manière incompatible avec les intentions des Nations Unies ; b) principe selon lequel les États doivent résoudre leurs disputes internationales par des moyens pacifiques, de telle forme que la paix, la sécurité et la justice ne se trouvent pas en péril ; c) devoir de non-intervention dans des affaires de juridiction domestique de n'importe quel État, selon la Charte des Nations Unies ; d) devoir de coopération mutuelle entre États ; e) principe d'égalité de droits et d'auto-détermination des peuples ; f) principe d'égalité de souveraineté des États ; et g) principe selon lequel les États doivent remplir de bonne foi leurs obligations assumées conformément à la Charte des Nations Unies, et aussi assurer leur plus grande effectivité dans la société internationale afin de réaliser les intentions des Nations Unies.

La prévalence des droits humains est un principe constitutionnel, internalisé après intense mouvement international en faveur de la déclaration de principes de base susceptibles de guider les États dans leurs relations internationales. La compréhension du principe de prévalence des droits humains passe par deux niveaux importants. Ces degrés de perception normative se révèlent dans deux questions principales. D'abord, qu'est-ce qui doit prévaloir ? La réponse à cette interrogation se trouve facilement dans la structure du principe lui-même. Elle est évidente dans les lectures les moins prétentieuses – prévalence *des droits humains*. Ici, la commande normative est entière, perçue comme un tout, synthétiquement analysé. Ce sont les droits humains qui devront prévaloir. Telle est l'exigence normative.

Les droits humains forment un univers complexe d'idées et, en même temps, ils composent, dans une vision plus holistique[8], la

8 Le mot *holon* est d'origine grecque (ὅλον) e a été employé pour la première fois par le philosophe Arthur Koestler dans *The Ghost in the Machine*. Le concept a été bien expliqué par Yves Bouchard dans la note 2 de bas de page du livre *Le Holisme épistémologique de Kant* : Parmi les représentants de la thèse réductionniste, on compte entre autres Russel et le Wittgenstein du*Tractatus*, et parmi les représentants de la thèse holiste, Quine (holisme épistémologique) et Davidson (holisme sémantique) en particulier. Cette opposition est également fréquente dans d'autres disciplines. D'un point de vue sociologique, une société d'individus ne se réduit pas au seul nombre d'individus qui la composent. La société possède une dynamique propre dont on ne peut rendre compte par la seule énumération des individus qui en font partie. Par ailleurs, ce n'est pas non plus en regroupant spontanément un certain nombre d'individus que par là on forme une société. En génétique, l'étude des systèmes adaptatifs complexes repose en bonne partie sur cette conception d'un système comme un tout, c'est-à-dire que le système lui-même possède des propriétés exclusives que l'on ne saurait rencontrer ni dans les éléments, ni dans leur simple conjonction. A. Koestler a donné le nom de *Holon* (du grec ὅλον) à cette forme particulière d'unité. (BOUCHARD, [S.d.], p. 13).

direction de l'ordre de prévalence de la primauté des droits humains. Ainsi, enquêter sur le concept de primauté des droits humains c'est, en même temps, se positionner sur les droits humains qui vont prévaloir. Il convient de souligner que la signification et l'éclaircissement des droits humains renforcent l'idée de la nécessité d'une dialectique plus démocratique, ou, en d'autres termes, selon Karl Raimund Popper (1998, p. 19), renforcent la construction d'une méthode scientifique ayant des prémisses qui n'aient pas l'intention d'être des vérités absolues, substitut de la certitude scientifique par le progrés scientifique.

Selon les concepts abordés dans cette recherche, la réponse à la question posée antérieurement se révèle graduelle au fur et à mesure que certaines garanties retombent sur les droits humains. Il y a des droits humains reconnus dans le droit international, des droits humains reconnus et intangibles, des droits humains reconnus, intangibles et communs du noyau dur et, au degré de primauté le plus élevé, des droits humains de *ius cogens*. Dans ce sens, la primauté rend l'instrumentalité des droits humains. Soutenir des normes protectrices de la personne humaine qui seront toujours au-dessus des entraves formalistes et des gouvernements qui ne respectent pas ou qui ne ratifient même pas les traités internationaux sur les droits humains, cela signifie stimuler le processus de renforcement du droit international des droits humains. Il s'agit d'échanger la recherche des vérités scientifiques contre une dialectique plus ouvertes aux critiques. Il est indispensable de souligner que le cadre idéal à cette activité d'étoffement constant du *ius cogens* est la démocratie. Dans celle-ci, les préceptes seraient analysés et construits par tous les sujets – collaborateurs des valeurs démocratiques –, ciblant la nécessité de rendre compatibles les contenus avec la protection de la personne humaine.

Il incombe à la prévalence des droits humains, en tant que norme de *ius cogens*, d'impulser la construction du noyau dur des droits et, conséquemment, l'idée des droits humains communs. La reconnaissance de la personne juridique internationale de la personne humaine, centralisée par la force première des droits humains, doit se sédimenter dans l'ordre international afin de démontrer le retard des positionnements qui empêchent encore la participation entière de l'être humain dans la société internationale. C'est de la personnalité de DIP de la personne humaine que découle la nécessité de réformer les règles processives internationales qui, dans la pratique, se révèlent contradictoires dans leur participation en qualité de sujet.

3. LA FORCE IMPERATIVE DE LA PREVALENCE DES DROITS NUMAINS ET LE RETOUR DE LA PERSONNE HUMAINE AU CENTRE DU DROIT INTERNATIONAL : D'OBJET A SUJET DE DIP

La vision marquée par la souveraineté absolue des États demeure encore forte dans certains champs du droit international (spécialement dans la création de normes juridiques internationales, telle que la formation d'accords et de postulats dans les tribunaux internationaux). La souveraineté absolue s'unit à l'image d'un État absolu, hautain et étranger à l'existence de sujets n'assumant pas la forme d'un État. Cette image est incompatible avec la position remarquable des Organisations internationales, ainsi qu'avec l'action importante de la personne humaine dans les espaces internationaux.

La personnalité de DIP des Organisations internationales a entamé sa sédimentation à partir des positionnements du Tribunal International de Justice concernant les réparations pour dommages dans l'affaire de l'assassinat du comte Folke Bernadotte, premier médiateur des Nations Unies en palestine, le 17 septembre 1948. On s'est demandé si l'ONU était détentrice de personnalité pour demander réparations pour l'assassinat du diplomate suédois. La position de M. Felleb s'exprime dans le discours incisif de la cour concernant la personnalité des Nations Unies :

> *[...] comme il a été démontré, la personnalité internationale des Nations Unies est fermement établie dans le droit international, non seulement dans les préceptes de la Charte comme un tout, mais aussi dans la pratique des États, membres et non membres. Je dois à présent démontrer que cette personnalité porte en elle-même la capacité nécessaire à l'accomplissement de ses intentions et l'exercice de ses fonctions du point de vue procédural*[9].

Un autre sujet dont la personnalité se renforce dans la phase du droit international post-Seconde Guerre Mondiale est la personne humaine. José Roberto Franco da Fonseca analyse la géopolitique et le droit international et soutient que les États ont de plus en plus besoin d'établir des relations avec les gens, sous une perspective physique ou juridique. Franco da Fonseca identifie le rapport de l'État avec les étrangers qui entrent dans son territoire, avec les étrangers

9 [...] as we have just shown, the international personality of the United Nations is firmly established in international law, not only by the Charter provisions as a whole, but also by State practice on the part of those Member and non-member States. I should now like to demonstrate that this personality carries with it the capacity necessary for the fulfilment of its purposes and the exercice of its functions from a procedural standpoint. Statiment by Mr. Felleb (United Nations) p. 74-7, III, 1949. Disponible sur : http://www.icj-cij.org/search/index.php?pg=1&p2=2&op=0&str=+Conde+Folke+&1g=0&op=0. Accès le 22/01/2014.

représentants d'États, avec des nationaux qui se rendent dans d'autres États, ainsi que la relation de l'État avec ses habitants et la relation de la société internationale d'États avec les personnes, devant l'imputation de devoirs envers elles (crimes internationaux ou crimes de caractère international) (1996, p. 319-320). D'objet à sujet, la personne humaine cesse de participer indirectement à la société internationale et devient destinataire de droits et de devoirs de DIP.

En 1949, Câmara Filho n'écartait pas la possibilité de reconnaissance de la personnalité internationale de la personne humaine. L'auteur argumentait que les personnes ne se verraient « en situation d'apparaître comme sujets de droit international, directement obligés ou autorisés par la norme, que lorsqu'existeraient des cours internationales devant lesquelles ils pourraient paraître comme plaignants (1949, p. 102). Sous cette perspective, il serait déjà possible de voir la personne humaine comme sujet de DIP dès 1907, quand a été créée la Cour de Justice Centre-Américaine. La CJCA, dont le fonctionnement a commencé en 1908, a été créée dans un contexte d'instabilité des relations des pays d'Amérique Centrale, en raison de la forte intervention de puissances extra-régionales. La célèbre Doctrine Monroe, dans la pratique, a représenté les efforts déployés par les États-Unis pour subjuguer les États d'Amérique Centrale en faveur des intérêts américains, l'un d'eux étant la construction d'un canal inter-océanique dans la région.

Au cours des Conférences de Washington, les États d'Amérique Centrale ont signé le Traité Général de Paix et Amitié, la Convention Additionnelle au Traité Général, la Convention qui créaient la Cour de Justice Centre-Américaine et autres six accords. Selon SORTO, la CJCA a été le premier organisme doté d'une juridiction aussi large que la juridiction des tribunaux domestiques, contrairement à la Cour Internationale de Justice de La Haye (CIJ), dont la compétence est limitée par la volonté des États (SORTO, 1999, p. 293). La CJCA constituait une grande avancée dans la perception de la personne humaine en tant que sujet de droit international parce qu'elle permettait, selon sa compétence, des requêtes de citoyens d'Amérique Centrale contre les gouvernements des États-parties, face à l'épuisement des instances internes ou aux dénégations de justice par le gouvernement requis. Il incombait également à cette Cour de juger les requêtes non résolues par les chancelleries des États intéressés. Bien que l'existence de la Cour de Justice Centre-Américaine ait été plutôt brève, la requête en jugement du nicaraguayen Alejandro Bermúdez Núñez contre le Costa-Rica est allée jusqu'au bout. Sans aucun doute, la CJCA a été pionnière en donnant un accès juridictionnel à la personne humaine.

La centralité de la personne humaine dans l'ordre international, consubstancielle à l'attribution de personnalité juridique de DIP,

a été analysée par SORTO dans sa recherche sur la condition de la personne humaine dans le Projet de Code de Droit International Public d'Epitácio Pessoa, élaboré en 1911. Pour Sorto, l'auteur du projet s'est aligné sur la perception classique de la position des États en tant qu'uniques sujets de droit international, laissant de côté des avancées déjà perçues à l'époque. En 1911, année de l'élaboration du projet, la Cour de Justice Centre-Américaine était déjà opérante (1907-1918) et sa jurisprudence reconnaissait la personne humaine en tant que sujet de droit international, lui permettant de figurer comme partie dans les actions. Actions qu'elle pourrait traduire en justice contre l'État de sa nationalité (SORTO, 2013, p. 145-146).

Une autre avancée est constituée par les contributions de doctrinaires tel que Pasquale Fiore, lequel considérait sujet de droit international tout être ou institution ayant une individualité créée de son propre droit et agissant dans le monde (FIORE *apud* SORTO, 2013, p. 141-142). D'autres auteurs s'alignent sur Fiore et Sorto, tels Alejandro Álvarez, Hildebrando Accioly, Haroldo Valladão et Cançado Trindade. L'État ne doit pas être compris comme étant une fin en soi-même, mais comme une structure créée par des personnes, dont l'existence n'est légitimée que dans la recherche de leur protection. La personne humaine ne peut donc être soumise à la volonté de l'État, pas plus que le droit international ne peut être fondé uniquement sur la volonté des États. Pour Francisco de Vitoria, l'un des fondateurs du droit international, dans son ouvrage *De Indis* (chapître VI et VII), le droit international régule une société internationale composée d'êtres humains organisés socialement en États. De plus, les réparations des violations aux droits humains caractérisent une nécessité internationale atteinte par le droit international avec les mêmes principes de justice appliqués aussi bien aux États qu'aux personnes. Le droit des gens est un droit pour tous, personnes et États (VITORIA *apud* TRINDADE, 2014, p. 253).

L'action de la personne humaine est indispensable à la concrétisation des droits humains parce qu'elle configure l'essence du concept commun de droits humains, développé au cours de cette recherche. La création de tribunaux internationaux marque bien cette transformation. Outre l'expérience de la Cour de Justice Centre-Américaine pour ce qui est de la participation de la personne humaine, il est possible actuellement de mentionner la Cour Européenne de Droits Humains, la Cour Interaméricaine de Droits Humains et le Tribunal Pénal International. Chacun représente, avec sa systématique propre, un espace d'action de la personne humaine dans l'ordre international, que ce soit en qualité de requérant (Cour Européenne de Droits Humains et – indirectement – la Cour Interaméricaine de Droits Humains) ou en qualité inverse (Tribunal Pénal International, dans les cas de crimes contre l'humanité, crimes de guerres et génocide). Il convient d'ajouter

encore la pratique récente du Conseil de Sécurité, reconnue par la Cour Internationale de Justice, de créer des obligations à des entités n'étant pas d'État, y compris des individus (PARLETT, 2010, p. 298), ainsi que le Protocole Facultatif du Pacte de Droits Civils et Politiques qui rend viable, moyennant le consentement de l'État soumis à requête, l'accès de la personne humaine victime de violations de droits humains à la Cour Internationale de Justice.

La personnalité juridique nationale et celle qui est internationale sont des attributs de l'être humain, car le droit international se base sur la prévalence des droits humains et, conséquemment, s'appuie sur la centralité de la personne humaine. Les droits humains communs, la primauté des droits humains et toutes les autres normes de *ius cogens* outrepassent la figure des États et se lancent directement dans l'action et dans la protection des personnes. Si des arguments contre la personnalité internationale de la personne humaine trouvent encore quelque appui c'est parce qu'il existe encore un attachement rétrograde à la souveraineté absolue des États. La pratique ne chemine pas en synchronie avec la protection de la personne humaine des droits humains. Cela exige une recherche du niveau de participation de la personne humaine dans les tribunaux de droits humains en vigueur, sous la perspective critique de la prévalence des droits humains.

4. CONCLUSION

Les discours purement rhétorique par les États ne seront retranchés des relations internationales, comme le prouve lorsque la participation de l'individu dans ces relations est le fait efficace. En fin de compte, il y a encore de nombreux obstacles à des préjugés politiques et juridiques. Par conséquent, le principe de la prévalence des droits de l'homme est apparue comme une véritable ligne directrice du comportement de l'État, que ce soit au niveau international, que ce soit en interne. En raison du principe de la prévalence des droits de l'homme sont nés en droit international, ce qui lui donne le statut de primate norme sur le droit interne, comme le montre.

La primauté du droit international sur le droit national résulte de la force obligatoire des normes créées par les sujets DIP dans la société internationale. Cependant, la nature juridique de ce principe était au-delà des règles « typiques » du droit international, on a vu que sa pertinence normatif axé sur les besoins historiques et sociaux pour protéger les droits de l'homme soulevées à la catégorie des jus cogens. Il a été démontré que la force probante signifie l'imposition au-delà de la volonté des Etats comme le manque d'intérêt des États à l'égard des droits de l'homme reste visible à travers les nombreuses condamnations dans les tribunaux internationaux des droits, sans parler des plaintes

aux organes compétents.

Ce manque d'intérêt a également été noté dans le domaine des normes de jus cogens parce que même si elles ont été créées en tant que catégories, il n'y avait pas d'avance législative au contenu de l'accomplissement. Soit dit en passant, le thème est encore très délicate, même quand il a parlé de remplissage jurisprudentielle des tribunaux internationaux. Selon ce qui a été dit, le ius cogens existe pour répondre aux intérêts supérieurs de la société internationale, et non pas les intérêts des Etats, alors l'existence valide des obligations erga omnes DIP. Le fait que les législateurs et les juges internationaux demeurent quant à savoir si cette catégorie normes si particulières, légitimant davantage le rôle de la doctrine de pointer les normes qui composent le jus cogens. Cela a été fait ici.

La nature convaincante de la primauté des droits de l'homme a conduit au domaine controversé sur l'étendue des droits de l'homme, parce que si le point tente de mettre en cause la légitimité même des droits de l'homme. On a remarqué que le relativisme plutôt affaibli l'idée de l'universalité des droits de l'homme, parce que dans les États ou les groupes sociaux de refuser de mettre en œuvre des droits de l'homme au motif que ces dispositions font mal ses traditions, la culture, etc. Cependant, on a constaté qu'il n'y a pas d'arguments découlant des aspects relativistes justifiant l'évincement de certains droits individuels.

Alors que certains ont fait des droits sacrés que les barrières universelles à sa trouvaille longueur, on a vu que les droits subjectifs capables de former un noyau de droits de l'homme commun à tous. La commune correspond donc à l'espace dans lequel tous sont ou souhaitent faire partie, l'espace est divisé entre eux et où tout le monde participe. Voici le lien à l'action politique. Ainsi, la commune est déduite ne peut légitimer progressivement à partir des noyaux plus simples (famille, locale) au plus complexe (international), déférent universel qui a l'extension comme son teint.

Par conséquent, il est conclu que le noyau des droits de l'homme a été construit par les principaux traités de droit international qui forment les soi-disant systèmes internationaux de protection de la personne humaine. Il est très élevé, car l'obtention du diplôme traditionnellement considérés comme domestiques dépassé les frontières de l'État et des sujets atteints lorsque relatif à la protection des êtres humains. Il est devenu clair que la création de ce besoin impérieux d'une plus grande participation de l'individu dans l'ordre international, il est « né à la politique étrangère. » Tous les arguments et les règles qui ont été présentés comme des obstacles à ces actions des êtres humains étaient simplement des outils de l'Etat.

Il ne serait pas raisonnable de croire que les actes de l'État toujours signifierait la réalisation du contenu essentiel de la personne

humaine. Ainsi, selon le durable, le principe de la primauté revient l'instrumentalité des droits de l'homme, a défendu l'existence de normes de protection de la personne humaine qui sont toujours au-dessus des barrières formalistes et les gouvernements, comme on le voit, violent ou non à défaut de ratifier et d'adhérer aux traités relatifs aux droits de l'homme.

L'assimilation négative de certains groupes de droits de l'homme universels n'a pas le même sens de l'assimilation négative des droits de l'homme ordinaire. Dans le premier cas, il la question présentée par le rapport correspondant à l'abstraction simple. L'analyse du second cas a exigé une plus grande prudence. assimilation des non-droits de l'homme commun signifiait la négation de la possibilité de la vie humaine socialement partagée. Le déni de l'humanité elle-même est la force essentiel dans les crimes de masse. Le discours des conséquences de ne pas l'assimilation aux droits de l'homme commun pourrait être perçu dans diverses situations de violence qui ont dans le texte. Le principe de la primauté des droits de l'homme est contraire aux privilèges, parce qu'ils nient essentiels à la construction et à la reconnaissance de cette égalité de règle. De sorte que, par l'action politique, sont réunis les droits communs à tous est nécessaire que ceux qui agissent sur le plan politique sont sur un pied d'égalité. On a vu qu'il est possible que de faire de la politique dans la zone commune, à savoir où il y a égalité. De même, que si elle est libre dans l'espace qui agit sur le plan politique.

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THE INTERNATIONAL INVESTMENT AGREEMENT NOWADAYS: FROM THE CONSENT TO ITS SOCIAL FUNCTION AS A GUARANTOR OF THE INTERESTS OF CITIZENS[1]

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Abstract: At the center of a globalized world and under intense transnational financial circulation, there is the foreign investment. In this sense, investigating the realization of the social and economic functions of the Foreign Investment Agreement is an insurmountable necessity for understanding its effects on the citizenship rights. Therefore, it was discussed the rapid and multiple transformations that the International Investment Law has been supporting over time and the direct reflection on the formation of the Foreign Investment Contracts that, nowadays, require complex answers to the achievement of legal security.

Keywords: International investment agreement - Economical function. Social function - Development - Citizenship.

1 Translated by Paula de Oliveira Henriques

1. INTRODUCTION

In the contemporary world, the deeply globalized world presents the intense transnational financial flow, also, as an opportunity for the development of societies around the globe. However, the circulation of capital per se is not favorable to the people - almost all of the time. This is because the international financial flow is fundamental to the development of economically vulnerable societies in the current economic-productive model, but is only able to achieve this when there is effective citizen control over the circulation of capital.

From this, it is possible to infer that capitalism essentially needs constant commercial expansion for its existence based on maximizing profitability and accumulation, and on the other hand, civil society can, through the equipping of global governance bodies, enhance its control over the international financial flow in defense of its developmental interests. Thus, in order to better understand the conflicting relation between invested capital and the concrete development of receiving states, the international investment contract exits as a natural object of scientific approach, as it is a mandatory legal instrument in investment relations between sovereign States and foreign investors.

In this section, an attempt is made to understand the international investment agreement at the present time through the hermeneutical approach of its social and economic functions. It is clear that the international agreement, particularly that of investment, has undergone numerous transformations since its inception - after all, it is representative of extremely conflicting, complex and stressed from global political and economic transformations cross-border relations, - and therefore requires thorough understanding. Thus, it is possible to see the shift in the genesis of the international ageement, which legal security was modernly based on the traditional civilist conceptions of reciprocal obligations and which, at the same time, finds legal stability that is fundamental to it, precisely, in the legitimacy granted only by citizen participation in the business of the sovereign states to legal transactions involving foreign capital. For no other reason, it is necessary to investigate whether, in fact, the international investment agreement provides spaces of struggle - always considering the emancipatory potential of the Law to Citizenship in order to allow the attainment of development as a fundamental human right.

In this sense is that a scientific incursion is made on the investment contract at the present time, delimiting its training center, its economic and social effects, as well as its reflections on citizenship

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2.THE INTERNATIONAL INVESTMENT CONTRACT: FROM THE CLASSIC TO THE CONTEMPORARY

Undoubtedly, the practical issues related to foreign investment[2] are quite complex, as they require the application of law in relations that necessarily involve different legal systems. It is not forgotten, moreover, that, since the Second World War, the world, through the deepening of globalization[3], has in fact experienced a new economy in which business has been internationalized, companies have extrapolated national borders and countries from the periphery of the epicenter of global capitalist make constant and significant efforts to access global trade as exporters. It is in this context that States and companies have been forced into international cooperation.

In the search for providing security for international trade, the international contract emerged[4] as an "engine of international trade", conferring "juridicity on the economic operations that underlie it", allowing "the formalization of the promises made between the parties, reducing the uncertainties, the risks and costs of the business "(JÚNIOR, 2006, p. 2). The international contract is, therefore, in globalized relations, the legal guarantee that the rights deriving from the established pacts can be fully exercised by the parties involved in economic business of the most varied, including those of foreign investment. Nevertheless, as inherent in Law, the search for legal certainty - embodied in predictability and certainty - is what defines and orders the relationships and decisions of economic agents in the global Market (TRINDADE, 2007, p. 12-31).

In this sense, it must be said that the concept of foreign investment, such as International Investment Law itself, is subject to transformations, over time, due to the pressure exerted by global economic relations in particular; and that the international investment

2 In most of the international agreements signed in the field of investment, despite the very broad definitions, foreign investment refers to all types of assets - in a non-exhaustive role - that include direct and indirect investments. For UNCTAD, the difference between one and the other lies in the degree of control in the management of investment in another economy that direct investment implies. (JUNIOR, 2014, pp. 13-43).

3 It should be noted that globalization is understood in this work as a complex and unfinished phenomenon, translated by the "intensification of transnational interactions, be they interstate practices, global capitalist practices or transnational social and cultural practices" (SANTOS, 2002, p.).

4 Only from the nineteenth century can one speak of ... foreign investments" because, in the previous period, investments took place in "colonial territories" and "were subject to metropolitan legal regimes, export of assets "(COSTA, 2012, page 28).

agreement is, at the present time, significantly more complex than the classically known.

Regarding foreign investment, it is well known that the scope of the protection promoted by Investment Law has been greatly expanded since the nineteenth century. While, at the time, foreign investment was heavily used in the development of public infrastructure and the exploitation of natural resources, since the Second World War - for the reasons previously mentioned - there was a deep diversification of foreign investment that, in addition to the traditional loans, started to finance the implementation of industries and service providers.

Moreover, in view of its primary role - as indicated above -, the international investment agreement was classically constructed with the objective of legal protection of the foreign investor, as well as of the investment made, without much concern for the guarantees of the host State. This contractual conception is embodied in the ideal that national state law confers a higher level of protection to the receiving State than to the foreign investor.

> *"Highly vulnerable to interference by the host State, whether through nationalization or expropriation measures, or through restrictions on the repatriation of investor profits, tax increases or other legislative changes" (VICENTE apud BAPTISTA; RIBEIRO, 2014, p. 816).*

Under this assertion, the investor - vis-à-vis the host States - would be quite vulnerable in international transactions, remaining unprotected and susceptible to sovereignty.

Therefore, it was materialized the international investment agreement, aiming at protecting the resources invested against confiscation and expropriation. In addition, legal engineering has always worked to internationalize economic stability in the execution of foreign investment contracts, protecting the purpose pursued by investors: the profitability of the invested capital.

However, it is true that reality is capable of demonstrating that the aforementioned asymmetry between investor and host state has in fact been oversized in the interests of globalized capital. After all, although undoubtedly foreign investment may to some degree slip in the political-institutional power of the states, it is notorious that countries today are vulnerable to the various economic pressures of the global financial market.[5]. Developing nations, under impoverishment penalties, are

5 In this sense, "at the same time, the relevance of the figure of the state is actually diminished and settled is that these are not the only subjects of international law" (VASCONCELOS, 2016, p. 61). Sobre o tema: VASCONCELOS, Raphael Carvalho de. **Teoria do Estado e a Unidade**

embedded in a complex network of international investments, attentive to market patterns, otherwise they will not participate in the international community that is so essential, in the current economic-political model, to the survival of States (CASTRO, 2014, p. 102). As evidence of this, very commonly, investment agreements stablish, through its clauses, "access to a dispute settlement system outside the framework of the host State" (CASTRO, 2014, p. 108), forcing the countries that are recipients of foreign investment to fully subscribe to the economy of the agreements, to risk jeopardizing their credibility with the global market - which would difficult new and essential investments.

The investment agreement, from its classic conception to the most contemporary one, is an indispensable tool to reduce the uncertainties involved in international transactions - improving long-term contracts, as well as the circulation of capital -, protecting investments.

However, the distinguishing note of the contemporary foreign investment agreement is precisely the focus on the current institutional environment, especially the political and social domains that conclude the contract. The fact is that security so persecuted by investors is not only economic - based on predictability of risk - but also legal. With the deep internationalization of contemporary societies, investment contracts have touched upon the most diverse spheres of social interest (HURREL, 2007: 222), thus revealing that investing in disregard for the interests of cosmopolitan citizenship is extremely unsafe.

For all of this, the risks inherent in any foreign investment agreement can be efficiently mitigated by reducing the unpredictability and incompleteness of such instruments. Therefore they must, inexorably, be built with due legal care not only respecting their economic function but, above all, their social function.

3. LEGAL SECURITY AND ECONOMIC FUNCTION.

In fact, it can not be denied that the obsession with international investment agreement is consonant with that of international law: to create and consolidate international regulatory systems "capable of enhancing international legal certainty", facilitating, by reducing political risks and costs international economic flows (COSTA, 2006, p.60). Such international regulation is expressive in the field of economic relations and is based on the protection and promotion of investment, usually through complex international regulatory systems which, although not specifically intended for foreign investment (such as the World Bank, the IMF and the WTO, for example) are technical or dispute settlement bodies designed to impose limits on the sovereignty

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of States in the economic execution of investment contracts.

Obviously, the classical conformation of the foreign investment agreement is not accidental, but, on the contrary, it assumes the guarantee of the economic effects expected by the investor on the aforementioned pact. In this sense, it is appropriate to affirm that the primary function of the investment agreement is to provide economically, with legal certainty, the underlying business with the receiving State.

For this reason, it should not be forgotten that investments are regulated, with a protective purpose, by international contracts - that is, by the Law of Investments -, however, they are economic in nature, related to the capital flow that inserts them in the process of maintenance of the capitalist system itself, based on constant expansion of currencies. Under this economic dimension, foreign investment takes place in the perspective of the resulting profit - confirming, in fact, the relevance of the economic function of the international investment agreement for the construction of legal instruments that are safe for the investor. In this sense, moreover, the Model Bilateral Investment Treaty elaborated by the United States pointed as a characteristic of international investments "*the commitment of capital or other resources*" related to the "*expectation of gain or profit*".

Undoubtedly, the relative[6] legal certainty established by the investment agreement, in view of its economic function, was, moreover, capable of overcoming the traditional barriers of international trade, favoring the internationalization of mass production, commercialization and financing of goods and services. The referred agreement allows the realization of foreign investment even in the face of the investor's fear of being involved in the complex litigation in which the receiving State is the contracting party and at the same time, regulatory authority[7]. For this reason, the investment agreement subjects the parties to very strict rules, especially, favoring the autonomy of the will.

Moreover, that since the nineteenth century, economic liberalism

6 There is a great demand for international investment regulations in order to make international contracts more flexible in order to increase legal certainty for investors, for example unilateral disruptions promoted by recipient states. In the same way, throughout the twentieth century, the construction of "an effective system of global order and law that allows international business to provide trustworthy legal instruments" (RIBEIRO, 2014, 128) has been demanded.

7 Here, it is necessary to consider, in addition to the Judiciary, the Legislative Branch, which can undoubtedly create legal norms that, because they are contrary to the interests of the foreign investor, may adversely affect the profitability of the investment made. For example, public policies for tobacco control that go head-on against the goals of the transnational tobacco industry. To know more about it, it is recommended: VEDOVATO, Luís Renato; VEDOVATO, Tatiana Giovanelli; SPERANDIO, Ana Maria Girotti. The role of international law in domestic legislation on tobacco control. Journal of Health Law. São Paulo, n. 3, v. 13, p. 150-175, Nov./ fev. 2013.

has been establishing an environment favorable to the acceptance on a global scale of the principle of autonomy of the will for the benefit of the economic order; that is, the argument is based on the economic efficiency of investment agreements.

For an adequate understanding of the economic function, founding of investment agreements, it is necessary to remember that the contracts are legal instruments that have gained the current contours from the economic theories of the eighteenth century that, by a series of historical[8] factors, defended freedom[9] as a universal panacea and the free movement of wealth as a social necessity. In this sense, the contract was traditionally constructed as an instrument of defense of freedom with a view to the movement of goods and that would carry, in a self-absorbed way, the belief of a natural equity capable of performing justice between the parties – *quid it contractuelle, dit juste* (MARQUES, 2014, p. 67).

Furthermore, it should be noted that the autonomy of the will is explained, precisely, by the theoretical construction carried out around the investment agreements so that its economic function executes the legal protection. The classical doctrine on the subject argues that, although not unlimited, the will of the parties - in international contracting - is widely accepted (STRENGER, 1998, p. 117) and should be able,, most of the times, to prevent the interference of the national judiciary in the manifest will in the instrument contracted between the receiving State and the foreign investor (ARAUJO, 2000, pp. 11-18).

Uncontroversially, autonomy of the will is a delicated issue for all parties involved in foreign investment transactions. After all, it is the space for the State to attempt to impose its sovereignty on contracting and, on the other hand, the foreign investor seeks to subject the contract to conditions that are less favorable to state intervention (DOLZER, Rudolf, Christoph, 2008, p. 80-82) – on the grounds that contractual balance must be achieved, since there would be a potential political risk in contracting involving sovereign States. In this context, it must be remembered, however, that the host States, in their participation in international business, contractually limit their sovereignty to guarantee the flow of investments without which they could not subsist in a globalized world.

In the practice of international contracting what is sought, finally, is the contractual security capable of guaranteeing the immutability of clauses with economic content, protecting the investment in order to allow the complete realization of its cycle, from the investment to the remuneration of contributed capital.

8 These economic theories arose as a response to corporatism and to the limitations imposed on bourgeois practices by the Catholic Church.

9 Here, it refers to the freedom that seeks to realize the individual interests of those who contract

Therefore, the legal framework perfected over time to support the ideal of the need to protect investment against the power of host States has remained consolidated in the foreign investment contract, built with privilege to the autonomy of the will, in order to grant legal certainty to the economic objective of foreign investors.

The contemporary contours, however, as will be seen below, challenge the legal security afforded by international investment agreement that are built exclusively with respect to their economic function.

4. THE ACTUALITY OF THE INVESTMENT CONTRACT AND ITS SOCIAL FUNCTION

The legal security, that is so essential to foreign investment, as already discussed in this paper, has been pursued through the economic function of international investment agreements. However, investment agreements - as complex as they may be – The legal security so essential to foreign investment, as already discussed in this paper, has been pursued through the economic function of international investment contracts. However, investment agreements - however complex they may be - have been challenged, first by the lack of definition of what the autonomy of the will is in each legal system and, second, by the globalization of trade and the development of a multicultural society that demands protection of the individual and his dignity and cultural identity (ROSADO, 2016, p. 359).

In view of the object of this research, however, it is only necessary to state - in addition to the discussion of the previous topic - that the meaning of private autonomy, intrinsically related to the economic function of the contracts, does not find correspondence in the diverse legal traditions existing around the globe and, on the contrary, it does not seem to move to a common denomination[10]. Thus, one suddenly sees the inability of the autonomy of the will, by itself, to guarantee robust legal security to international business:

> *y esto nada tiene de sorprendente, la diversidad de los significados posibles de este concepto – tan caro al derecho contractual de tradición occidental, pero tan extraño al de las demás tradiciones jurídicas – no es sino la expresión, en este dominio específico,*

10 To understand in detail and depth the different meanings of the concept of private autonomy in contemporary legal families in the light of Comparative Law, it is recommended to read: VICENTE, Dário Moura. *La autonomía privada y sus distintos significados a la luz del derecho comparado*. In: ARROYO, Diego P. Fernandez; RODRÍGUEZ, José Antonio Moreno. (Org.). **Contratos internacionales**. Buenos Aires: ASADIP, 2016.

> *de la inmensa diversidad de los derechos a través de las fronteras. Esta diversidad es, a su vez, una consecuencia inevitable de la naturaleza cultural del derecho (...) y de la intrínseca variabilidad de todas las manifestaciones de cultura humana (VICENTE, 2016, p. 81-82).*

It is to be recognized that, in today's pluralistic and fragmented world, protection of the rights of the people - in the context of foreign investment - demands far more sophisticated solutions than classically constructed formalists and conformists. If the investment agreement represents the legal security that is so necessary for international investment, it can not ignore the current scenario in which the financial market is inserted, always having to be attentive to the aspirations of the Citizenship - the ultimate recipient of the resources invested. For this, the international investment agreement must also be built with attention to its social function. The social function of the investment contract is certainly justified by the sociological bias, especially by the ideal of sociality[11], but also by its economic importance, since, as pointed out, it is indispensable to the effective security of investments in postmodernity[12].

Unsurpassed in the broad understanding of the social function of the contract is also to observe its historical construction that occurred from the idea of limitation to the exercise of property rights.

Since St. Thomas Aquinas, the ideal about the existence of a social function, besides the economic one, has been theorized - although not under such denomination. The aforementioned Catholic philosopher, when questioning the legitimacy of someone possessing a property exclusively ("*whether it is lawful for a man to possess a thing as his own?*"), defended the ideal that all goods, although appropriated individually, have a common destiny that must be observed [13] (AQUINO,

11 It is the social duty of common responsibility that authorizes the relativization of subjective rights with the use of the principle of social function in private relations (RAISER, Ludwig apud GEHLEN, 2004, p.179).

12 Postmodernity is strongly marked by the crisis of mistrust in law, its instruments and institutions (including the contract), which favors the increase of litigation, with direct effects on private law (MARQUES, 2014, p.185).

13 It is not the object of this research, however, that the proper understanding of the division between the incipient concepts of ownership and use (use) that St. Thomas Aquinas proposes in his classical work favors the analysis of his ideal of social function. Like this: "*I answer that, two things are competent to man in respect of exterior things. One is the power to procure and dispense them, and in this regard it is lawful for man to possess property. Moreover this is necessary to human life for three reasons. First because every man is more careful to procure what is for himself alone than that which is common to many or to all: since each one would shirk the labor and leave to another that which concerns the community, as happens where*

1947, p. 3345-3348).

However, it was in the nineteenth century that the ideals about social function found the necessary conditions for its theoretical development: supported by rationalist thinking and economic liberalism, the Industrial Revolution provoked profound social changes, privileging legal institutes built under the premise of unlimited[14] freedom, embodied in bourgeois needs, advocated formal equality between contractors. To this end, it was suggested that, because they were endowed with reason, all people would be fully capable of, rationally, deliberating contractually. In this sense, Kant prescribes: "in man, law has ... the form of imperative, because, as a rational being, a pure will can be assumed in it" (KANT, 1959, 68). However, in practice, the belief in maximum contractual freedom has brought serious consequences to coexistence in society.

Initially, the working class - victimized by unimaginable[15] abuses in the labor relationship, all under the aegis of free contractualism and abuse of property rights - reacted by advocating the destruction of the ruling class and the appropriation of the means of production; the social convulsion, then, provoked a search for the conciliation between the capitalist interests and those of the workers.

As an exponent of this conciliatory countermovement, there is the encyclical *Rerum Novarum* written by Pope Leo XIII in 1891. Although the papal text does not contain any mention of the social function proper and, in addition, point to socialism as a radical and harmful thought - including recommending to workers, subservience to employers - (LION XIII, 1891), the encyclical imputed to the capitalists, based on the dignity of the human person, the duty to improve the working conditions of the workers:

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there is a great number of servants. Secondly, because human affairs are conducted in more orderly fashion if each man is charged with taking care of some particular thing himself, whereas there would be confusion if everyone had to look after any one thing indeterminately. Thirdly, because a more peaceful state is ensured to man if each one is contented with his own. Hence it is to be observed that quarrels arise more frequently where there is no division of the things possessed. The second thing that is competent to man with regard to external things is their use. In this respect man ought to possess external things, not as his own, but as common, so that, to wit, he is ready to communicate them to others in their need. Hence the Apostle says (1 Tim. 6:17, 18): "Charge the rich of this world . . . to give easily, to communicate to others" etc." (AQUINO, 1947, p. 3347-3348).

14 According to Adam Smith at the time, freedom is the foundation of economic organization. Therefore, the market must be allowed to self-regulate, nationally and internationally, through its invisible hand (Smith, 1996, pp. 435-452).

15 As Huberman described in his book The History of Man's Wealth: "It is a new era in history that active and prosperous commerce is an index not of improving the situation of the working classes, but of their poverty and degradation" (GASKELL apud HUBERMAN, 1936, p.183) and working children aged 7 years and over (HUBERMAN, 1936, p.185).

> *as for the rich and the bosses, should not treat the worker as a slave, but should respect the dignity of man. (...) It is shameful and inhuman to use men as instruments of profit, and to esteem them only in proportion to the strength of their arms. Christianity (...) also forbids employers to impose on their subordinates a job superior to their forces or in disharmony with their age or gender (LION XIII, 1891).*

The content of the encyclical, it must be pointed out, was reaffirmed by Pope Pius XI through the encyclical *Quadragesimo Anno* which, in the text of Leo XIII, taught that the encyclical *Rerum Novarum* was "against the false theories of human freedom" and offered "to all mankind very sure rules for the good solution of the thorny problem of the human consortium, the so-called Social Question, precisely when it was most opportune and necessary." In particular, Pius XI stated that the preceding encyclical

> *although work (...) is not a mere commercial genre, but the human dignity of the worker must be recognized in it, and it can not be exchanged like any commodity, in fact today in the labor market supply and demand share the contractors in two opposing classes or camps, who fiercely oppose each other (PIO XI, 1931)*

And, for the same purpose,he affirmed:

> *violates the right order, when capital enslaves the workers or the proletarian class with the purpose and condition that business and all economic progress are in their hands and revert to their advantage, despising the human dignity of the workers, the social function of economy and social justice itself and the common good (PIO XI, 1931).*

Subsequently, Karl Renner broached the subject and advanced deeply in the conceptualization of the phenomenon. Under the strong influence of Marxist thought, he defined the social function as the reflection of the purpose of a legal institute in economics (RENNER 1981: 49). In addition, it should be pointed out that the Constitution of Weimar[16], of which he participated as a constituent, further elaborated

16 In the original, article 153 of the German Constitution of 1919 established: *das Eigentum wird von der Verfassung gewährleistet. Sein Inhalt und seine Schranken ergeben sich aus*

this definition and provided that property - guaranteed, defined and limited by the constitution - obliges everyone and that its use must constitute a service for the common good (GERMANY, 1919).

This means that it is possible to distinguish the social function of property in two senses: the first as a purpose (or a role) indicative that every legal institute corresponds to an economic image and, te second, that the exercise of a right does not is dissociated from existing in society and, for this reason, more than compensating socially for the exercise of property, a social service must be provided as the right is exercised.

From all that is pointed out, it is not difficult to verify that the conceptual evolution of the social function took place from the property right. In this respect, the indiscriminate use of property has proved to be so damaging, historically, that its exercise had to be mitigated in the name of sociality so essential to human existence.

It was from the consolidation of the institute of the social function of the property that the social function of the contract was constructed as a limitation to the contractual freedom and, in addition, as a tool of socialization of the advantages or compensation of the damages deriving from the effects of contracting. This aspect is very relevant to this research, because the externalities of international investment agreements are subject to all nationals of the host State.

In this section, the foreign investor will only find legal certainty when they observe – in the construction of the investment agreement - the one that is not considered more efficient cause of the right, but rather a final reason: Citizenship (CLAUDIA, 2014, 214). By unprotecting people from the host State, one is deprotecting the invested capital itself, after all, contrary to Classical International Law, which is based on the supposed axiological neutrality from a very liberal position, at the present time, human rights, although not consolidated, are fundamental to the stabilization of social expectations and, intrinsically, to the execution of international investment agreements (SILVA, 2016, p. 116).

It has been demonstrated that the social function is *conditio sine qua n*on for the effective realization of legal security in the international investment business, since it is the host State, through its civil society, that will guarantee the fulfillment of the contracts, define the social

den Gesetzen. Eine Enteignung kann nur zum Wohle der Allgemeinheit und auf gesetzlicher Grundlage vorgenommen werden. Sie erfolgt gegen angemessene Entschädigung soweit nicht ein Reichsgesetz etwas anderes bestimmt. Wegen der Höhe der Entschädigung ist im Streitfalle der Rechtsweg bei den ordentlichen Gerichten offen zu halten, soweit Reichsgesetze nichts anderes bestimmen. Enteignung durch das Reich gegenüber Ländern, Gemeinden und gemeinnützigen Verbänden kann nur gegen Entschädigung erfolgen. Eigentum verpflichtet. Sein Gebrauch soll zugleich Dienst sein für das Gemeine Beste (GERMANY, 1919).

division of labor and will provide the necessary predictability to the economic agents (LEISTER, 2011, 279), it remains to determine the effects of the social function on the rights of Citizenship.

5. THE EFFECTS OF THE SOCIAL FUNCTION OF THE INTERNATIONAL INVESTMENT CONTRACT ON CITIZENSHIP RIGHTS

The new economy that has been conforming since the end of the 20th century is, in fact, global and networked; after all, the circulation of capital is organized on a global scale and through a network of connections between economic agents (CASTELLS, 2000, p. In this scenario, it is essential to understand the effects of the foreign investment agreement on Citizenship. However, not from the classic effects, but those that are expressed by the social function of contracts. This is because the States, with intense globalization, have given part of their power to the market, which has in fact influenced the lives and behavior of people today (JAYME, 2005, p. 4).

In short, the quest is precisely to understand the intimate relationship between foreign investment - a component of the financial flow of the international market - and the life of the people in the national states, since it should not be forgotten that, regardless of the limits brought by international situation that is contemporary with the decision-making power of States (especially developing countries), it is the national governments that, after all, elect and implement measures that will determine the lives of their inhabitants. It is the responsibility of States : "*no sólo las políticas sino también la elaboración de las normas estatales (...), la incorporación o no a determinadas convenciones internacionales (...) y la participación o no en procesos de integración*" (ARROYO, 2005, p. 94) and, as stated by Arroyo, none of these state activities, nor the construction and execution of investment contracts, are or may be neutral; "*cómo se orienten dependen en gran medida los efectos concretos que los fenómenos que trae aparejados la globalización están teniendo y van a tener en el futuro sobre los Estados*" (ARROYO, 2005, p. 94).

In fulfilling its social function, the foreign investment agreement functions as a constraint on the dominance of international economic forces; consequently, it serves as a containment of the effects contrary to Citizenship that may arise from it. However, there is no naivety in this proposition: the financial market does not yield to the legal regulation of the sociality of the investment agreement by grace, but rather with a view to achieving its own interests. As is broadly stated in this article, foreign investment can only enjoy effective legal security when entering

a national state if it is attentive to the interests of the Citizenship, in order to ward off the social upheaval capable of destabilizing all the protection to the economic effects of the investment made. The legal security conferred by the rule of law on foreign investment can only be achievable if justice and social welfare are observed; outside of this rule, the investment risk is unpredictable. And, undoubtedly, without predictability there is no transnational financial flow - which exposes the market to economic crises such as 2008[17], for example.

Not least, through International Investment Law, minimum standards have been built, based on principles governing international agreements, under the requirement of clauses and conditions that observe the contractual good faith and the compatibility of the contracts with the constitutional order (DOLZER, Rudolf and Schreuer, Christoph, 2008, pp. 11-17) - in addition to attention to national legislation in general and customs. All this is to exclude the possibility of expropriatory measures, which are known to be adopted by the host State (Schrijver, 1995, pp. 108-111) in some situations.

From the awareness that law has a potential for social emancipation directly related to "cosmopolitan movements, organizations and groups that use the law to take their struggles forward" (SANTOS, 2003, p. 71), the externality of the social effects of the foreign investment contract proves to be a relevant opportunity to struggle for the consolidation of citizens' rights as a resistance to the current economic horror (Forrester, 1997: 5-14) that has made the world a suitable place for economic, but little receptive to human existence worthy.

Therefore, what challenges Citizenship today is the exuberant and irrational domain of capitalism; there is an urgent need to relocate humanity in the global decision-making center, with references beyond consumerism and economics (BEDIN, 2009, pp. 173-174) – which will only be possible with the citizen's appropriation of the fracture spaces of the globalized financial market, as is the case of investment contracts that demand attention to sociality.

Undoubtedly, at the present time, human rights are part of international jus cogens, being hierarchically superior norms in the international legal order (RAMOS, 2009, p. 205), neglecting citizenship rights in the construction of foreign investment contracts is an impediment to the effective realization of the desired economic objective. Therefore, considering the system in which it is inserted, protecting human rights means facilitating the realization of the whole cycle underlying the foreign investment agreement, since without adequate protection of human rights in the realization of foreign

17 It is a profound global economic crisis, with an epicenter in the United States, whose peak occurred in 2008, causing negative growth rates and a prolonged deceleration of the global economy. Known as the subprime crisis.

investment, there is no possibility of "ensuring the rule of law and the security of investments "(RAMOS, 2009, p.220).

Finally, in postmodernity[18], human dignity integrates and informs international law (CASELLA, 2009: 249), proving to be a true paradigm of regulation and implementation of contracts, essential to the stability of international investments.

6. CITIZEN CONTROL OVER THE INTERNATIONAL INVESTMENT AGREEMENT AS THE ACHIEVEMENT OF HUMAN RIGHTS WITH AN EMPHASIS ON THE RIGHT TO DEVELOPMENT

In short, in the new universal society the financial flow goes beyond geographical, historical and cultural borders, multiplying their forms of articulation and contradiction, impacting daily life and social institutions (ROSADO, 2016, p. 351). In this scenario, citizen control of the international investment agreement is an opportunity that can not be ignored for the realization of social justice by guaranteeing that people access effective development; not only economic development, but to that which is reverted to a broad social benefit and to the construction of legitimate and democratic governments capable of ensuring that all the transnational financial flow, when entering the host State, is destined to the construction of social justice. It is, thus, the alignment of the investment contract, under citizen control, with the transformation that International Law itself in contact with International Human Rights Law has been promoting for the construction of a new global economic order based on cooperation, aiming at the development (FERREIRA, 2011, p. 51-52).

Although foreign investment is an indisputable source of growth promotion, especially for developing economies, only citizen control over investment agreements can prevent misallocation of resources that would, on the contrary, progressively increase the foreign capital, compromising the possibilities of "integral development, socially and culturally determined, supported in the legal guarantee of the effectiveness of the right to life and the dignity of the human person" (FERREIRA, 2011, p. 114-115).

In an inverse perspective, the implementation of human rights is fully reconcilable with foreign investment (ALMEIDA, 2014, p.609); and more than that, is an insurmountable condition for safe inversion. The premise that maximizing profit as the main draw for

18 According to Erik James, postmodernity is strongly inspired by plurality, communication, speed, fluency, narration, return to the feelings and internationality of private relations (JAYME, 1995, pp. 246-247).

foreign investors is not at all mistaken - which would logically prevent the achievement of the human rights of the courts. The defect in this assertion is, however, in disregarding the social function of investment as an insurmountable condition for the promotion, regulation and protection of foreign investment.

Recent studies, including from the World Bank, point to the reciprocal benefits to citizenship and to the foreign investor when the investment is made with respect to citizenship rights: while the latter is protected against expropriation and observes a profitable return on capital employed, the citizens enjoy, for example, the reduction of infant mortality rates, the increase in the level of education of women and a high rate of success in completing infrastructure projects (ALMEIDA, 2014, p. 612).

Organized civil society, not only locally, but above all, through a system of global governance, should be vigilant to foreign investment contracts that should not be built under little or no transparency. An example of an opportunity for citizen control of foreign investment contracts is the advancement of UN member states in legal regulation with a view to ensuring transparency[19] and public access to international investment arbitrations, including imposing their mandatory arbitration procedures under the UNCITRAL rule and, subsequently, by editing the Mauritian Convention on Transparency[20], granting, certainly, greater legitimacy to arbitration decisions and security to litigants, fomenting[21] the international investment market. At the same time, Citizenship benefits from being able to control[22] arbitration procedures whose

19 Working Group II defined at its forty-eighth session that regulating transparency is "to improve the rules of publicity for actions, public access to documents and hearings, and the amicus curiae intervention", while ensuring that arbitral tribunals "protect all information that is truly confidential, with the presumption of free and public access to the actions ". And, according to the UNCITRAL Transparency Rule, confidential information is confidential business information; information restricted by treaty; protected information by internal legal order; information that impedes law enforcement and essential safety information.

20 This is the United Nations Convention on Transparency in Arbitrators between Investors and States within the Framework of a Treaty which seeks to extend the practical application of the United Nations transparency rule and is available for signature since 2015. It will enter into force after the deposit of five Member States. Although signed by seventeen countries, only Maurício made the deposit, so far.

21 One of the consequences of the implementation of transparent practices in arbitration proceedings is the emergence of a case law bank that facilitates, expedites and guarantees well-informed and therefore safer and more effective decisions (ARROYO, 2016, pp. 244-271).

22 The UNCITRAL transparency rule empowers powerful civil society control tools. They are: the disclosure of all the constituent elements of the arbitration procedure, including documents produced by the parties or by the court; the holding of public hearings, as well as the availability of the transcription of the same; the availability of expert, documentary and witness evidence (at the request of any person or by court order); and the possibility of intervention by interested

decisions may threaten to harm the citizens of the host State of foreign investment.

This is the effective opportunity to combat the concentration of world wealth and the aggravation of internal social inequalities, strengthening the democratic control by international multilateral institutions of the processes of transnationalization and financialization of the economy. Turning human rights into a global agenda reinforces the diversity and plurality so necessary to human development.

Foreign investors and receiving states can not, without voluminous damage, neglect protection of human beings - particularly amid the contradictions of the globalized financial market. As Cançado Trindade observed, "never, as in our day, has been so strongly advocated for an integral vision of human rights, to permeate all areas of human activity" (TRINDADE, 2003: 428). As exhaustively pointed out in this paper, the viability of peace building, human development and the maintenance and expansion of the global market is intrinsically linked to the protection of people across the globe.

7. FINAL CONSIDERATIONS

The complex network of connections - due to globalization in the contemporary world, which does not admit simplified solutions to the contradictions inherent to the main productive forces - profoundly affected the juridical relations coming especially from International Investment Law. In this scenario, it is affirmed in this work, that the search of the international financial market for legal security passes, inexorably, by the respect to the rights of the human people.

In the complex game of interests between civil society and capital, which nowadays surpass all geographical and cultural barriers, the potential of social emancipation of Law is revealed, creating an opportunity to fight for Citizenship. After all, the life of the people, around the globe, will not be transformed by contempt to the complex current social and economic reality; on the contrary, assuming and understanding the political, economic and productive dimensions is the most effective way of intervening to modify human existence.

If, in fact, law is always built in the interests of the socially powerful (LEISTER, 2011, 276), those who hold economic and politic control can not neglect the protection offered by the Law itself, and in moments of fracture - proper to the capitalist contradiction - expose to the Citizenship a true ring in which one can fight for the advance of the protective regulation of the real interests of the citizens. That is why, in this work, it is emphasized that emancipation by law is not a

parties, including the amicus curiae.

gratuitous offer, but a forced assignment of those who control the law, in order to eliminate the ruin of the legal system and the consequent social collapse so feared.

The proposal to control civil society over foreign investments is not understood in a decontextualized way and seeks, ultimately, to protect people in receiving states against the barbarities of a world subject to the horrors of the global economy built on exploitation and accumulation.

Finally, the ideal of citizen control over contracts of foreign investment is built on two basic premises, which can not be forgotten: on the one hand, everyday life, under penalty of sudden perishing of the people who endure the greatest vilification, can not wait by the radical transformation of the productive system in force; human people need protection today and now. On the other hand must be acknowledged that the whole life of the law is a struggle (IHERING, 2009, p.23) and that no citizen achievement is definitively guaranteed, and the constant attention and vigilance of civil society is indispensable - not only for but especially to ensure that human guarantees are respected and social setbacks are removed. After all, "those who have much never forget to defend their interests" (PIKETTY, 2014, 561) and ignoring the possibility of law as a trench of contention to the lucrative drive of capital, brings no benefit to the poor.

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THE NON-CRIMINALIZATION PRINCIPLE IN ACCORDANCE TO THE NEW BRAZILIAN MIGRATION LAW[1]

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Abstract:In the study of migration, one aspect that deserves special attention is the tendency of immigrant's criminalization by host countries and the mechanisms of international and domestic law to suppress such phenomenon. Hence, the purpose of this article is precisely to address these mechanisms and develop the theoretical construction of the "non-criminalization principle".

Keywords: migration - criminality - non-criminalization

.1. INTRODUCTORY REMARKS:

In the study of migration, one aspect that deserves special attention is the tendency of immigrant's criminalization by host countries and the mechanisms of international and domestic law to suppress such phenomenon. Hence, the purpose of this article is precisely to address these mechanisms and develop the theoretical construction of the "non-criminalization principle", expressly provided for in Law No. 13,445, of May 24, 2017, in which its scope differs from the provisions of Law No. 9,474, from July 22, 1997 – Refugee Law – which does not extend to all migrations, as will be analyzed throughout this paper.

However, before that, it is necessary to clarify the meaning of some basic keywords: migration policy, forced migration, asylum and criminal policy.

1 Translated by Alexandre Sales Cabral Arlota

Migration policy is a set of measures adopted by a certain State to control the flow of people across its borders, as well as the residence of foreigners in its territory. As the world orderly follows in sovereign States, the immigrant is sometimes received as an invader, and other times as development promoter, in accordance with the State's interest in each moment. However, the State is not limited to the negative aspect of governmental authority over people in a given place, but it has another perspective of extreme importance, which is the protection and assistance of individuals.[2]

Migration policies tend to answer to worldwide requirements (human rights, respect for conventions, right to asylum), and also to multiple issues, such as the pressure of public opinion, security requirements, the belief of competitiveness in the business world and the desire to attract elites. This permanent contradiction results in a negotiated, discretionary right, which reflects in the migrant's daily treatment[3], and in the difficulty itself to establish the contours of a "migration policy" in Brazil, either in the present or in the past, as verified from the concurrence of humanitarian aid policies and those related to the selection of good migratory flows.[4]

With regards to migrants, their traditional grouping is based on autonomy and vulnerability: (a) voluntary migrants, i.e., those who came to the country for economic and social reasons, such as the search for a better life and better work conditions; and (b) involuntary migrants (forced migration) - usually related to survival issues - in this grouping, refugees, stateless persons, asylum-seekers[5] and IDPs, among

2 SICILIANO, André L. ***Antes de discutir a Política Migratória brasileira:*** *um ensaio conceitual*. University of São Paulo: International Relations Institute, 2012, p. 5.

3 WIHTOL WENDEN, Catherine. ***Politiques migratoires injustes***. *In*: Cairn. Info. Projet 23-28. Waxes: Paris, 2013, p. 12.

4 Currently, the "survival" of a law from the Brazilian civil-military dictatorial period and the regulatory power of the National Immigration Council contribute to this "plasticity" and to the discussion of whether there is, or not, a Brazilian immigration policy. I stand for the position that it is possible to set a Brazilian immigration policy, even for its own "plasticity".

5 For many scholars, asylum and retreat are considered as synonyms. In some Latin American countries and in particular in Brazil, these terms entitle different institutions, with different characteristics, in spite of the common context in which they coexist: welcoming those who suffer persecution (at least in the classical concept of refuge) and therefore cannot continue to live in their place of residence or nationality. This welcoming context highlights the genre called "broad sense asylum", which is the set of institutions that secures the foreign host who cannot return to his/her place of residence or nationality, due to persecution without cause. Its species are: a) "political asylum", which is divided into "territorial asylum", "diplomatic asylum" and "military asylum" (Ramos, André de Carvalho. Asilo e Refúgio: *semelhanças, diferenças e perspectivas*. *In*: Ramos, A.C.; RODRIGUES, Gilberto; ALMEIDA, Guilherme Assis (eds.). ***60 anos de ACNUR****: perspectivas de futuro*. São Paulo: CL-A Cultural, 2011, p. 15); b) refuge, whose characteristics have been analyzed in other items of this paper, including

others can be included. However, forced migrations may occur due to environmental disasters, including the effective lack of rights (that could be either social, economic or cultural) which, in specific cases, can turn into the reason for forced migration.[6]

One of the criticisms of such classification is that the qualification of some migrations as forced suggests a category of voluntary migration, including automatically migration due to economic reasons, for example, the extreme disparity found in the international society, which is questionable.[7] Additionally, the categories above refer to vulnerable human groups that require protection from a State, to a greater or smaller extent for various reasons. Thus, the distinction between migrant groups is neither ontological nor unequivocal and should be constantly subject to criticism, in accordance with the worldwide changes towards migratory flows.[8]

The ordinary choice of (meaning) terms used to define the irregularities in migration is often made to establish certain political positions, since it makes value judgments and sets forth relations between such phenomenon and criminality levels. In addition, some authors claim that the term "illegal immigration" is incorrect in a semantic manner, since neither human mobility can be labeled as legal or illegal a priori, nor the entering in a country in disaccord with the procedure established in the frontier control legislation may be enough to label an individual as "illegal".[9]

The term "irregular" has been proposed by several authors to avoid xenophobic connotations and the respective intolerance associated with the term "illegal", aiming to assume a certain political neutrality.

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the aspects related to concession, due to serious and widespread violations of human rights or the requirement of persecution.

6 JUBILUT, Liliana Lyra. *Migrações e desenvolvimento*. *In*: AMARAL JÚNIOR, Albert (ed.). ***Direito Internacional e desenvolvimento***. Barueri: Manole, 2005, p. 127-131.

7 JUBILUT L.L. Migration... *In*: AMARAL JÚNIOR, A. (ed.). ***Direito***..., 2005, p. 131; MORAES, Thais Guedes Alcoforado of. O princípio da não devolução de refugiados à luz do Sistema Interamericano de Direitos Humanos. *In*: GALINDO, George Rodrigo Bandeira (ed.). ***Migrações, deslocamentos e direitos humanos***. 1. ed. Brasilia: IBDC; Research Group C&DI, 2015, p. 36. Furthermore, Bauman (2003) points out that, with the arrival of modernity, the very sense of injustice has changed, and today means "[...] to be left behind in the universal movement towards a life full of pleasures [...] since the proclamation of pleasure and happiness as the supreme purpose of life are a characteristic of today's society, as well as the promise of those in power to ensure conditions that allow a continuous and persistent growth of the full pleasure and happiness available (Bauman, Zygmunt. ***Comunidade****: a busca por segurança no mundo atual*. Rio de Janeiro: Zahar, 2003, p 75-76).

8 MORAES, T. A., The principle… *In*: Galindo, G. ***Migrações***..., 2015, p. 36.

9 GUIA, Maria João. *Crimigração, securitização e o Direito Penal do crimigrante*. *In* : **Revista Liberdades**. N. 11 - September/December, 2012. P. 90-120. São Paulo: Revista dos Tribunais, 2012, p. 109.

However, others argue that both terms have the same meaning, choosing different expressions, which vary in accordance with the specific violations made by the Migration Law.[10] For example, in relation to the lack of mandatory documentation, the terms "undocumented", "no documents" or "unauthorized" should be the ones applied.

Undocumented, clandestine or illegal immigrants, according to the expression to which they are assigned, suffer discrimination twice: on one hand, their legal possibilities are very limited; on the other, their social vulnerability makes the struggle for their rights' effectiveness almost impossible, and the impunity for such rights' violation is usual.[11] According to Boaventura, this scenario is part of a transnational Third World of people that is expanding, although it does not establish an electoral constituency for the purposes of political processes at a national level, which moves in a "no man's land" from a legal point of view and that vital experiences demonstrated by the dark side of a growing global economy whose iniquities are in part guaranteed by the existence of national frontiers[12] and the coercive powers of the states that the watch, ranging from administrative measures of compulsory withdrawal to the criminalization of immigration itself. Thus, they reveal the most profound contradictions among the exclusive powers of sovereignty and cosmopolitan politics of human rights to protect new transnational front vulnerability to new transnational impunity.[13]

10 GUIA, op. cit., 2012, p. 71.

11 SANTOS, Boaventura de Sousa. ***La Globalization del derecho.*** *Los nuevos caminos de la Regulación y la emancipation*. Bogotá: *Universidad Nacional de Colômbia, Instituto de Servicios Legales Alternativos*, 1998, p. 127.

12 Boundaries, in the sense of spatial limits delimiting a State's territory, are not about to disappear, as well as the States themselves, which are still the major players in the international and global scene. This maintenance, on one hand, does not fail to be positive for democratization and for human's expansion, since the demarcation is a guarantee against the Empire's imperative totalitarianism, which also calls for border devices as barriers of exclusion, which also are no longer "margins" between the center dominated periphery. According to Rui Cunha Martins, the demarcation issue is "[...] when we do not produce it, it does not mean that this demarcation does not exist, or that we left the task to those who will eventually produce it with no democratic criteria, whether moral or totalitarian "(Martins, Rui Cunha. ***O método da fronteira:*** *radiografia histórica de um dispositivo contemporâneo (matrizes ibéricas e americanas)*. Coimbra: Almedina, 2008, p. 229). Still with regards to border maintenance: Bauman, Z. ***Comunidade****,* 2003, p. 21.

13 Forced migration is not only characterized by the State's illegal practices, once it also violates the freedom to come and go, and also since they violate the human right to developed as an economic, social, cultural and inclusive political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in the development and distribution of the resulting benefits (JUBILUT, Liliana Lyra Migration and development. *in* : AMARAL JÚNIOR, Alberto (org) ***Direito Internacional e Desenvolvimento***. Barueri: Manole , 2005, p 135).

A Criminal policy is a program that establishes the actions that should be considered as crimes and the public policies for enforcement and crime prevention and control of its consequences. Its elaboration is the means by which the State offers answers to the expectations, insecurity and the current conflicts in the social body in a certain historical context.[14] This is why the indiscriminate use of the criminal justice system is common, in order to allay public spirits and prevent the practice of behaviors labeled as deviant or even immigration itself, without taking into account that, by the very nature of its institutions (excluding, stigmatizing, symbolically and materially violent), it will not be able to, by itself, control migration flows, insecurities and maintain social peace.

2. FRAMING THE DISCUSSION CONCERNING NON-CRIMINALITY: CRIMINOLOGY MOBILITY OR "CRIMMIGRATION"

Nowadays, the analysis of migration's criminalization ration has been carried [15] by scholars as "crimmigration" - or "mobility

14 DIETER, Maurício Stegemann. ***Política Criminal Atuarial:*** *a Criminologia do fim da história.* Thesis (Doctor of Law - UFPR). Advisor: Prof. Dr. Juarez Cirino dos Santos. Curitiba: 2012, p. 12.

15 It is important to note that, in the first half of the twentieth century, for example, the **Chicago School** has developed a research regarding the connection between social disorganization in large urban centers - caused, among other factors, on the disordered "wave" of immigrants and the unforeseen process of assimilation and integration - and criminal behavior as a result of these phenomena. These studies have shown that immigration does not imply in crime increase, specially considering violent crimes (murder, robbery, rape and bodily harm). On the contrary, for example, Robert Sampson concluded that it is quite the opposite, *i.e.*, immigrants tend to commit fewer violent crimes. Thus, in the United States, immigration did not only contribute to crime increase, but it also contributed to its decrease. (SAMPSON, Robert J. **Rethinking crime and immigration**. *In*: Contexts, Vol 7, No. 1, pp 28-33. Yale: American Sociological Association, 2008). Sampson analyzed the immigrants' integration process to their destination, as well as their deviant behavior, and concluded that the first generation tends to avoid such behavior, which may be due to the fear of deportation and stricter penalties. According to their studies, the first generation of immigrants practiced 45% less violent crimes than the third. With the same thesis: Rumbaut, Ruben G.; EWING, Walter A. **The Myth of Immigrant Criminality and the Paradox of Assimilation**: Incarceration Rates among Native and Foreign- Born Men. Immigration Policy Center: Washington DC, 2007. Available in: <http://www.immigrationpolicy.org/special-reports/myth-immigrant-criminality-and-paradox-assimilation>. Accessed on 24 April 20015. Also with the same thesis: GUIA, Maria João. ***Imigrantes e Criminalidade Violenta em Portugal***, in 2010.

criminology"[16], being the last denomination least used, although it prevails in Australia.

The "crimmigration" expression was created by Juliet Stumpf, in 2006 (Clark Law School, USA), to describe the migration's criminalization in the United States.[17] Subsequently, Maria João Guia translated into Portuguese, and in 2011 published an article in the Revista Liberdades regarding migrant's criminalization in Portugal.[18] Both authors manage a network of researchers, the CINETS, which monitors the relationship between migration policies and criminal policies in different locations around the world.[19]

Stumpf and Guia are based on the assumption that migration law and criminal law have several features in common, capable of generating obscuring practice between the two areas of law: both criminal legislation and the migration law promote the distinction between insiders and outsiders and therefore the two are inclusion and exclusion systems that distinguish categories of people (innocent versus guilty, admitted or excluded, legal or illegally).[20]

Suiting the previous theories to the Brazilian reality, "crimmigration" can be defined as: (a) the criminalization of the act of migrating, especially of undocumented immigration), highlighted in Europe and the United States; (b) but also the actual wide relationship between criminal and immigration policy: (i) the immigration law in the service of criminal law: the transfer to the administrative law of sanctions previously limited to criminal law (such as expulsion, that was a penalty in the Penal Code of 1890) and the use of typical criminal sanctions, such as prison; the Federal Police's authority to admit the entry, stay and naturalization of individuals as well as to receive asylum claims; expulsion for individuals who have committed common crimes; (ii) the

16 Pickering, Sharon; BOSWORTH, Mary; AAS, Katja. Forensic of mobility. In FRANCE, Leandro Ayres (ed.). Criminology alternatives. (In press).

17 STUMPF, Juliet. The Crimmigration Crisis: Immigrants, Crime and Sovereign Power. *In*: **American University Law Review.** Vol 56: 2, 2006, p. 367-419.

18 GUIA, Maria João. *Crimigração, securitização e o Direito Penal do crimigrante*. *In*: **Revista Liberdades**. N. 11 - September/December 2012. P. 90-120. São Paulo: Revista dos Tribunais, 2012, p. 109.

19 Available in: http://www.crimmigrationcontrol.com/.

20 According to Howard Becker, lead author on sociology of deviance from the 60s and 70s of the twentieth century, the *outsider* is the one that strays from the group rules, and, as these rules are created by society itself also the deviation is. The deviant is the one to which such label has been applied successfully, and deviant behavior is the one that people determine as such. People that are labeled "deviants" have in common, beyond that stigma, the experiences of being labeled that way. This "label" has rates, depending on who performs the deviation and those who feel harmed by it: the law itself is applied differently for each person, depending on the race, gender and economic status of both the offender and the victim (BECKER, Howard. **Outsiders**: *estudos de sociologia do desvio*. Rio de Janeiro: Zahar, 2008, p. 17-25).

criminal law as frontier control strengthening: the criminalization of the trafficking of immigrants, re-entry of expelled foreigners, among others.[21]

In this sense, it should be considered that immigration and criminal legislation often impose sanctions to the individual for the same offense: firstly, criminal detention and later expulsion or deportation, a result often more serious than prison and also submitted to a process. Often, the effects of immigration law are more serious than criminal law, such as expulsion with perpetual effects, the impossibility of immigration regularization due to criminal records, to the extent that the immigrant in this condition has almost no right.[22]

3. THE NON - CRIMINALIZATION IN INTERNATIONAL LAW:

Regarding the United Nations system, the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the General Assembly of 1990, predicted an obligation for the States to grant to documented and undocumented migrant workers a range of civil, social and labor rights, which include, inter alia, justice, health and education access for children; the freedom of expression and worship; the right to participate in trade unions and to have labor rights equivalent to national workers. The key idea of this convention is simple: all migrant workers and their families should enjoy and exercise rights regardless of their immigration status.[23]

The Convention also establishes the right to the due legal process in criminal matters (article 18): the presumption of innocence (which also applies to provisional release, since the presumption of innocence cannot lead to early implementation of penalty); right to communicate

21 The development of the concept of "crimmigration" in Brazil is located in: MORAES, Ana Luisa Zago. ***Crimigração****: a relação entre política migratória e política criminal*. Thesis (Doctor). Graduate Program in Criminal Science. Porto Alegre: PUCRS, 2016. Available in: http://www.capes.gov.br/images/stories/download/pct/2016/Mencoes-Honrosas/Direito-Ana-Moraes.PDF

22 MORAES, Ana Luisa Zago. ***Crimigração***.... 2016.

23 UNITED NATIONS. **Rights of All the Migrant Workers and Members of their Families**, the endowed by the UN General Assembly by resolution No. 45/158 from December 18th, 1990. *In:* BRAZIL. Message to the National Congress No. 696 from December 13, 2010. Available in: <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=489652>. Accessed on April 8, 2017. The Convention entered into force on July 1st, 2003, 13 years after its approval by the UN General Assembly, when the 22nd ratification instrument was obtained, being all of those arising from developing States and least developed States, with the exception of Turkey. Actually, currently it is the human rights treaty with the lowest number of ratifications: there are 48 States, none of those being major immigrant receiving countries. In addition, Brazil has not yet performed its internalization task and will not host it with a constitutional amendment (*emenda constitucional*) status.

in a language which he/she understands, the nature and reason of the charge; right to have the time and resources needed to be judged within a reasonable time; righ to full defense, which entails producing evidence, to communicate and be accompanied by a lawyer of his choice and, if so, to be defended by a counsel paid by the State, free of charge, if he/she has not sufficient incomes to pay; to benefit from the free assistance of an interpreter if he/she does not understand or speak the language used by the court; to not produce evidence against itself; to appeal against a decision to a higher court; compensation in the event of a judicial error; not to be prosecuted for the same fact for which he/she has already been acquitted or convicted.

The Convention, in its article 56, forbids the expulsion of migrant workers, excepting the reasons defined in the national law and without prejudice to the aforementioned guarantees. It adds that regarding the possibility to expel a migrant worker or a member of his family it shall be taken into account humanitarian reasons and the period of residence of the concerned person, until that moment in the employment State. Article 22 provides that people cannot be subject to collective expulsion measures and that each case must be examined and decided individually by the competent authority in accordance with the law. It also adds that the written and justified decision shall be communicated to those who are interested in a language that they can understand, including the possibility to appeal with a suspensive effect, unless national security requires, and if the decision is not from a judicial and definitive authority. In addition, if the already executed expulsion decision is subsequently annulled, compensation shall apply.

The American Convention on Human Rights, of November 22, 1969, for the purpose of which "[...] a person is every human being" (article 1, item 2), establishes mechanisms for the prohibition of cruel, inhuman or degrading treatment or punishment (article 5, item 2), of arbitrary prison (article 7, item 3), and provides for various guarantees (Article 8). In article 22, it also reproduces the right of every person to leave his country, adding that the foreigner who has entered legally may be expelled only in "[...] compliance with a decision adopted in accordance with the law." In the same article, prohibited the collective expulsion of foreigners and predicted the impossibility of expulsion or delivery to another country, whether or not the origin, "[...] where the right to live or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinion" and such seal is identified with the non-refoulement principle.[24]

In a regional manner, the Inter-American Court of Human Rights,

24 Failure to return (non- refoulement) set forth in the Status of Refugees' Convention of 1951 (art. 33) and simultaneously in the United Nations Convention against Torture (art. 3) and the American Convention of Rights Human (art. 22.8 and 9).

when challenged by Mexico, in 2002, to express its limits regarding the right of States to establish their migration policies and labor rights of undocumented migrants, has helped to build this response. In the Advisory Opinion No. 18/03, the Court mentioned being the obligation of States to determine their migration policies solely in the light of international instruments to protect human rights, and the principles of equality and non - discrimination, which are part of jus domain cogens. Additionally, the distinctions between nationals and migrants, whether documented or undocumented, should be objective, proportionate and reasonable.[25] Thus, it pointed limits on migration policies and concluded that the irregular immigration status is not a limiting factor nor is able to weaken these principles.

In the report on migration in the United States, it recommended detention facilities near to urban centers, to ensure that the prisoners have access to legal defense, never in distant places, neither outside the national territory. Finally, the IACHR alleged that the State should eliminate the application of summary deportation for all people in vulnerable situations and asylum seekers to demonstrate well-founded fear at the time of his first interview, at the border or another entry point. Likewise, it recommended that the State should eliminate the summary deportation for immigrants approached 100 miles from the international border and 14 days after entering the country. In these cases, it said that the State should prove that the immigrant was less than 14 days in the country, not the other way around. In addition, even if it consented to deportation, the prisoner should be given the opportunity to consult a Public Defender or lawyer before giving his definitive consent.[26]

In the Report on migrants' human rights, stateless persons, victims of human trafficking and internally displaced persons,[27] the Commission brought elements considered by the European Court of Human Rights and the UN Human Rights Committee at the time to consider the right of a person to remain in a State in which he is not a

25 OEA. Inter-American Court of Human Rights. Advisory Opinion OC-18/03... 2003, § 161, p. 131 and § 168, p. 132.

26 *ORGANIZACIÓN DE LOS ESTADOS AMERICANOS. Comissión Interamericana de los Direitos Humanos.* ***Informe sobre imigraciones en Estados Unidos:*** *Detenciones y debido proceso* / Report on immigration in the United States: Detention and due process. OEA/ Ser.L/V/II. Doc. 78/10 30 diciembre 2010 Original: Inglés. Available in: <http://www.cidh.org> Accessed on June 30, 2014.

27 *ORGANIZACIÓN DE LOS ESTADOS AMERICANOS. Comissión Interamericana de los Direitos Humanos*. ***Derechos humanos de migrantes, refugiados, apátridas, víctimas de trata de personas y desplazados internos: Normas y estándares del Sistema Interamericano de Derechos Humanos.*** OEA/ Ser.L /V/II. Doc 46/15 31. Diciembre 2015 Original: Español . Available in: http://www.oas.org/es/cidh/informes/pdfs/MovilidadHumana.pdf . Accessed on April 8, 2017.

national - elements to be weighed against the State's power to expel the foreigner, which are: (a) the age of the non-national immigrant when he emigrated to the receiving State; (b) the time of residence in the receiving country; (c) family ties in the receiving State; (d) the extent of damage to the family of the deportee by virtue of the deportation; (e) contributions to the society where he lives; (f) the extent of their bonds in their country of origin; (g) the ability to speak the main language of their country of origin; (h) the seriousness of the offense; (I) the age at the time the offense was committed; (j) the period elapsed since the committed offense; (l) evidence of rehabilitation after criminal activity; (m) the efforts made to obtain the nationality of the receiving State.[28]

4. THE NON-CRIMINALIZATION PRINCIPLE IN THE NEW MIGRATION LAW:

The non-criminalization is one of the principles expressly provided in article 3 of Law No. 13.445/2017: "The Brazilian migration policy is governed by the following principles: [...] III – non-criminalization of immigration." This principle suits the recommendations and reports of the Inter-American Commission of Human Rights above and is characteristic of migratory legislation aimed to protect human rights, overcoming the tightening security paradigm presented in the legislation, like the current Statute of the Foreigner.[29]

From the analysis of the new law, this principle can be divided into four subprinciples: (a) non-criminalization of migration; (b) non-discrimination in criminal proceedings and criminal enforcement of common crimes; (c) due legal process in the compulsory withdrawal measures; (d) non-imprisonment of migrants based on their legal status.

a. The non-criminalization of migrations:

Currently, the typical foreigners crimes are those already established before the end of the Brazilian civil-military dictatorship, like the re-entry of the person who was expelled, disciplined by article 338 of the Penal Code of 1940, and the crime of fraudulent foreign law

28 OAS. ***Derechos humanos de migrantes***... 2015, p. 177. The report concluded, in line with the studies of "crimmigration" above that, the immigration detention is a way of immigration criminalization and due to that, procedural safeguards shall be taken into account. He also added that the violation of immigration laws can never be alone, comparable to the violation of criminal laws, and that the first response to irregular migration can never be the arrest, since the measures of deprivation of liberty shall be restricted to situations that violate fundamental legal rights (OEA. ***Derechos humanos de migrantes***... 2015, p. 191).

29 Regarding the Foreigner Statute, the immigration laws that preceded it and the presence of security - based paradigm: MORAES, Ana Luisa Zago. ***Crimigração***…, 2016.

(article 309 of the Criminal Code) which provides "... to use the foreigner to enter or remain in the national territory, a name that is not his ".

In addition to the provision of two criminal types in the Code, the Statute of the Foreigner of 1980, in art. 125, when dealing with infractions and penalties, prescribes in its paragraph XII the crime of introduction of foreign clandestinely and the concealment of irregular foreigner (punished with imprisonment (detenção) penalty of one up to three years, and if the violator is a foreigner, punished with his/her expulsion); as provided in item XIII, it is also a crime making false statements under "[...] visa transformation process, registration, change of settlements, naturalization, or to obtain passport for foreigners, laissez-passer, or when required, exit visa", (confinement (reclusão) of one up to five years and, if the violator is a foreigner, punished with his/her expulsion).

Finally, item XI of Article 125 sets forth that the violation of Articles 106 and 107 of the Statute constitutes a criminal penalty (punished with imprisonment (detenção) of one up to three years). The content of these articles deal with prohibitions which foreigners are subject to, including participate in the management or representation of unions or professional association, as well as of entities who supervise the exercise of regulated professions; provide religious assistance to institutions of collective detention, including prisons; own a Brazilian vessel, a newspapers company, or a Brazilian aircraft; hold permission to explore mineral resources, auctioneer or customs broker (Article 106). It also includes an express prohibition to engage in any political activity (items I, II and III of Article 107).

The aforementioned provisions cannot be considered incorporated by the Constitution of 1988, since the latter assured to foreigners the freedom of union association, the exercise of any work, occupation or profession (Article 5, item XIII), and the freedom of assembly (Article 5, item XVI), having also included the express provision of religious freedom (Article 5, item VI) and equal treatment between nationals and foreigners (Article 5 main clause).

It is certain, however, that if literally applying the provisions of Articles 106, 107 and 125, the immigrant will be charged, prosecuted and sentenced, and the final and unappealable condemnation court decision can lead to the expulsion and hence the prohibition of its re-entry. Thus, the maintenance of these provisions in the legal system creates insecurity for the immigrant, since, despite the unconstitutionality and the few police investigations initiated, even the investigations culminate in flagrant delicto arrests of immigrants who seek the regularization of immigration before the Federal Police.

In May 2016, a writ from the Federal Police was served upon the law professor of UFMG (Federal University of Minas Gerais), Maria

Rosario Barbato, an Italian citizen, to render a deposition about the supposed union and political activities, both prohibited by the Statute.[30]

That is the reason why the legislative bill PL 2516, in its Article 4, expressly revoked such impediments and provided the migrant with, further to the civil, social, cultural and economic rights and liberties, the right to freedom of movement in national territory, also the "right of assembly for peaceful purposes" and "the right of association, including those related to unions, for lawful purposes".

With regard to criminal provisions, it provided new wording to the crime of "coyote", criminalizing only those who promote the illegal entry of immigrant in order to obtain economic advantage (Article 232 of the Penal Code), with a minimum penalty of confinement (reclusão) of two years and a maximum of five, subsequently adding one-sixth to one-third of the crime is committed with violence or if the victim suffers from inhuman or degrading condition. This provision should be observed along with the Human Trafficking Law (Law No. 13,344/2016), which sets forth heavier penalties to the human trafficker - that is different, when the purpose is the transport of people, by means of serious threat or violence - permanent residence for victims in the national territory, regardless of their migratory status and collaboration in administrative, police or judicial procedure.

By the text of the legislative bill, the residence may be authorized, upon registration, to the person under one of the following situations: "XV - victim of human trafficking, slave labor or violation of right worsened by his/her migratory condition" (Article 25), in consonance with the guarantee of "IV - protective measures for victims and witnesses of crimes and rights violations" (Article 4).

It results from the non-criminalization principle, further to the revocation of criminal provisions for the simple fact of being a migrant, the recognition of the vulnerability of the irregular migrant, especially those who are a victim of human trafficking, but also those who suffered other violations of right worsened by their migratory condition.

b. Non-discrimination in the criminal procedure and criminal enforcement of common crimes:

This subprinciple is very important because the political and criminal tendencies in Brazil nowadays that reflect the most on criminalization of foreigners are not the crimes themselves, with court decisions that subject them to the negotiated justice, but other common

30 BRAZIL. Justice Ministry. Regional Superintendence of the Federal Police in Minas Gerais. Craft n. 2827/2016 - IPL 0310 / 2016-4 SR / DPF / MG. Belo Horizonte, April 07, 2016. It is stated in the subpoena that the teacher "is a foreigner and is working in unions and political parties in the national territory, and should provide clarification in the interest of Justice."

crimes and discrimination during the execution of the court decision (especially for foreigners arrested for drug trafficking).[31]

The amount of foreign people in deprivation of liberty in Brazil, mainly for drug trafficking, is also due to the difficulty of granting freedom in the course of the process of obtaining progression scheme and the conditional release due to the punitive culture related to drug trafficking, especially the international one, as previously analyzed.

In addition, it is ignored that the foreign prisoner has the same rights as the Brazilian one[32], including the constitutional guarantee of access to justice and Public Defenders, the presumption of innocence, the right to work and the redemption through the work[33], the right to study and the redemption through the study, the right to religious and worship freedom, health and hygiene, temporary exit, visitation, including conjugal visits, the translation to their native language and consular assistance. Foreigners are also entitled to progression regime and conditional release.

What occurs in practice, however, is the projection of the effects of the decree of expulsion on the day-to-day of the fulfillment of the court decision of non-national individuals, affecting the right to enjoy the progressive system of fulfillment of the court decision and anticipating its fulfillment and violating the principle of presumption of innocence by denying provisional release.[34] The classic position of the Federal Supreme Court and the Superior Court of Justice, in fact, is precisely in the sense of the impossibility of granting any form of progression in the execution of the court decision to the benefit of the foreigner sentenced of a criminal offense waiting for a possible expulsion already

31 In 2014, according to São Paulo State Department of Penitentiary Administration's data, 81% of foreign nationals were arrested for drug trafficking (Law 11,343/2006), while only 13% patrimony, and 1.4%, crimes against life. The information was provided by the Press Office of the Secretariat of Penitentiary Administration on December 10th, 2014: 2,078 foreign prisoners (1,559 men and 519 women) in the State of São Paulo, in which 1,692 were arrested for the crime of drug trafficking (1,203 men and 484 women). At the national level, the total number of foreign prisoners in July 2013 was 3,191, and the percentage of prisoners for drug trafficking is approximately 90%. Available in: <http://www.justica.gov.br/seus-direitos/politica-penal/acesso-a-informacao/estatisticas-prisional/anexos-sistema-prisional/total-brasil-junho-2013.pdf>. Accessed in: December 8, 2014.

32 In addition to the constitutional and international law predictions mentioned in the previous section of this thesis, non-discrimination is one of the UNITED NATIONS' essential principles of the Minimum Rules for the Treatment of Prisoners. **Human Rights and Prisons**: Trainer´s Guide on Human Rights Training for Prison Officials. United Nations: New York and Geneva, 2005).

33 In prisons where there are no workplaces, any other daily activity, constant and scheduled, should be considered for redress purposes, once it is the State's duty to provide work.

34 SOUZA, Artur de Brito Gueiros. ***Presos estrangeiros no Brasil****: aspectos jurídicos e criminológicos*. Rio de Janeiro: Lumen Juris, 2007, p. 206.

decreed, or in the course of a expulsion procedure in progress, under penalty of frustrating the very order of expulsion (using a "presumption of escape") and to guarantee the progression to those who cannot work lawfully in Brazil.[35]

Contrary to this trend, there are recent judgments favorable to the regime progression of foreign prisoners. The Superior Court of Justice, by relaxing its traditional position, has already stated that the irregular status of a foreigner in the country is no circumstance in itself able to derogate the principle of equality between nationals and foreigners and "[...] the possibility of escape and, consequently, frustration of the expulsion decree does not justify the rejection of the request for progression to the half-open regime."[36] Similarly, the Supreme Court, on some occasions, followed the understanding that the fact that the person sentenced for drug trafficking is a foreigner, in jail, does not own residence in the Country and is subject to an expulsion process, does

35 CAHALI, Yussef Said. ***Estatuto do Estrangeiro***. São Paulo: Saraiva, 1983, p. 218. The author brings several judgments from Brazil's Federal Court of Justice (STF) and Superior Court of Justice (STJ) in this sense. Similarly, Artur de Brito Gueiros Souza comments, among other judgments, *habeas corpus* No. 56,311, in which STF decided that "... the foreigner must await full compliance with the court decision, without the right to progression to the semi-open conditions". He added, regarding the conditional release, that one of the grounds for rejection is Decree-Law No. 4,865, dated of 1942, which prohibits the release of foreigners. It occurs that such Decree was tacitly revoked by the 1946 Constitution, and also due to the subsequent foreigner's legislation (Decree-Law No. 941, 1969, later repealed by Law No. 6,815, of 1980), legislation that did not anticipate restriction to obtain deliverance or any other similar institute (SOUZA, A. B. G. ***Presos***..., 2007, p. 207-227).

36 BRAZIL. Brazil's Superior Court of Justice (STJ). *Habeas corpus* No. 219.017-SP, Rel. Min. Laurita Vaz, judged on 3/15/2012, reported in the information No. 493, period: March 12-23, 2012. In 2015, another decision was given in this same sense: "[...] 1. The progression of the punishment system, both national and foreign, should be guided by the respect of the dignity of the human person and with the compliance of the equality and individualization of punishment principles, with the evaluation of the objective and subjective criteria set forth in art. 112 of the LEP. 2. The benefit cannot therefore be denied by the mere fact that the offender is in an irregular situation in the country or even if there is a decree of expulsion issued against him, reasons which, in accordance with the settled case-law of this Court, do not they would be suitable for this purpose "(BRAZIL, Superior Court of Justice, *Habeas corpus* No. 309.825/ SP, Sixth Group, Minister Rogerio Schietti Cruz, Judged on 03/03/2015. In this same sense: "This Superior Court has consolidated an understanding in the sense that the foreigner's irregular situation in the Country is not a circumstance capable of removing the equality principle between nationals and foreigners, which is why the existence of a proceeding or even a decree of expulsion for the foreigner's disadvantage does not prevent the granting of the benefits of a progression regime or conditional release, since expulsion may occur, according to the national interest, after the punishment compliance, or even before that. "(HC 324.231 / SP, King REYNALDO SOARES DA FONSECA, QUINTA TURMA, judged on 09/09/2015, DJe 10/09/2015) 2. Unfounded Special Appeal (*Agravo Regimental improvido*). 321.157/SP, Rel. Minister NEFI CORDEIRO, SEXTA TURMA, judged on 04/05/2016, DJe 04/18/2016).

not constitute an obstacle to the court decision progression regime.[37]

Despite some favorable judgments, judges, in the lower court, usually deny the progression regime. One of the reasons for maintaining the closed prison system is that Article 114 of the Brazilian Penal Execution Law demands certain obligations for such progression, including that the prisoner should be working or prove his possibility to work immediately (item I).

The conditional release needs more requirements than progression, among them "[...] to obtain lawful occupation, within a reasonable time if it is fit for the job" (Arts. 131 and 132 of the Brazilian Penal Enforcement Law), which is why, as a rule, it is denied by the courts of the Country, under the argument that there is no possibility for the foreigner to perform lawful occupation and to establish residence for being irregular in the Country. In order to reverse this position, it is necessary, in addition to the jurisprudential changes the interaction between different institutions, in order to shelter immigrants in suitable places, to provide activities assimilated to "lawful occupation" and to enable them to provide for their own livelihood (transdisciplinary assistance).[38]

The same difficulty is found for the substitution of the deprivation of liberty by restriction of rights, a benefit usually denied by Brazilian judges and courts in cases of foreigners that were accused of drug trafficking. Brazil's Federal Court of Justice has ruled that there is a restrictive penalty for such offense and, in the case of a foreigner convicted of this offense, it stated: "[...] why (i) has the enforcement of a court decision been established; (ii) there is no decree of expulsion to its disadvantage; and (iii) in the view of lower instances, it fulfills the requirements of art. 44".[39]

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37 Previous said by Brazil's Federal Court of Justice (STF): HC 97.147-MT, DJe 12/2/2010. Recently, STF also ruled: "[...] I - The foreigner's exclusion from the progressive punishment system conflicts with several constitutional principles, especially the prevalence of human rights (Article 4, II) and isonomy Article 5), which prohibits any discrimination based in race, color, creed, religion, sex, age, origin and nationality. Precedent. II - Order granted to remove the regime progression seal to the patient, referring the case to the execution court, to verify the existence of the requirements of art. 112 of the LEP "(BRAZIL, Brazil's Federal Court of Justice (STF), *Habeas corpus* No. 117878. Second Class, Rapporteur Mr. Ricardo Lewandowski, Judged on November 19, 2013. Electronic Case Dje-237. Published on December 03, 2013).

38 In São Paulo, the reception experience due to the work of *Instituto Terra*, *Trabalho e Cidadania (ITTC) – "Projeto Estrangeiras"* –, who has been allocating some women in the "Casa de Acolhida", of the *Pastoral Carcerária* and the "Casa do Migrante", which receives foreigners for the purpose of conditional release, has caused positive results (BRAZIL. ***Relatório sobre a situação das pessoas estrangeiras presas no Brasil***..., 2014, p. 24-26).

39 BRAZIL. Brazil's Superior Court of Justice (STJ). *Habeas corpus* No. 103,311. First Class. Rapporteur, Minister Luiz Fux. Judged on June 7, 2011. ***Diário da Justiça***, Brasília, DF, June 29. 2011, *Ementa* Vol. 02553-01, p. 00086.

The access to the formal labor market requires egress assistance programs since it is very likely that the non-national will not have a previous job or the command of the language. It also requires documentation, such as the Brazilian Labor and Social Security Portfolio (CTPS) and the National Registry of Individuals (CPF) and, ultimately, the regular stay in Brazil. Likewise, such documents are required to formalize a contract for property rental and for other civil life activities. Thus, the requirements run into the seizure of passports when the offense is committed, as well as the unfeasibility of migratory regularization of the foreigner who commits a crime in Brazil.

One step in settling the issue and making it feasible to grant the benefits related to the progressive system of compliance with the court decision was Normative Resolution No. 110 of April 10, 2014, of the National Immigration Council, which authorized the granting of provisional residency, in particular, for the purpose of establishing equal conditions for the execution of court decisions by aliens.[40] The Resolution was regulated by Ordinance No. 6, dated of January 30, 2015, which provided that the Department of Foreigners will issue the provisional stay and that this does not depend on a judicial order, proving the condition of the foreign prisoner, and may be postulated by the Union Public Defender, regardless of power of attorney.[41] From the time of stay, the National Registry of Foreigners can be acquired and

40 The Brazilian Normative Resolution No. 110, dated of April 10, 2014, published in the *Diário Oficial da União* No. 75, dated of April 22, 2014, states: "Art. 1. Brazil's Ministry of Justice shall, by virtue of a judicial decision, grant temporary stay, in a special capacity, to foreigners in compliance with their court decision in Brazil. Sole paragraph. The stay referred to in the caput of this article will be linked to the compliance of the court decision or to the effectiveness of its expulsion. Art. 2 The granting of stay under this Resolution contemplates the rights and duties provided for in Law No. 6,815 of August 19, 1980, pursuant to the judicial decision. "

41 BRAZIL. National Secretary of Justice. Ordinance No. 6, January 30, 2015. *Diário Oficial da União* No. 22. Executive Power, Brasília, DF, February 2, 2015. According to the Ordinance, the Foreigners' Department will grant provisional stay to foreigners who are defendants in criminal proceedings or are serving court decision in the national territory, and requires the following documents, according to art. 2: "I - judicial decision, in accordance with the first paragraph. II - original or authenticated copy of the foreign prisoner's identification, which may attested by any document proving his identity and nationality. III - address or location of the interested party indication". According to the Ordinance, a judicial decision consists of a conviction or decision granting provisional release or alternative precautionary measures to imprisonment, conditional release or regime progression. The application protocol will be valid as evidence of immigration regularity until final decision, as well as used to allow the foreign prisoner to access complementary services and documentation, labor and tax, until the publication of the final decision on permanence in the *Diário Oficial da União* and subsequent *RNE* issuance. Adds art. 3o that "[...] the provisional stay may be permanently transformed in cases of family reunion".

simplifying the issuance of the CTPS, the CPF and other documents necessary for life beyond prison.

Law No. 13,445/ 2017 confronts the issue and, as a corollary of non-criminalization, expressly provides, in its art. rt. 54, § 3:

> *The expulsion processing in case of a common crime will not affect the progression of the regime, the compliance sentence, the conditional suspension of the proceeding, the commutation of the court decision or the granting of an alternative punishment, collective or individual pardon, amnesty or any benefits granted on equal terms to the Brazilian national.*

In relation to permanent residence, it also expressly provided that:

> *Art. 57. Regulation shall provide for the special conditions of residence authorization to enable measures to re-socialize the immigrant and visitor in compliance with court decisions initiated or executed in the national territory.*

In addition to such measures, it is not ignored that the decriminalization of drugs, the effective implementation of custody hearings, full and free legal assistance by the Office of Public Defense and also consular assistance can also have consequences in the number of imprisonments and in the benefits regarding the regime progression. The latter is provided in arts. 5 and 36 of the Vienna Convention on Consular Relations of 1963, and Brazil, as part of the Convention, should simplify the performance of consular functions, including reporting the prison - except for asylum seekers or refugees, since they cannot enjoy the protection of its State, due to the persecution that motivated the asylum demand -, as well as receiving communications in the case of Brazilians arrested abroad.[42]

42 Considering the importance of consular assistance and, at the same time, the difficulty of implementing prison communication to the Consulates or Embassies, the National Council of Justice (CNJ), after inspections in prisons - to be listed below - and of contact with the network of assistance to foreign prisoners, in São Paulo, the Brazilian **Resolution No. 162** of November 13, 2012, settling that the judicial authority should report the arrest of any foreign person to the diplomatic mission of his State of origin or, Ministry of Foreign Affairs and the Ministry of Justice within a maximum of five days. In the same way, it was determined the communication of decisions of regime progression, conditional release and extinction of criminal liability.

c. The due legal process in the compulsory withdrawal measures:

The due process is a constitutional principle (art. 5, LIV, Constitution) and is also provided in various international treaties and there is no dispute as to its application to the immigration law as set forth above. Thus, the New Migration Law in its art. 46, expressly provided that the compulsory withdrawal measures preserve, "the provisions of Law No. 9,474 of July 22, 1997 and the instruments and mechanisms for protecting stateless or dealing with humanitarian situations, and other legal provisions, conventions, international treaties, and agreements."

Law 13,445/2017 also provided for the "denial of collective expulsion or deportation practices" (article 3, XXII), in addition to the aforementioned right of freedom to move in national territory, adding the "right to leave, stay and to re-enter national territory, even while the application for residence is pending, the extension of stay or transformation of residence visa" (article 4, XV).

As for expulsion, it is expressly provided that it will be based on a procedure that guarantees the contradictory and full defense, and that the Union Public Defender will be notified of the expulsion proceedings' initiation, if there is no established defender (article 58). It also added that the presumption of innocence also applies to the expulsion on the grounds that the expelling person whose case is pending a decision will be in a regular immigration situation (article 59).

Under the new law, the causes of expulsion will be limited and will be restricted to serious crimes, such as genocide, crime against humanity, war crime or crime of aggression, as defined by the Rome Statute, and a felony common crime deprivation of liberty, considering the seriousness and possibilities of resocialization in national territory (article 55), taking into account the recommendations of the IACHR. The inhibition of re-admission resulting from the expulsion, which was once perpetual, shall have a fixed term (article 55), complying with the determination of the term of validity of the measure of impediment linked to the effects of the expulsion regarding the proportionality in relation to the total term of the penalty and will never exceed twice its time (article 54, § 4).

The causes of non-expulsion are amplified beyond the current ones (Brazilian spouse or child) to also include those who have entered Brazil until the age of twelve, residing since then in the country; or is a person over seventy who has lived in the country for more than ten years, considering the seriousness and the basis for expulsion (article 55), also in response to the recommendations of the IACHR.

The new law brings the ultimate distinction between expulsion, restricted to convicted criminal and deportation, due to an administrative procedure in relation to the immigrant that is in an irregular migratory

situation in national territory (art. 50). However, it also requires due process regarding deportation, to explicitly state that its procedure must respect the contradictory and full defense (art. 48).

d. The non-imprisonment of migrants based on their legal status:

"Administrative" imprisonment, whether for expulsion purposes, for deportation purposes or even for repatriation - as are some arrests in the "Connector Zone" of the Guarulhos International Airport - is a practice that still occurs in Brazil and with small visibility precisely since it is an "administrative measure".[43]

An example was the arrest, in Paraná, in November 2016, of three immigrants from the Republic of Guinea, one of them aged 17, who arrived in Brazil in the Porto Paranaguá and they were not given the opportunity to demand asylum. The journey of the Guineans lasted 14 days in the Atlantic Ocean, eleven of them were hidden in the helm of a ship with flags of Liberia and Philippines. The three immigrants were detained by the Federal Police, two of them sent to the Piraquara II State Penitentiary (PEP II), and the minor was sent to the Child Protection Agency. At no point was there any guidance regarding the request for shelter and shelter, and the detention for deportation purposes lasted almost two months, having been relaxed by judicial order in habeas corpus.[44]

This is why the importance of the legislative amendment that sets forth the need of the Federal Police Delegate to represent before the federal court the necessary measures to outcome the deportation or expulsion (article 48), as well as the revocation of the administrative detention for the purposes of expulsion and deportation.

5. FINAL REMARKS

The International Refugee Law acts in the protection of the refugee from the moment they leave their place of residence, from one country to another, until the granting of the refuge in the host country and eventual termination[45]. In addition, Brazil has dawned as an emerging country in terms of admission and reception of refugees through various levels of protection: in addition to the ratification of the 1951 Convention related to the Status of Refugees and its 1967 Protocol (global system), it adhered to the Cartagena Declaration of 1984

43 Some exemplary cases were presented in the PhD thesis: MORAES, Ana Luisa Zago de. ***Crimigração***... 2016.

44 BRAZIL. Regional Federal Court of the 4th Region. Proceeding No. 5050940-70.2016.4.04.0000. Rapporteur, Judge Leandro Paulsen. Porto Alegre, December 2017.

45 RAMOS, A. C. *Curso*..., 2014, p.143.

(regional system)[46] and enacted Law 9,474 of 1997 (national level).[47]

Law 9.474 already provided the non-criminalization of refugees and asylum seekers in its arts. 8 and 10, in which, respectively, it determined that the irregular entry into national territory does not establish an obstacle to demand asylum to the competent authorities (Article 8), and that the request will suspend any administrative or criminal proceeding for irregular entry, filed against the requester and people from the family group that accompany them (article 10). It also adds that if the refugee status is recognized, the procedure will be filed, provided that it is demonstrated that the corresponding violation was determined by the same facts that justified the aforementioned recognition (article 10, § 1). In addition, it also provides for the non-return of the refugee or refugee applicant by providing that the refugee or asylum seeker will not be expelled (article 36) and, if it is for reasons of national security or public order, they cannot be sent to a country where life, liberty or physical integrity may be at risk (article 37).

Along with the protection of refugees are the mechanisms of complementary protection, a situation that was not even foreseen in the Brazilian legislation of the 80's, nor a target of public policies, and applicable, for example, to the Haitians who entered Brazil as of 2010. The mechanism, initially conditioned the entry quotas for Haitians

46 The Cartagena Declaration, adopted by the "Colloquium of International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems, held in Cartagena, Colombia, from 19 to 22 November 1984, was inspired by the Convention of the Organization of American States African Union (now African Union) Convention on Refugees of 1969. The latter came into force in 1974 and established, for the first time, **the definition of a refugee**, which is considered as the one who, due to a scenario of serious human rights violations, was forced to leave his habitual residence to seek refuge in another State. The Cartagena Declaration, in its third item, established that this definition should, in addition to setting forth the elements of the 1951 Convention and the 1967 Protocol, it also contemplated as refugees people who have fled their countries since their life, security or liberty had been threatened by violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances that have seriously disturbed public order (RAMOS, André de Carvalho. *Asilo e Refúgio: semelhanças, diferenças e perspectivas*. *In*: RAMOS, André de Carvalho; RODRIGUES, Gilberto; ALMEIDA, Guilherme Assis de (orgs.). *60 anos de ACNUR: perspectivas de futuro* - São Paulo: Editora CL-A Cultural, 2011, p. 26). Subsequently, and reaffirming its commitments, the Declaration of Brasilia for the Protection of Refugees and Stateless Persons in the Americas followed the Declaration of the Plan of Action of Brazil, which is intended to be a common roadmap for strengthening the protection and promotion of durable solutions for refugees, displaced persons and stateless persons in Latin America and the Caribbean, and a framework of cooperation and solidarity. The latter was adopted in the process celebrating the thirtieth anniversary of the Cartagena Declaration, on December 2 and 3, 2014, in Brasilia.

47 BRAZIL. Law No. 9,774, of July 22, 1997.

nationals,[48] was implemented by the Brazilian Normative Resolution No. 97 of January 12, 2012,[49] which provides the granting of a permanent visa as set forth in art. 16 of Law No. 6.815 of August 19, 1980, to the nationals of Haiti, whereas the National Committee for Refugees (CONARE) did not give them the refugee status.[50]

For forced migrants not recognized as refugees by the absence of the "persecution" element, art. 10 of the Refugee Statute and the non-criminalization principle, under Law 9.474 have not been applied, even by analogy. Hence the importance of affirming the non-criminalization principle of migrations in Brazil from international law and from the new migration law.

Thus, the ascending entry of immigrants into Brazil, whether if they are recognized as refugees, whether if they are recognized as economic migrants, in addition to adding more challenges to the Brazilian migration policy globally, it also requires the development of decriminalizing measures beyond the Refuge Law, like the non-criminalization principle and its consequences.

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48 The limitation of the monthly number of visas granted by the Brazilian Embassy in Tahiti was traced back to the quotas of *Era Vargas* and encouraged undocumented immigration and coyotes, causing many immigrants to cross borders by foot until reaching Acre.

49 BRAZIL. National Immigration Council. Brazilian **Normative Resolution 97**, of January 12, 2012. Available in: <http://portal.mte.gov.br/cni/>. Accessed on August 20, 2015. Normative Resolution 117/2015 extended, until October 30, 2016, the validity of Normative Resolution No. 97.

50 The National Committee for Refugees (CONARE) sent the requests from Tahiti nationals, with the exception to individual cases, in which the well-founded fear of persecution, received between January 2010 and June 2011, to the National Immigration Council (CNIg), set forth in the Brazilian Normative Resolution No. 13 of March 23, 2007, to be analyzed based on the Brazilian Normative Resolution No. 27 of November 25, 1998, dealing with special situations and omissions.

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THE CONSENT DECREES IN THE BRAZILIAN CAPITAL MARKET

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Abstract: Supported by literature research, document and data collection, an approach concerning the legal regulation of capital market is carried out, starting from the review of the regulatory instrument known as consent decree (settlement). Its first step aims at the clarification of general notions about the roles and segments of capital market, followed by the presentation of the fundamental principles regarding the disciplined set of legal dispositions. In the sequence, some features of the Brazilian regulatory body, the Brazilian Securities and Exchange Commission (CVM), are presented, such as its functions and powers, focusing on the exam of the regulatory provisions contained in the sanctioning administrative process (SAP). In accordance with Article 11, § 5 of Law nº 6.385/76, the rules issued by CVM, which govern PAS both in ordinary and in summary rites, prescribe that, once the defendant is summonned, the issuing of a warning to advert about the possibility to propose a term of commitment is mandatory. The acceptance of the term and the consequent compliance to the provisions of the settlement constitute neither the confession to the facts nor the recognition of the illicit nature of investigated conduct. A total number of 405 terms were approved by the regulatory body between 2009 and

2014, which characterizes a wide use of this regulatory instrument. This present analysis concluded that, although the settleement herein presented may be recognized as an important mechanism in the context of capital market regulation, its excessive use constitutes a distortion of both its purposes and of the foundations of normative discipline of the market, and even of the set of functions assigned to CVM.

Keywords: capital market - regulation - administrative sanctioning proceedings - consent decree.

1. INTRODUCTION

The subject of the legal regulation of the capital market has been remarkably discussed in the past decades, both in legal and in regulatory aspects. In the regulatory aspect, the most diverse discussions have materialized, concerning the normative power of the regulatory bodies as well as its roles, forms of action and the enforcement of both the sanctioning and the surveillance functions regarding the performance of the economic agents before the markets.

In Brazil, the dealings between the regulatory body of the capital market, the Brazilian Securities and Exchange Commission (CVM) and its agents have been suffering modifications throughout the years, with a larger approximation due to the arising of features such as public hearings and the consent decree (settlement), which characterizes a larger aperture of the normative system. About the consent decree, the authority is allowed by law to even negotiate directly with the defendants, in order to lift or terminate proceedings, which constitutes an alternative reaction (execution of the consent decree) to the pure and simple enforcement of penalties (warnings, fines, suspensions, etc.) established in law.

The academy must not remain secluded from such debate, for the study of the questions to which it is directly or indirectly related is pressing. Therefore, a new and instigating line of research is inaugurated, having the consent decree as a background to subsidize innumerous theoretical and conceptual discussions, from both the point of view of the reflections concerning the convenience of the model itself as well as of the adequate form of its enforcement by the regulatory body. The specificity of the approaches and of the analysis herein find their justification in the relevance of the subject.

Therefore, the following research problem is formulated, which shall find its solution through the following question: are the legal and regulatory provisions, that allow the defendant in the Sanctioning Administrative Proceeding (SAP) to propose the consent decree, by

themselves, justify the opportunity and convenience of CVM in the approval of substitutive agreements in an exaggerated scale?

For the purpose of orientation, the published literature concerning the general subject has been reviewed (considering its inherent interdisciplinarity) and also regarding the proposed specific cut (although subject to few researches). The investigation also counted with both legal and regulatory documental searches, as well as with the gathering, consolidation and analysis of empiric data concerning the consent decrees entered into by the Brazilian regulatory body between 2009 and 2014. The consolidated data was transformed into charts and inserted to this present work, in order to facilitate the comprehension of its readers.

The main purpose of this investigation is to perform an approach regarding the legal regulation of the capital market, based on the critical analysis of the regulatory instrument known as consent decree, in order to subsidize the building of a satisfactory answer to the research problem herein.

This present work is divided as follows: i) review of the literature concerning the roles and segments of the capital market, of the main foundation of the set of legal dispositions that rule such market, as well as of the characteristics of the brazilian regulatory body (CVM); ii) exam of the legal foundations and of the set of regulations concerning the Sanctioning Administrative Proceeding (SAP), focusing on the mechanism known as Consent Decree (Settlement); iii) gathering of empirical data regarding the Consent Decrees executed between 2009 and 2014, presenting such data through the charts herein inserted, with details concerning the amount of settlements executed each year; iv) critical analysis of the forms of use of the mechanism governed by the CVM.

2.BRIEF NOTIONS REGARDING THE CAPITAL MARKET

The capital market, also known as "Securities Exchange", comprehends a diversity of operations involving securities[1] issued by publicly traded corporations, focusing on the financing of already existent companies and even of companies undergoing establishment, making the development of their corporate projects possible.

The market permits an environment that gathers a number of economic subjects: on one side, saving agents, with excessive resources; on the other, taking agents, needing capital; and there are also those who

1 In Brazil, there is no definition for the term securities. An illustrative list including a series of titles under a variety of natures, such as stocks, debentures, and subscription bonuses has been included in article 2º of the Law n. 6.385/78, which regulates the securities exchange and created the Securities Commission.

are simply looking for an investment for their resources through the acquisition of papers, aiming at the rentability of the invested capital. Thus, the importance in the process of channeling of resources towards investments[2].

The primary share market operates with the securities issued by publicly traded companies, which constitutes the offer of new papers to the investing public[3]. The issuing companies are also responsible for the trade of their own papers, using the product of such trade in the financing of their investments[4]. As stated by ELIAS and GAMA, the main role of this segment consists on fundraising for the economic agents through the issuing[5] of such papers, which may be underwritten by the shareholders of the own company or publicly offered, allowing any investor to acquire them.

On the other hand, the secondary[6] share market "registers only the transfer of the property of papers already acquired from the companies, thus, not impacting directly the flow of resources available for the issuing companies"[7]. This business segment allows the investor to convert the investment, transforming it back to money[8], and thus, obtain the return of the invested capital and, consequently, imputing liquidity[9] to the papers acquired in the primary market. Therefore, the

2 VASCONCELLOS, Marco Antonio Sandoval de; GARCIA, Manuel E. Fundamentos de Economia. 2. ed. São Paulo: Saraiva, 2005, p. 213.

3 KÜMPEL, Siegfried. Direito do Mercado de Capitais – do ponto de vista do direito europeu, alemão e brasileiro. Rio de Janeiro: Renovar, 2007, p. 68.

4 ASSAF NETO, Alexandre. Mercado financeiro. 11. ed. São Paulo: Atlas, 2012, p. 200.

5 The public issuing should be performed, in general, under the intermediation of the integrating institutions of the securities distribution system, known as "intermediaries", such as investment banks, brokering and distributing societies. The aforementioned process is called underwriting, usually undergoing through a pool of institutions for the operation. The participation in question is fundamental for the success of the public issuing, once such institutions directly aid the issuers in the compliance to the demands and requirements formulated by the CVM regarding the distribution offers.

6 The secondary market works mainly in the stock exchanges, market administration institutions, in which are performed the transactions involving securities. The stock exchanges integrate the securities distribution system, under the supervision of the regulatory body. Such institutions are responsible for providing an adequate environment for the performance of the securities business, in addition to acting as an auxiliary body at the monitoring of the respective members and of the securities transactions thereunder, as well as preventing the manipulation of prices and detecting unusual movements in the market, besides other functions.

7 GOULART, André Moura Cintra; LIMA, Geraldo Augusto Sampaio Franco de; GREGÓRIO, Jaime. Mercado de renda variável. In: LIMA, Iran Siqueira; LIMA, Geraldo Augusto Sampaio Franco de; PIMENTEL, Renê Coppe (Org.). Curso de mercado financeiro: tópicos especiais. São Paulo: Atlas, 2006, p. 28.

8 LAMEIRA, Valdir de Jesus. Mercado de Capitais. 2. ed. Rio de Janeiro: Forense Universitária, 2003, p. 123.

9 The liquidity is an economic concept which, in general, indicates the possibility to transform

negotiation market is of vital importance to ensure the success of single issuing and, in a broader view, of the own primary share market.

3.THE LAW OF THE CAPITAL MARKET

The law of the capital market is represented by the set of legal dispositions that discipline the operations carried out in its environment. According to KÜMPEL's doctrine, three main points may be identified as the objects of regulation, being the most important the one that includes the judicial organization of certain market segments and its dispositions concerning the conditions to negotiate securities, intending to protect its functioning ability. According to the author, such branch of law belongs into the Economic Law and is penetrated by public law due to its considerable collective interest in the existence of markets as effective as possible[10]. Thus, two primary goals are pertinent to the regulation of the law of capital market: i) the protection of it functioning ability (priority scope); and, consequently, ii) the protection of the investor[11].

The protection of the functioning ability of the market, as a legal asset to be prioritarily protected, aiming at the maximization of its efficiency, requires the taking of a number of adequate measures such as: i) institutional functioning ability (which consists on the basic conditions for the existence of a series of efficient mechanisms in the different segments of the market, through its opening in such a way that permits the access of supply and demand, and therefore, allow the the channeling of the largest possible portion of the capitals towards the market and their acquisition by the economic agents, fulfilling the financing needs of such agents. Regarding the basic legal conditions, measures taken for the preservation and enhancement of the investor`s trust, which is directly related to the transparency, stability, equality in the access to data, justice and integrity of the segments of the market, which would be related to the duty of assuring isonomic treatment regarding the right to sensitive information, transparency of the shareholding structure of the companies, rules of conduct applicable to the intermediaries of the market, as well as the monitoring of the market by the government); b) operational functioning ability (related to the necessity to reduce costs for both the issuers of securities and the investors, considering that such costs impact directly on the decisions of

an asset into money. Such phenomena is one of the features that makes the capital market so attractive in the eyes of the investors, as it allows them to negotiate its ownership at any time, together with other interested investors. The higher the easiness of negotiation of a certain asset in market price, the higher its liquidity.

10 KÜMPEL, op. cit., p. 4-8.

11 Ibid, p. 21-37.

both parties. Therefore the necessity of such a drastic reduction on both the securities issuing expenses and the financial burden of the investing agents); and c) the placement functioning ability (aiming at the assuring of the fluidity of the resources/capitals, considering its scarcity, to the most relevant alternatives at the development point of view, driving the execution of social reality transforming projects.

On its turn, the protection of the investor, as an additional legal asset, would unfold in the defense, through the law of capital market: a) of the unspecific set of investors (the defense of the investing agents, both actual and future, considering that the business performance potential is of extreme importance for the liquidity of the market, with positive reflexes on its functioning ability); and b) exceptional protection of the individual concerns of the investors, through the damage reparation pretensions (legal projection on benefit of the investors, individually, in occurrence of the performed securities trading business, and not of the investor agents in general)[12].

The law of capital market, thus, shall include rules arising out of the Legislative Power, as well as the regulatory rules created by specific bodies constituted for the exercise of specific functions in the capital market environment. In Brazil, the regulatory body of the capital market is the Brazilian Securities and Exchange Commission (CVM).

4.BRAZILIAN SECURITIES AND EXCHANGE COMMISSION

The Brazilian Securities and Exchange Commission, created by the Law n. 6.385/1976[13], is a federal agency under special[14] regulation

12 KÜMPEL, op. cit., p. 21-41.

13 Prior to the creation of the CVM, the Laws n. 4.595/64 and n. 4.728/65, along with the Laws n. 6.385/76 and n. 6.404/76 were of high importance for the structuring of the national financial system.

14 According to MOREIRA NETO, the agency may be described as "an entity of public law from the indirect administration, created by law, functionally decentralized from the State, which performs both its own and specific state attributions, doted with financial, administrative and patrimonial autonomy". The author also points out that the most important characteristic is in the specialization of such bodies and functions in order to comply to certain public interests. MOREIRA NETO, Diogo de Figueiredo. *Curso de direito administrativo*: parte introdutória, parte geral e parte especial. 11ª ed.,rev. e atual. Rio de Janeiro: Forense, 1998, p. 186. The phrase special regime agency, adverts GASPARINI, does not find its legal concept in the law, and the doctrine has been attempting to outline it from the legal regime of the agency, once it possess "larger privileges than the normal agencies". GASPARINI, Diógenes. *Direito Administrativo*. 14ª ed. rev. São Paulo: Saraiva, 2009, p. 327. According to NAZAR, "the special regime agencies are those to which the creating law grants specific privileges and increases its autonomy if compared to the other agencies, without damaging the constitutional precepts". NAZAR, Nelson. *Direito econômico*.

that answers to the Treasury Department and has legal personality and its own estate. The CVM is also doted of independent administrative authority, absence of hierarchic subordination, fixed tenure and stability of its leaders, as well as financial and budget autonomy. Until its constitution, there was not any specific entity to absorb the regulation and monitoring of the capital market[15], being such functions, a burden of the Central Bank of Brazil[16].

Its condition of specially regulated agency, it is important to point out, was effective only after the issuing of the Provisional Measure n. 8, converted into the Law n. 10.411/2002, which gave the entity the status of Regulatory Agency[17]. Until that given moment, it was not uncommon to find in the doctrine authors who would deny such nature[18].

As of the imputation of such inherent characteristics to CVM, the treatment given should be proportional to said nature, specially in connection with the possibility of issuing of regulatory dispositions concerning the securities exchange market in Brazil. Hence, through the exam of articles 3rd, 4th and 5th of the Law n. 6.385/1976, KÜMPEL clarifies that the jurisdiction of CVM includes both the regulation of the securities exchange market and the permanent monitoring of the activities and of the services carried out in such segment as well as the dissemination of information concerning both the market itself and those who take part in its operations and the securities negotiated

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2ª. ed. rev., ampl. e atual. Bauru: EDIPRO, 2009, p. 48.

15 FORTUNA, Eduardo. Mercado financeiro: produtos e serviços. 15. ed., rev. e atual. Rio de Janeiro: Qualitymark, 2002, p. 21.

16 As to such aspect, the interesting considerations of WHITE are assigned as: "Considering that, at that moment the securities Exchange had a relatively reduced expression, there was no intention to grant it a regulatory body of its own, so, the Central Bank, whose main attributions were the control of the means of payment and the monitoring of the banking institutions, became also entitled to the regulation of such market". WHITE, Maria Clara Isoldi. A nova constituição e a regulamentação do sistema financeiro. Revista da CVM, nº 15, jan./fev./mar. 1987, p. 23.

17 EIZIRIK, Nelson, et. al. Mercado de Capitais - regime jurídico. 3. ed. Rio de Janeiro: Renovar, 2011., p. 260.

18 Egon Bockmann Moreira, in his article published in 1999, prior to the creation of the referred law, when analysing the legal nature of the National Monetary Counsel, of the Central Bank of Brazil and of the CVM, denied them the status of regulatory agencies through the following terms: "...seems inadequate to attribute to such administrative person the title of "independent regulatory agencies", considering that the managerial and functional bond with the direct administration prevents such classification. Actually, they are not even "Administrative Agencies", but bodies that submit to the traditional concepts of deconcentration" (CMN) and "decentralisation" (BACEN and CVM)". MOREIRA, Egon Bockmann. Conselho Monetário Nacional, Banco Central do Brasil e Comissão de Valores Mobiliários. Considerações acerca de sua natureza jurídica, em face das chamadas "Agências Administrativas". Revista de Direito Mercantil, ano XXXVIII, v. 116, out./dez. São Paulo, Malheiros, 1999, p. 141-142.

thereunder[19].

Generally, the CVM, considering the purpose of its functions, shall exercise them in order to: i) ensure the efficient and regular functioning of both the securities and "over the counter" markets; ii) protect the owners of securities from the irregular issuing and illegal acts of officers or controlling shareholders from companies or securities portfolio managers; iii) prevent or forbid fraudulent practices or manipulations intended to create artificial conditions for supply, demand or for the prices of the securities traded in the market; iv) ensure the public access to information concerning the traded securities and its issuing companies; v) ensure the observance of equitable trading practices in the securities market; vi) stimulate savings and its application in securities; vii) promote the expansion and efficient and regular functioning of the stock market and stimulate the permanent applications in the capital stock of public companies[20].

The CVM, created with the purpose of disciplining, monitoring and developing the capital market, has, in its regulatory function[21], one of its main capacities[22]. Through autonomy and agility, the CVM shall

19 KÜMPEL, op. cit., p. 249.

20 CVM. Available at: <http://www.cvm.gov.br>. Access: July 25, 2015.

21 In the doctrine it is possible to find authors that regard the difference between ruling and regulation. In this present work, the broad sense of regulation will be considered, in fact, in a wider manner, including both the ruling and the regulation in their strict sense. Regarding the subject, it is interesting to point out the position of Maria Eduarda Fleck da Rosa, to whom the capacities attributed to the CVM may be defined as hybrid, including both the ruling and the regulation. When ruling, the agency would be detailing the content of the principles and rules stipulated in Laws n. 6.385/76 and n. 6.404/76. In opposition, when regulating, would fulfil eventual gaps or omissions in such legal documents. According to the author, the regulatory power, named suplementar capacity, reveals itself in the "possibility of the CVM to integrate the legal system, in order to fulfil normative gaps arising out of new situations in the capital market, which complexity and dynamism could not be foreseen by the ordinary legislator." The author proceeds pointing out that the regulatory power "shall be exercised within the limits imposed by article 4th (of the Law # 6.385/76, as marked) and of the Federal Constitution." ROSA, Maria Eduarda Fleck da. *O Poder Normativo da Comissão de Valores Mobiliários*. São Paulo, 2012, 139f. Master's dissertation (Master's Degree in Laws). Post-Graduation in Laws at the State University of São Paulo, f. 103.

22 It is important to point out the definition brought by Odete Medauar which, although signs the meaning of the term in its broadest sense, ends up listing a series of powers that are mistaken for those attirbuted to the CVM: "We understand that the regulation, in its current context, includes: the creation of norms; the fiscalization of its enforcement; the attribution of qualifications (i.e. authorization, permission, concession); the imposition of penalties; the mediation of conflicts (both to prevent and to solve, making use of a variety of technics, such as: public consultation, public hearings, execution of a compromise to cease and adjustment settlement)" MEDAUAR, Odete. Regulação e Auto Regulação. *Revista de Direito Administrativo*, Rio de Janeiro, nº 228,

regulate the dynamic and complex economic and financial relations undergoing inside such environment[23], guiding its activities by a set of principles based on a series of foundations, identified as key-factors for the promotion of the fundamental conditions for its expansion and development. Such purposes depend on the efficiency and trust reliability of the market, consequence of the guarantee of adequate levels of protection and harmony amongst the concerns of all the economic agents trading thereunder. Such foundations are[24]:

> General public interest: the transfer of resources between the investors and the economic agents is crucial for the continuous formation of capital, when contemplating a society such as the Brazilian, which clearly opted for the capitalist model, based on free enterprise and the market-oriented economy. Is through such resources transfer process that the investment and growth of the economic units is obtained and, as a consequence, of the society as a whole. Therefore, the regular functioning of the securities exchange market is of general public interest.
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> Reliability: the existence and the growth of the market depend on the trust that its various agents have on the system. If the purpose of the regulatory body is to favor the development of the market in such a way that it will always be able to cope with the growing demands of the society, it becomes imperative to observe said purpose. The regulation should be carried out in order to create a trustworthy foundation that shall ensure the owners of savings accounts that the trade in the market environment brings solely its own risks.
>
> Efficiency of the market: one of the many features regarding the free market is its ability to function as a mechanism apt to direct the savings of a society towards the financial projects with the most adequacy with its expectations. This aspect has to be observed and sought during the regulatory work, considering that only through such work it is possible to best meet the needs of society. Equally, the decreasing of the costs related to

abr./jun. 2002, p. 126.

23 According to Alexandre Santos de Aragão, "the laws that grant normative power to the independent regulatory entities have low normative density, in order to provide the development of sectorial norms apt to, under autonomy and agility, rule the dynamic and complex subjacent social reality". ARAGÃO, Alexandre Santos de. O Poder Normativo das Agências Reguladoras. *Revista Trimestral de Direito Público*, nº 36, São Paulo: Malheiros, 2001, p. 104.

24 COMISSÃO de valores mobiliários (Brasil). *O Mercado de Valores Mobiliários Brasileiro*. Rio de Janeiro: CVM/SOI, 2013. [on line]. Available at: <http://www.portaldoinvestidor.gov.br/portaldoinves tidor/export/sites/portaldoinvestidor/publicacao/Livro/LivroTOP-CVM.pdf>. Access in: 10 jun. 2015.

the mediation of such resources meets both the needs of the companies and the individuals that invest on it, and it shall be through the efficiency of the market that such purposes may be achieved: locating and operating efficiencies.

Competitiveness: the efficiency of the market depends on the level of competition established among its participants. Therefore, the regulation has to maintain the attention on such fundament, not only preventing competitiveness decreasing actions, but also ensuring its health. Also, the active competition reduces the need for regulation.

Free market: the freedom of action in the market and of access to its mechanisms is a precondition of the existence of a market able to adequately perform its functions. In the process of regulation of the securities market, it is necessary the permanent presence of both the respect to the free flow of the forces of the market and the free access to the performance of the activities and to the operations thereunder.

The analysis if the abovementioned fundaments permits the conclusion that the regulatory role of the agency comprises not only one, but many objectives, which may be seen as complementary amongst themselves. Such conclusion is clear in the doctrine of CANTIDIANO[25], to whom the activity of the regulatory body accommodates at least four main scopes, as described below:

> *The entire activity performed by the regulatory body has the finality (a) of stimulating the creation of savings and its application in securities, (b) promote and ensure the expansion and the efficient and regular functioning of the securities market, (c) protect the securities owners and the investors, against (i) the irregular issuing of securities, against (ii) illegal acts of the administrators and controllers of the companies and savings managers and and (iii) against the use of relevant information not yet divulged to the market and (d) ensure the observance of the proportionate trading practices in the market.*

In order to carry out its normative, monitoring and sanctioning functions, the CVM is endowed with police power, through which it can limit the individual liberty in favor of public or collective interests. Thus, the agency has both material and institutional means

25 CANTIDIANO, Luiz Leonardo. O Papel Regulador da CVM. In: WALD, Arnoldo (Org.) *Direito empresarial*: mercado de capitais, v. 8. São Paulo: Revista dos Tribunais, 2011, p. 672.

at its disposition for the regular performance of its attributions, having the responsibility, for example, to initiate sanctioning administrative proceedings *ex officio*.

5.THE CONSENT DECREE IN THE SANCTIONING ADMINISTRATIVE PROCEEDING

The fundaments and finalities of the legal discipline of the capital market point to the necessity of maintenance of an environment of respect of the legal (i.e. Laws n. 6.385/1976 and n. 6.404/1976) regulatory (i.e. normative instructions issued by CVM) frameworks, as well as the proportionate practices by the administrators, fiscal counselors and shareholders of publicly traded companies, mediators and the other participants of the market.

Therefore, the Law n. 6.385/1976 endows CVM with the powerduty to apply a series of penalties to the offenders, amongst which, notices, fines, suspensions, temporary impediments and prohibitions and withdrawal. The application of such penalties occur after ascertainment and verification, via sanctioning administrative proceeding (SAP), of the violating actions in the legal, regulatory and proportionate practices frameworks. It must be pointed out that the penalization should proportionate larger educational and preventive effects for the participants of the market.

The abovementioned Law, in its article 11, §5, states that the regulatory body may, at its own discretion, if permitted by the public interest, suspend, in any stage, the administrative proceeding installed for the ascertainment of the offenses to the securities exchange market, if the investigated offender executes the CD (settlement), obliging himself to: I – stop the practice of activities or actions considered illicit by CVM; and II – correct the irregularities pointed out, including the indemnification for the damages caused.

The SAP shall observe the proceeding established by CVM itself in the exercise of its normative power. Currently, it is disciplined through Deliberation n. 538 of March 5th, 2008, with the amendments brought by Deliberation n. 552/08 (rules the ordinary proceeding), and also the Instruction n. 545/14 (rules the summary proceeding). Both disposing about the proceedings to be observed in the procedural protocol of the SAP installed by the agency.

Both in Deliberation n. 538 (art. 13, §4º) and in Instruction nº 545 (Art. 2º, § 2º, inc. VI), in the citation act shall include a notice regarding the prerogative of the accused of executing a CD[26], except

26 As noted by WELLISCH and SANTOS, the North American consent decree would be the main inspiration for the Brazilian version of the instrument. WELLISCH, Julya Sotto Mayor; SANTOS, Alexandre Pinheiro dos. O termo de compromisso no âmbito do mercado de valores

in event of the ascertainment of the irregularities related to Law n. 9.613/98 (which regards the crimes of money laundering, concealment of assets, rights or values; the prevention of the use of the financial system for the practice of the illicit acts prescribed by this law, and creates the Financial Activities Control Counsel – FACC), as well as the cases ruled by the Instruction n. 301/99 of CVM.

The CD is ruled by the Deliberation n. 390/01 (amended by Deliberation n. 486/05), which regards the proceedings of the aforementioned institute, through Ordinances PTE n. 71/05 and PTE n. 066/08, both from CVM.

6.DYNAMICS OF THE CONSENT DECREE

Except when of the ascertainment of the irregularities in connection with Law n. 9.613/98 and in the event of cases ruled by Instruction n. 301/99 of CVM, the agency is authorized to execute the CD in the other installed SAP, as prescribed by art. 1st, §1st of the Deliberation n. 390/01 of CVM.

The interested party in the execution of the CD my present a written proposal to CVM, through which the party obliges to: i) stop the practice of activities or actions deemed illicit, if the case may be; and ii) correct the identified irregularities, including indemnification of the damages caused to the market or to CVM.

The interested party shall disclose the intention of execution of the CD until the deadline of the defense arguments, notwithstanding the burden of presenting such arguments. However, the aforementioned disclosure is also permitted in the preliminary investigation stage. In the first case, the full proposal shall be addressed to the Administrative Proceedings Control Coordination – APCC in no longer than 30 (thirty) days after the presentation of the defense. In the second case, it shall be addressed to the Superintendence responsible for the investigation.

The Federal Specialized Prosecutor´s Office (FSP) of CVM shall be heard about the legality of the proposal presented by the interested party. After the manifestation of the FSP, the General Superintendent shall submit the proposal of execution of CD to the Consent Decree Committee (CDC)[27], which shall present its opinion (in no longer

mobiliários. *Interesse Público* – IP, Belo Horizonte, ano 11, n. 53, jan./fev. 2009. Besides the influence of the consent decree, noted by the two authors, it is possible to say that the consent decree, in national context, has similarities with the compromise to cease the investigated practice, present in the Antitrust Law (n. 12.529/11) and, also with the conditional suspension of the criminal proceeding, prescribed in Law n. 9.099/95.

27 The current composition of the Committee is disciplined in article 2nd of the Ordinance CVM PTE n. 71, of August, 17th, 2005, with text provided by the Ordinance CVM PTE n. 066, of April 1st, 2008. Article 2nd – The Consent Decree

than 30 days as of the presentation of the opinion of FSP) regarding the opportunity and convenience in the execution, and de adequacy of the proposal formulated by the accused, proposing to the Body its acceptance or denial, considering the opportunity and convenience, the nature and severity of the offenses object to such proceeding, the accused records and the effective possibility of penalty, in the particular case.

Prior to the preparation of its opinions, the CDC, in its convenience, may negotiate with the proposer the most adequate conditions. Such negotiation between the CDC and the proposer shall be concluded within a maximum of 60 (sixty) days, with the possibility for the Committee to, at the end of negotiations, amend the initial proposal, if within the deadline imposed by the Committee. May this be the case, the deadline for the preparation of the opinions of the Committee be counted as of the date in which the negotiations were concluded or as of the presentation of the amendments to the initial proposal, as the case may be.

The execution proposal, together with the opinions of the CDC, shall be submitted to the deliberation of the Body, which shall come to a decision regarding its acceptance or denial. If accepted, the decree shall be entered into by the President of CVM, by the interested parties and by two witnesses.

The CD shall suspend the current administrative proceeding, for the period stipulated for the fulfillment of the settlement. On the other hand, the conditions of the decree, after accepted by the Body, shall not be amended, unless a new deliberation is carried out by request of the interested party.

The execution of the consent decree shall not imply in a confession as to the matter of fact, nor acknowledgement of illegal conduct analyzed in the proceeding that originated it, being those the most relevant advantages for the accused of illegal practices.

From the decision of the Body that denies the proposal for CD there shall be no appeals to the Resources Counsel of the National Financial System, once the discretion to accept or deny the execution of the decree is exclusively of the agency, pursuant to art. 11, §5th of the Law n. 6.385/76.

7. ANALYSIS OF THE MAIN THEORETICAL AND PRACTICAL ASPECTS OF THE CONSENT DECREE

Committee shall be comprised of the owners of the following Superintendences: I – General Superintendence – GS; II – External Monitoring Superintendence – EMS; III – Corporate Relations Superintendence – CRS; IV – Market and Intermediaries Relations Superintendence – MIRS; V – Auditing and Accounting Regulations Superintendence – AARS; and VI – Sanctioning Proceedings Superintendence – SPS.

According to SILVEIRA[28], the judicial nature of the CD is approximately of the transaction, to the extent that characterizes a deal between the accused and the CVM. As a matter of fact, the settlement may be understood as legal business, considering that it combines the features from both civil transaction and discretionary[29] administrative act, in which the Administration is endowed with a certain liberty to evaluate or decide.

The nature of the legal business is clear through the analysis of MUTO and YOKOI[30], to whom it is a role of CVM to accept the proposed terms, deny or even discuss amends, as typical options of the agents that seek to perform legal businesses, but without the necessity of legal approval of the eventually performed decree. It is important to emphasize that the dynamics of the consent decree in the Brazilian reality is different, for example, from the one present in the American model, in which the efficiency of the *consent decree* depends on the judicial approval.

Through the CD there is a possibility of reparation to the damaged investors, even if not parties in the proceeding. EIZIRIK[31] teaches that the demand for reparation only occurs in the event of any quantifiable damage or against identifiable damaged individuals so it may be possible to attribute to each their own indemnification values. In this respect, it is duly noted that the art. 10 of the Deliberation n. 390/01 prescribes that, in the event of damages to investors, there is a possibility for CVM, at its discretion, to notify such investors to present further information regarding the quantification of the value to be paid in reparation.

In abovementioned case, the damaged investor shall refrain from presenting information further than the extent of the damaged suffered and the value of reparation. Nevertheless, in the event of undetermined or unidentifiable damaged investors, the agency may, by common consent with the proposer and at his expenses, publish summons with

28 SILVEIRA, Sandra Maria Bittencourt da. *O Instituto do Termo de Compromisso no Sistema de Regulação do Mercado de Capitais Brasileiro*. São Paulo, 2006. Master's dissertation (Master's Degree in Laws). Post-graduation at Catholic Pontifical University - PUC. f. 35.

29 Administrative act is the unilateral declaration of the State in the exercise of public prerrogatives, expressed through complementary concrete commands of the law issued in order to enforce its fulfillment and subject to legitimacy control by the jurisdictional body. MELLO, Celso Antônio Bandeira de. *Curso de Direito Administrativo*. 15ª Edição. São Paulo: Malheiros Editores 2003, p. 352.

30 MUTO, Silvio; YOKOI, Yuki. Colegiado da CVM amplia o uso de termos de compromisso. *Revista Capital Aberto*, ed. 60, 2008. Available at: <http://www. capitalaberto.com.br/temas/colegiado-da-cvm-amplia-uso-de-termos-de-compromisso/#.VZxPO lK4JMp>. Access in: 07 jul. 2015.

31 EIZIRIK, Nelson et. al. Mercado de Capitais - regime jurídico. 3. ed. Rio de Janeiro: Renovar, 2011, p. 359.

the purpose of determining and identifying such damaged investors as well as to reach the quantification of the individual values to be paid as indemnification.

Until 2006, emphasizes SILVEIRA[32], the main obligations imposed to the proposers in the accepted consent decrees were: donations to charitable institutions, recomposing of data to the damaged investors along with the costs incurred by CVM in connection with the administrative proceeding, implementation of internal negotiations policy in trading securities with publicly traded companies, performance of trainings and seminars and distribution of materials regarding applicable regulations, with educational scope, performance of public offering for the papers and for the acquisition of shares from the minority shareholders that do not adhere to the public offering.

As to the enforcement, the CVM may carry out the judicial enforcing of the decree, which is a extrajudicial executable title, pursuant to article 11, §7th of the Law n. 6.385/76, together with the restart of the sanctioning administrative proceeding, suspended by occurrence of the settlement. Such conduct is not considered *bis in idem*, once the consent decree does not apply penalties, but imposes obligations[33].

Prior to its amendments by Law n. 10.303/01, the final part of the §7th of the article 11 of Law n. 6.385/76 prescribed that the non fulfillment of the consent decree implies in contempt, pursuant to article 330 of the Criminal Code. The doctrine criticized such paragraph. According to EIZIRIK[34], the crime was not configured, once no orders were issued by CVM as of the execution of the consent decree. Considering the negotiating nature of the decree, there is no order, but solely a simple agreement.

Another important question, emphasized by SILVEIRA[35] is that the non compliance of the consent decree may not be considered as an aggravating circumstance by CVM in the application of penalties if the accused, by non complying with the settlement, is condemned in the sanctioning administrative proceeding. The claim is that the settlement solely imposes the suspension of the SAP installed against the accused, therefore, the penalization of the accused, after the ascertainment of the illegality of the practices pointed out by CVM as infractions, could not be aggravated by the non compliance of the decree.

Once there is a confirmation that the settlement entered into by CVM and the accused arised out of a legal defect, thus not brought by

32 SILVEIRA, op. cit., p. 79.

33 MORAES, Luiza Rangel de. Considerações sobre o consent decree e sua aplicação no âmbito da disciplina do mercado de valores mobiliários. *Revista de Direito Bancário e do Mercado de Capitais*, São Paulo, nº 4, jul-set, 1998, p. 40.

34 EIZIRIK, op. cit., p. 273.

35 SILVEIRA, op. cit., p. 14.

convenience and opportunity criteria, an interested party may request in court the deconstruction of the consent decree executed through judicial ruling. However, the deconstruction based on legal defect does not ban the possibility to execute a new decree, free from defects[36].

Throughout the years, the modalities of obligations assumed by the consenting parties has been altered. In the beginning, the obligation leaned towards the offering of seminars or to elaborate educational material to be distributed amongst the investors. Since the year 2000, in many consent decrees contained the obligation of donation to social programs and philantropic entities has been noted. In 2005, there was an increase in the attributions of values to CVM as a form of compensation for expenses, donations, fines, and damage repair caused to the agency or the the capital market. After 2006, the obligation to pay a determined amount to CVM, without specification of the reason, became more frequently noted[37].

Such as prescribed by the relevant legislation, the CVM may reject the proposal of consent decrees. In the year 2005 a data survey regarding the enquiries to determine the reasons that lead CVM to reject or accept the consent decree was carried out, concluding as follows: in the event of approval of the proposal to a consent decree by CVM, such decision was based mainly on the presence of the convenience and opportunity features, with emphasis on the compensation for the damages as a determinant factor for the acceptance of such decree. On the other hand, in the event of rejection of the proposal, the decision was based mainly on the absence of both the aforementioned features and of the compensation for the caused damages and in the event of undertaking of a commitment related to the supposed irregular practice as of the execution of the decree, considering that such practice is already mandatory by the regulation itself[38].

On January, 15th, 2009, a research contemplating 184 consent decrees entered into and settled by the CVM between the years 1998 and 2008 was published, exposing the enhancing level of compliance to the obligations therein. Only one non-compliance was detected (IA CVM n. 04 of 1999), in which, according to TANJI[39], was followed by a: "(i) ruling by the body of CVM with the application of administrative penalties, (ii) promotion of public action by the Federal Public Ministry in face of the promissory parties, in which the CVM acted as assistant

36 Ibid., p. 62.

37 TANJI, Márcia. *Mercado de capitais brasileiro e tutela coletiva dos interesses*. São Paulo, 2009, p. 102. Master's dissertation (Master's Degree in Laws). Post-graduation in Laws at the State University of São Paulo – USP.

38 SILVEIRA, op. cit., p. 87.

39 TANJI, op. cit., p. 101.

to the accusation"[40].

In practice, many consent decrees have a high money value, nevertheless, there are defendants that, even aware of their innocence, choose to execute the decree and pay, maintaining their good reputations, once the pending administrative matters represents an obstacle to good business opportunities, and even more, preferring to prevent the risks of conviction[41]. It must be noted that as "to the values owed to the damaged, those who suffered the damages arising out of the conduct of the promising party, a relevant value is perceived, but still lower than the one owed to the CVM"[42].

In an interesting exercise of application of the thesis/antithesis methodology, the magazine *Capital Aberto* published two opinion articles, in which the authors were proposed to face the following question: Are the consent decrees being used too largely by the CVM?.

According to CHAVES, the decrees have been too largely used by the agency, which reflects the need of more thoroughness in the approval of the settlements. In the opinion of the author, in severe cases, as in the event of the practice of improper use of relevant information, there should be no possibility of executing a consent decree. In opposition, AMENDOLARA denies the excessive use, as far as it represents an effective instrument which, in practice, prevents law suits that ore often dragged through long periods and show no guarantee of conviction to the damaging parties[43].

8.THE CONSENT DECREE IN THE PERIOD BETWEEN 2009 AND 2014: TRIVIALIZATION OF THE USE OF THE REGULATORY INSTRUMENT?

The methodological option for the performance of research about empirical data regarding the aforementioned instrument was made in order to achieve a better evaluation of the CD as a regulatory instrument in the Brazilian capital market.

Considering the need of a cut, the period between 2009 and

40 Process n. 2004.61.00.019427-5 processed at the 5th Federal Civil Court of the Judiciary Subsection of the Capitol of the State of São Paulo.

41 CARRION, Bruna Maia. Por que os cada vez mais milionários termos de compromisso se tornaram uma saída conveniente para a CVM e para os acusados. *Revista Capital Aberto*, ed. 91, mar. 2011, s/p. Available at: <http://www.capitalaberto.com.br/temas/ calculo-de-risco/#.VZxO4FK4JMp>. Access in: 06 jul. 2015.

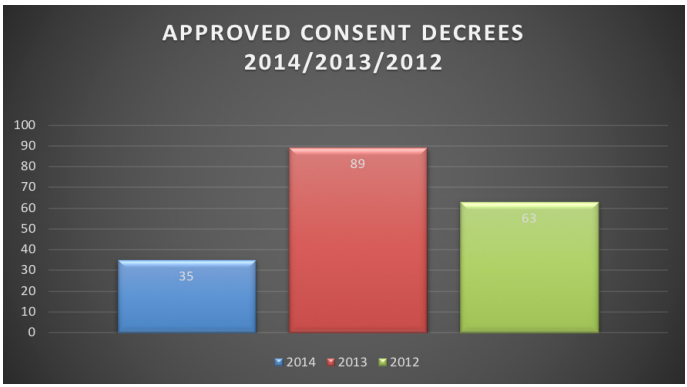
42 TANJI, op. cit., p. 102.

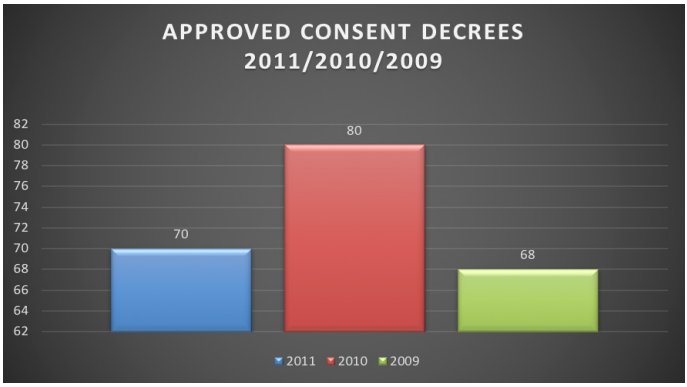
43 CHAVES, Renato. É preciso mais rigor; AMENDOLARA, Leslie. Instituto eficaz. *Revista Capital Aberto*, ed. 78, fev. 2010, p. 46-47. Available at: <http://www.capitalaberto.com.br/pageflip/78/Ed%2078/assets/basic-html/page46.html>. Access in: 06 ago. 2015.

2014 was more profoundly analyzed, even though the instrument has been used since 1998 (which is, just the year after its introduction to the legal system in 1997). In a further analysis, approaches were found in the doctrine regarding the subject, which, majorly indexed information concerning concrete data related to the period prior to 2009. Therefore, the proposed cut would allow a more updated view of the recent dynamics of the use of such instrument.

In that vein, the CD approved in the years 2009, 2010, 2011, 2012, 2013 and 2014 were obtained through research at the CVM files. It is important to highlight that: i) there are cases in which the settlements "approved" in a given year are only executed in the following year, giving reason to the option for the counting of only those approved until the end of the cut; ii) in many cases, there are more than one settlement approved in connection with the same SAP.

The obtained data was consolidated and transferred to the two following graphics, which, according to the adopted methodology, show the annual quantity of settlements approved by the regulatory body in each year of the selected periods.





It is noticeable, considering the consolidated data in the graphics, the excessive utilization, by the CVM, of the permission to execute the settlement together with the offenders of both the legal and regulatory frameworks and also of the equality of the practices carried out in the capital market, as an alternative answer to the application of the penalties prescribed in the Law n. 6.385/76. It is registered that were also observed cases in which the settlement propositions were rejected by the agency[44].

The data indicate that, although the settlement may be understood as an important mechanism in the field of capital market regulation – since it characterizes a larger aperture of the normative system to the market agents and ensures space to the alternative reactions to the pure and simple application of penalties, allowing the negotiations to be carried out between the agency and the defendants, in order to suspend or terminate law suits, fixate indemnifications, etc. – its excessive use implies a distortion of its finalities, of the fundaments of the normative discipline of the market and of the set of functions assigned to CVM.

The CD should not be vulgarized[45] in such a way that it constitutes a type of authorization/incentive to the practice of offenses, promoting the general knowledge that it would suffice for the offender to execute the decree, immediately after the offense, and be solely compromised to cease the practice of the activities or actions deemed illegal by CVM and correct the appointed irregularities, including compensating damages.

The confidence, one of the foundations of the regulation, indicates

44 In the analysis of the proposal for consent decree in connection with the sanctioning administrative proceeding RJ2012/9808, the body, in 01/06/2015, unanimously deliberated as inopportune e inconvenient the acceptance of the proposal, since the eventual execution of the consent decree together with the defendants would not represent a significant economy in the proceeding to the CVM, being the presented proposals rejected. Another important point: the recurrence is one of the reasons that causes CVM to refuse the proposal for consent decree, such as occurred in June, 17th, 2015, when to body unanimously decided for the rejection of the proposal for consent decree made by the Federal Government, which was accused of failure to comply with the provisions of article 115th of the Stock Corporation Law, arising out of its participation in the Extra-ordinary General Meeting that deliberated for the acceptance of the terms of the Provisional Measure 579 – which caused damages to the state company (AMEC, 2015).

45 There are two questions that may, perhaps, constitue a type of informal incentive to the use of the settlements in a larger scale: 1) the difficulty of the CVM regarding the agility in the judgement of the processes (there are processes from 2010 only now, in 2015, being judged); 2) the monetary penalties (currently, they cannot exceed the highest amongst the following values: i) R$500.000,00; ii) fifty percent of the value or the issuing or of the irregular transaction; or iii) three times the amount of the economic advantage obtained or of the loss prevented in occurrence of the illicit) prescribed in Law n.6.385/76. Although, it is believed that such factors may not be used as reasons for the distortion of the institute of the consent decree.

that the normative discipline of the market should be carried out in order to create a relying base that assures the savings owner the certainty that he may act exclusively under the risks of the own business in which he chooses to operate. The offenses to the regulatory framework corrode the trust of the investors in the market. And a market shall never be effective if there is no reliability in its regular functioning, to which the respect for the set of the game rules is mandatory.

In the same way, the role of the CVM should be in order to discourage the illegal practices, watch the protection of the owners of securities against the irregular issuing and illegal acts from the administrators and controlling shareholders or even securities portfolio managers; avoid or prevent fraud modalities or manipulations intended to create artificial conditions of demand, supply or price of the securities traded in the market; ensure the access to the public to the information regarding the traded securities and the issuing companies in connection to such securities; ensure the observance of the equal trading practices in the securities market; stimulate the creation of savings and its application in securities; promote the expansion and the efficient functioning of the stock market and stimulate the permanent applications in the shares of the capital stock of the publicly traded companies.

It must be reminded that, if at the application of penalties for the practice of actions that offend the legal and regulatory framework or the equal practices, the penalization should provide a larger educational and preventive effect to the agents of the market (intending to prevent future illegal practices), it is possible that, through the excessive use of the settlement, generate an exactly opposing effect, or else, the dissemination of the idea that the offending actions and unequal practices may be "erased" through the execution of a consent decree. Such possible negative effect is helped by the own legal discipline of the subject, which indicates that the settlement, if proposed, accepted and complied to, shall not constitute a confession as to the matter of fact, nor a recognition of the illegality of the analyzed conduct.

9.CONCLUSIONS

From the present research, the comprehension of the CD as an important regulatory mechanism to be used by the regulatory body of the Brazilian capital market, the CVM, was possible.

Through such instrument, the agency may enter into settlements together with the offenders of the legal and regulatory frameworks, or with the responsible for the performance of unequal practices in the market scope. The decrees constitute a possibility to an alternative reaction to the penalties prescribed in the Law n. 6.385/76, distinguishing

an open normative system that allows a higher approximation between the regulatory body and the market agents.

As an answer to the research problem that oriented this present investigation, it is believed that the previsions in both the legal and regulatory scopes, which contemplate the possibility for the defendant, in the sanctioning administrative proceeding context, to propose the execution of the consent decree, do not make, by themselves, opportune and convenient the excessive execution of the decrees.

Considering its nature of regulatory instrument, its use should be restricted to the foundations that inspire the regulatory framework, such as public interest, reliability and efficiency of the market. In the same way, those who use it, in this case the CVM, should be limited by the respect for the institutional finalities of the decree, such as the protection of the owners of securities, prevention or prohibition of fraud or manipulation types, ensuring of the observance of the equal trading practices in the securities market, stimulation of the creation of savings and its application in securities, promoting the expansion and the regular and efficient functioning of the market and stimulating the permanent application in the shares of the capital stock from the publicly traded companies.

By the examination of the SAP installed between 2009 and 2014, a final number of 405 decrees approved by the regulatory body was reached, a result that characterizes an increasing utilization of this regulatory instrument. The excessive use of the alternative reaction to the penalties is believed to implicate in a distortion of the finalities of the own settlement as a mechanism of regulation, as well as a violation of the foundations of the normative discipline of the market itself and of the set of functions assigned to CVM.

Therefore, the use of the CD must be restricted to punctual cases, which configures a public interest in the alternative reaction to the application of the penalties prescribed in the Law, considered the foundations of the regulation and the finalities of the CVM itself. In this vein, it is emphasized a possible directive for the role of the agency, as an incentive to new settlement models: i) as a general rule, the use must be restricted to the cases prescribed in the Instruction CVM n. 545/14, which applies the SAP in its summary rite, for the ascertainment of the possible objective offenses, related to an omissive conduct of the market agents; ii) exceptionally and under a higher thoroughness, the use in the event of certain generally light offenses (which application would obey the Deliberation CVM n. 538/08, which regulates the SAP in its ordinary rite), being forbid in grave cases such as the irregular use of relevant information.

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EDUCATION AS A TOOL OF THE CONSTITUTIONAL DUTY TO TACKLE HOMOPHOBIA: POTENTIALITIES AND STRUGGLES[1]

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Abstract: This article aims to analyze the role the school can play in the struggle against homophobia. The first part will examine homophobia, understood as an injustice in the cultural field that derives from a model of compulsory heterosexuality and male domination, which calls for politics of recognition. Then it will be analyzed in what fashion these politics of recognition are set on the Constitution of 1988, in order to conclude that it establishes an obligation of the State to adopt them. On the basis of this premise, the third part examines the privileged potential that school assumes in this scenario, addressing the central role it plays in the production of homophobia and the role it may play in its unmaking. Finally, the debates and tensions regarding the subject will be analyzed, especially those that arose of conservative and religious discourse and the formulation of the category of "gender ideology".

Keywords: Education - Homophobia - "Gender ideology" - Equality - Recognition.

1. INTRODUCTION

The 1988 Federal Constitution is defined by the central role given to the dignity of the human person and the fundamental rights, symbolically posited in its beginning, and also the "profound and visceral commitment to equality"[2] in the quest for the construction of a more

1 Translated by Miguel Alencar Rosa Teixeira Mendes

2 SARMENTO, Daniel. "A Igualdade Étnico-Racial no Direito Constitucional Brasileiro:

just and tolerant towards plurality Brazil. From this new axiological paradigm, the view of law as an instrument to social emancipation gains more relevance. Thus, the new constitutional order has served as the foundation to a series of new discourses and movements which aim to deconstruct atavistic cultural standards over which all sorts of prejudices and discriminations propagates. In this picture, the 1988 Charter is considered the "cornerstone from which sexuality and reproduction appear as legitimate fields in which to exercise rights in Brazil"[3], acting as normative basis for public policy developed in favor of sexual diversity and the combat against homophobia.

Despite this scenario, "sexual orientation" is not expressly posited in the prohibited modes of discrimination in art. 3º, IV of the Constitution. Its inclusion in this roster was the main request of the homosexual movement during the Constituent Assembly. However, the proposal fell short[4] and the debates around the measure revealed an enormous resistance towards the theme from the parliament members who understood the inclusion of the term would stimulate libertine behavior, immorality, and debauchery, serving only to encourage "bad habits", ridicule the official institutions, and propagate the AIDS epidemic.[5]

On the other hand, it seems indubious that discrimination by reason of sexual orientation is prohibited by the constitutional order of 1988, albeit implicitly. The opening of the cited art. 3º, IV, mentions "any other forms of discrimination", and the emancipatory spirit of the new Constitution allow this comprehension.[6] In Roger Raupp Rios' opinion, sexual identity discrimination should be included in discrimination by reason of sex, which is explicitly prohibited by the constitutional text, as the homosexual subject is discriminated due to the sex of whom it

Discriminação 'De Facto', Teoria do Impacto Desproporcional e Ação Afirmativa". In: SARMENTO, Daniel. Livres e Iguais: Estudos de Direito Constitucional. Rio de Janeiro: Lumen Juris, 2006, p. 141.

3 CARRARA, Sérgio. "Políticas e direitos sexuais no Brasil contemporâneo". In: Bagoas, nº 05, 2010, p. 134.

4 Although it wasn't included in the Federal Constitution, the prohibition of discrimination by reason of sexual orientation was included in the State Constitution for Mato Grosso and Sergipe, and in the Organic Law of various municipalities.

5 The proposal received the unapologetic nickname of "sexual disorientation amendment" (TREVISAN, João Silvério. Devassos no Paraíso: a homossexualidade no Brasil, da colônia à atualidade. 8ª Ed. Rio de Janeiro: Record, 2011, p. 158). About the propositions and debates of the constituent about the theme, see: MARMELSTEIN, George. "Jurisprudência arco-íris: comentários à decisão do Supremo Tribunal Federal acerca das uniões homoafetivas". In: Revista Brasileira de Direito Constitucional – RBDC, n. 17, 2011, pp. 233-235.

6 SARMENTO, Daniel. "Casamento e União Estável entre Pessoas do Mesmo Sexo: perspectivas constitucionais". In: SARMENTO, Daniel; IKAWA, Daniela; PIOVESAN, Flávia (coords.). Igualdade, Diferença e Direitos Humanos. Rio de Janeito: Lumen Juris, 2010, p. 636.

guides its affective-sexual involvement.[7]

Thus, from this premise, one can question which measures the constitutional order of 1988 demands from the State in face of that which is commonly called homophobia. Confronting this reality can be materialized in a complex array of actions of distinct orders, which range from repression and punishment of discriminatory behavior, to positive measures of intervention on reality in favor of sexual diversity. This article's focus is the second type of measure, analyzing how the adoption of public policy against homophobia in the field of education and schools have a privileged potential of social transformation, basing itself on Nancy Fraser's recognition theory.

The first part of the article will examine the problem to be faced, trying to comprehend homophobia as an injustice in the field of recognition due to asymmetrical and stigmatizing cultural standards, and which requires recognition policies for its confrontation, based on the theoretical keys developed by Nancy Fraser. Thus, its cultural basis, like the choosing of heterosexuality as the only legitimate/possible sexual orientation and the male domination characterized by the stratification of gender roles and superiority of the masculine over the feminine will be summarized.

The second part will approach the constitutional duty of adoption of recognition policies for the facing of homophobia, analyzing its normative frameworks in the Brazilian constitutional order and, mainly, the necessity of adoption of positive measures of intervention in the reality which consubstantiates as public policies of valuing difference and pluralism.

Among those various measures, the intervention in the field of education has a privileged potential. Thus, the third section will first analyze in which way school acts as a normalizing and disciplining instance for the production and reproduction of a homophobic culture, and then explore the possibilities of school taking the role of deconstructing a culture of intolerance and prejudices.

Finally, the fourth and final part will approach the disputes and tensions that such policies face, due to the actions of religious and conservative groups which aim that schools act in reinforcing the notion of a monolithic model of family and sexual experience and oppose that which they call "gender ideology".

2. HOMOPHOBIA AS A MATTER OF RECOGNITION

Discrimination and prejudice suffered by people who have a

7 RIOS, Roger Raupp. "Direito da antidiscriminação, sexo, sexualidade e gênero: a compreensão da proibição constitucional de discriminação por motivo de sexo". In: SARMENTO, Daniel; IKAWA, Daniela; PIOVESAN, Flávia (coords.). *Igualdade, Diferença e Direitos Humanos*. Rio de Janeiro: Lumen Juris, 2010, pp. 714-717.

non-heterosexual sexual orientation or affective-sexual practice, be it real or presumed/supposed[8], are traditionally denominated homophobia. Although widely adopted in the academic and militant discourse, having popularized later, the term is criticized and alternatives are proposed. Some authors believe the use of the suffix -phobia could send the idea that it is a psychopathology of the individual order, erasing the social, cultural, legal, and institutional components of the discrimination. Other suggested terms put more focus in these aspects, e.g., heterosexism and heteronormativity.[9]

Due to its wide dissemination, the expression will be adopted in this article, making clear that the author adheres to the critic of the term, as the discrimination that non-heterosexual people suffer is not only due individual actions, but mainly due to the social, institutional, and cultural standards that produce them.[10] Borrillo defines homophobia as:

> *The general, psychological, and social hostility towards those who, supposedly, feel desire or have sexual practices with individuals of their own sex. A specific form of sexism, homophobia rejects, equally, all of those who do not conform with the predetermined role by their biological sex. Ideological construct that consists in the constant promotion of a form of sexuality (hetero) in detriment of another (homo), homophobia organizes an hierarchy of sexualities and, in this way, extract political consequences.*[11]

It is noticeable that homophobia stems from a hierarchical system that values subjects in an asymmetrical way due to their sexual

8 An important case about this situation involved a father and son that, while embracing, were mistaken for a gay couple and assaulted in São João da Boa Vista, São Paulo, in 2011.

9 RIOS, Roger Raupp. "O conceito de homofobia na perspectiva dos direitos humanos e no contexto dos estudos sobre preconceito e discriminação". In: RIOS, Roger Raupp. (org.). *Em Defesa dos Direitos Sexuais.* Porto Alegre: Livraria do Advogado Ed., 2007, p. 120; JUNQUEIRA, Rogério Diniz. "Homofobia: limites e possibilidades de um conceito em meio a disputas". Revista Bagoas, V.1, n.1, jul./dez. 2007, p. 10.

10 On the other hand, even the individual reaction of visceral disgust, usually related to the notion of "phobia", towards homosexuals and same-sex affection "can be interpreted as political objection to the visibility of such minorities, associated to conservative dispositions towards sexual moral" (NATIVIDADE, Marcelo; OLIVEIRA, Leandro de. *As novas guerras sexuais*: diferença, poder religioso e identidades LGBT no Brasil. Rio de Janeiro: Garamond, 2013, p. 78).

11 BORRILLO, Daniel. *Homofobia:* história e crítica de um preconceito. Belo Horizonte: Autêntica, 2010. p. 34.

orientation.[12] Developed to the only standard, heterosexuality became compulsory and every other way of living that distances itself from this ideal is devalued. Also, heterosexuality is seen as the natural, correct, and healthy archetype while deviation is labeled as anti-natural, pathological, or sinful.

The above-mentioned definition by Borrillo shows the relation that exists between homophobia and discrimination against women as both are related to patriarchy and male domination, which imposes distinct, rigid, and unequal social roles to men and women justified through their naturalness and inevitability ("sexual differentialism") and male superiority in relation to the female.[13]

In this way homosexuality clashes with this hegemonic model through challenging gender performance in various levels like, e.g., in the sexual roles, since homosexuality is capable of making men take a passive posture which is destined for women; and that women take an active posture, reserved for men.[14] Thus, if the traditional construct of masculinity and femininity works through the unmoving separation of both universes, opposite and mirrored, the homosexual experience produces a disarrange in these frontiers[15], which homophobia aims to reestablish and reinforce at every moment.[16] Indeed, homophobia acts as a defense mechanism of the hegemonic model that pretends

12 Thus, "in the heterosexist ideology and system, more than a question of preference or sexual orientation, the binomial heterosexuality/homosexuality is a distinctive criteria to the recognition of dignity and the distribution of social, political, and economic benefits. (RIOS, R. R. "O conceito de homofobia na perspectiva dos direitos humanos e no contexto dos estudos sobre preconceito e discriminação". Op. Cit, p. 121).

13 *Ibidem*, p. 122. On the theme, Eribon argues the male domination should be understood in an ample manner, "as the domination of the 'masculine principle' over the 'feminine principle' and, thus, of the heterosexual man (i.e., the man!) over the homosexual man (that is not considered a man), in the sense that homosexuality is classified in the unconscious of our societies besides the 'feminine'" (ERIBON, Didier. *Reflexões sobre a questão gay*. Rio de Janeiro: Companhia de Freud, 2008, p. 101)

14 In this sense, Miskolci differentiates homophobia and heteronormativity to argue that this would be the hegemonic sexual order and gender roles, and could be reproduced by same-sex couples by emulation of traditional behavior and act in the erasing of the deviant gender experiences. Thus, the homosexual experiences would be submitted to distinct levels of social stigma depending on their distance from the hegemonic standard of gender experiences and family recommended by the heteronormative order. (MISKOLCI, Richard. Teoria Queer: um aprendizado pelas diferenças. 2ª Ed. Belo Horizonte: Autêntica, 2015, p. 15).

15 It is not a coincidence that homosexuality was perceived in the medical discourse in the end of the XIX century as a matter of "gender inversion", and that the homosexual male as someone who renounced their masculinity, such as the lesbian renounced their femininity. (ERIBON, D. *Reflexões sobre a questão gay*. *Op. Cit.*, pp. 101-102).

16 WELZER-LANG, Daniel. "A Construção do Masculino: dominação das mulheres e homofobia". Estudos Feministas. Florianópolis, v. 9, n.2, 2001, p. 465.

there is a linearity between sex, gender, and sexual desire/orientation, establishing as legitimate only those gender experiences that are "in accordance" with the "natural" sex of the individual and the sexual orientations that are aimed at the opposite sex/gender.[17]

According to Judith Butler, this coherence and continuity between sex, gender, sexual practice, and desire produces "intelligible" genders which are culturally acceptable and, from a causal relation between these elements (e.g., if male, then masculine), turn those who do not conform to this framing to unintelligible.[18] For the author:

> *The heterosexualization of desire requires and institutes the production of discriminate and asymmetrical oppositions between 'feminine" and 'masculine', in which these are understood as expressive attributes of 'male' and 'female'. The cultural matrix through which gender identity is intelligible requires that certain types of 'identity' cannot exist - that is, those in which gender do not arise from their sex and those in which the practice of desire do not 'arise' neither from 'sex' nor from 'gender'. [...] Alas, from this field's point of view, certain types of 'gender identity' appear as mere failures of development or logical impossibilities, precisely due to their non-conformity to the cultural intelligibility norms.*[19]

Berenice Bento highlights this complementary and feedback relation between heterosexuality and gender binarism since the dichotomist and complementary model of gender-sex justifies heterosexuality as a natural and unquestionable standard at the same time that the discipline of gender performances in accordance to

17 On this linearity, Zambrano and Heilborn argue that "the common sense considers a person, classified as man or woman (biological sex) will naturally have the expected behavior to each of these possibilities (male or female gender identity/role), and that their sexual desires will be directed towards persons of the sex/gender that is differente from their own (heterosexual orientation). These three elements - sex, gender, orientation - are seen in our culture as always combined in the same way, that is, it creates an hegemonic standard of being a heterosexual masculine man or a feminine woman." (ZAMBRANO, Elizabeth; HEILBORN, Maria Luiza. "Identidade de gênero". In: LIMA, Antonio Carlos de Souza (coord.). *Antropologia & Direito*: temas antropológicos para estudos jurídicos. Rio de Janeiro/Brasília: Contra Capa, 2012, p. 415).

18 BUTLER, Judith. Problemas de Gênero: feminismo e subversão da identidade. 8ª Ed. Rio de Janeiro: Civilização Brasileira, 2015, p. 43.

19 Ibidem, p. 44

this single model would serve as control of the sexual deviations.[20] According to Borillo, the binary division of gender and heterosexual desire are mechanisms of reproduction of the social order, not only of biological reproduction of the human species. Thus, the point of view in which homophobia is the 'guardian of the frontiers both sexual (hetero/homo) and gender (masculine/feminine).[21]

In this way, the confrontation against the discrimination withstood by women and homosexuals would involve the same "common enemy" that historically approached the demands of both the feminist and LGBT movements. Both movements aim at the "politicization of everyday" and the "publicization of the private"[22], and open the debate about the rigid separation of masculine and feminine gender roles, be it in the scope of family, be it in other social spaces, as well as a profoundly sexist and patriarchal culture that positions men and masculinity/virility as superior to women and femininity. According to Castells, the LGBT movement puts in risk patriarchy as it clashes with its premises of "compulsory heterosexuality" and "sexual repression", about which a rigid and hierarchical division of gender and sex roles has been historically established.[23]

These structures of sexual repression and compulsory heterosexuality that the author mentions receive influx in Brazil -- and Latin America in general -- of the Christian formation of our cultural matrix and the persistent influence of the Catholic Church and the Christian worldview in politics. In this way, the hegemonic family model, not only heterosexual ("God made male and female") but also matrimonial, indissoluble, and profoundly patriarchal, corresponds to the standard model recommended by Catholicism, and that should be

20 BENTO, Berenice. "In school we learn that difference makes a difference". In: Estudos Feministas, 19(2), 2011, p. 553. In similar fashion, Butler proposes that "the institution of a compulsory and natural heterosexuality requires and regulates gender as a binary relation in which the masculine term differentiates itself from the feminine term, realizing this differentiation through the practices of heterosexual desire. The act of differentiating the two opposing moments of the binary structure results in a consolidation of each of their terms, of the internal coherence of sex, gender, and desire." (Butler, J. Problemas de Gênero. Op. Cit. p. 53)

21 BORRILLO, D. Homofobia. Op. Cit., p. 16.

22 Thus, "feminist theorists argue that 'the personal is political', meaning that the apparently 'natural' dominion of private intimacy (family and sexuality) is legally constructed, culturally defined, and constitutes a locus of power relations. In the majority of those, the emphasis was put on the critical deconstruction of private rhetoric as part of a domination discourse that legitimizes women oppression" (COHEN, Jean L. "Repensando a privacidade: autonomia, identidade e controvérsia sobre o aborto". In: *Revista Brasileira de Ciência Política*, nº 7. Brasília, janeiro/abril de 2012, p. 169).

23 CASTELLS, Manuel. O poder da identidade. 8ª Ed. São Paulo: Paz e Terra, 1999. pp. 238 e 256.

defended from the disruptive influences of feminism and the struggle of sexual minorities.

With all the above it is easy to notice that homophobia represents an inequality or injustice of cultural order. According to Nancy Fraser, injustices can have economic causes, which requires remedies based on redistribution policies; or cultural causes, which demands recognition policies for their confrontation.[24] Fraser understands that, contrary to what happens with race and gender,[25] injustice due to sexual orientation would be the archetype of a problem of recognition, stemming from "institutionalized standards of cultural value which construct heterosexuality as natural and normative and homosexuality as perverse

24 "Each dimension is associated to an analytically distinct dimension of injustice. In the recognition dimension [...] the associated injustice is the non-recognition, in which the standards of cultural value negate the necessary importance to participate entirely in the social life to some actors. For the distributive dimension, however, the injustice corresponds to the bad distribution, in which economic structures such as property regimes and job markets, private some actors of the necessary resources. Each dimension, finally, corresponds to an analytically distinct form of subordination. The recognition dimension corresponds, as we saw, to the status subordination rooted in institutional standards of cultural value. The distributive dimension, however, corresponds to economic subordination, rooted in structural characteristics of the economic system." (FRASER, Nancy. "Repensando a questão do reconhecimento: superar a substituição e a reificação na política cultural". In: BALDI, César Augusto. (org.). Direitos Humanos na Sociedade Cosmopolita. Rio de Janeiro: Renovar, 2004, pp. 616-617). On the other hand, it should be highlighted that the author understands that it is possible that other forms of injustice exists, i.e., other forms of social order that produce other forms of subordination, highlighting that maybe the politic dimension could be a candidate to this tertium genus (FRASER, Nancy. "Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation". In: FRASER, Nancy; HONNETH, Axel. Redistribution or Recognition?: a political-philosophical exchange. Londres: Verso, 2003. p. 68)

25 In spite of the elegance and didactic of this theoretical bipartition, the author advocates that the recognition and redistribution policies are not necessarily excluding, and that concrete injustices can assume both faces simultaneously, which she calls "bivalent collectivities", which would be the case of injustice by reason of gender or race. Thus, although some injustices are closer to one or the other extreme, concrete injustices can be arranged in a gradient between two poles of redistribution and recognition, requiring, for its coping, remedies of both types. (FRASER, Nancy. "Redistribuição, Reconhecimento e Participação: por uma Concepção Integrada de Justiça". In: SARMENTO, Daniel; IKAWA, Daniela; PIOVESAN, Flávia. (coords.). Igualdade, Diferença e Direitos Humanos. Rio de Janeiro: Lumen Juris, 2010, pp. pp. 171-178). The author defends, then, that the notion of "perspective dualism" understands that recognition and redistribution can be understood as "analytically distinct", not occupying concretely separate social spheres, in the sense that "distribution and recognition do not occupy separate spheres. Rather, they interpenetrate, to produce complex standards of subordination" (FRASER, Nancy "Distorted Beyond All Recognition: A rejoinder to Axel Honneth". FRASER, Nancy; HONNETH, Axel. Redistribution or Recognition?: a political-philosophical exchange. Londres: Verso, 2004, p. 217)

and abject".[26]

According to the author, the recognition injustices are traditionally viewed as "identity distortions", based on the Hegelian notion that identity is build intersubjectively.[27] The author, however, aims to discover an alternate model that views the misrecognition as a problem of "social status".[28] According to this model, the institutionalized standards of cultural values should be analyzed by their effects on the relative position of social actors; it is, when these standards face the actors as equals, giving them the same value, one could talk of equality and reciprocal recognition, while different standards that seem the actors as inferior or superior, would cause exclusion and inequality, through status subordination and misrecognition.[29]

A central notion of Fraser's thought is that of participation parity, that requires of all members of society can interact between each other as free and equal partners, which in itself requires a distribution of material goods that would suffice (objective condition) and cultural standards of equal respect (intersubjective condition).[30] It is based on this normative idea that the author justifies the duty of adopting redistribution and recognition policies.[31] In this sense, the objective of recognition policies would be the participation parity on its intersubjective condition, that is, the construction of a world both tolerant and respectful towards difference, in which the assimilation of hegemonic cultural standards would not be a necessary price paid by minorities to enjoy their rights.[32]

3. THE CONSTITUTIONAL DUTY OF FACING HOMOPHOBIA

The duty of adopting recognition policies to face inequality stemming from cultural standards which produce subordination status – like homophobia – finds haven in the constitutional order of 1988. Academically it is discussed if the recognition in the constitutional field

26 "Institutionalized standards of cultural value construct heterosexuality as natural and normative, homosexuality as perverse and despised" (FRASER, N. "Social Justice in the Age of Identity Politics. p. 18). In spite of this, the author recognizes that redistribution issues can derive from these asymmetrical cultural standards. Thus, e.g., a person can be fired or impeded of having a social security benefit by reason of their sexual orientation. In this sense, recognition injustices can require, concretely, a redistribution policy, in a way that, from a practical standpoint every kind of subordination can be understood as two-dimensional. (*Ibidem*, pp. 24-25).

27 FRASER, N. "Repensando a questão do reconhecimento". *Op. Cit*, pp. 604 *et seq*.

28 *Ibidem*, pp. 610 *et seq*.

29 FRASER, N. "Social Justice in the Age of Identity Politics". Op. Cit.. pp. 29-30.

30 Ibidem. pp. 36-37.

31 FRASER, N. "Distorted Beyond All Recognition. *Op. Cit*, p. 217, p. 218.

32 *Ibidem*. p. 7.

comes from the principle of the dignity of the human person[33], from the principle of equality[34], or the right of freedom[35]. Normative basis aside, the dimension of recognition of subjects has constitutional hierarchy as a fundamental right, which means the State must maintain it. Moreover, it dictates the State should adopt recognition policies aiming to transform reality, overcoming asymmetric and stigmatizing cultural standards[36].

Starting from the principle of equality, Piovesan highlights that the constitutional order dictates equality not only in a negative dimension, as prohibition and repression of discrimination; but also, as a positive dimension that aims to promote the inclusion of stigmatized groups. According to the author, "prohibition of exclusion, in itself, does not automatically result in inclusion"[37]. As such, the constitutional order not only prohibits homophobic discrimination, from public or private agents, but also urges the adoption of vigorous and active measures for social transformation and overcoming a factual framework of intolerance and discrimination.

On the other hand, Sarmento arrives at the same conclusion facing recognition as a corollary of the dignity of the human person:

> *It is possible to talk about a fundamental right to recognition, which is a right to the equal respect of personal identity. It is a right which has a negative and a positive aspect. In its negative aspect, it prohibits practices that disrespect people in their identity, stigmatizing them. In the positive dimension it mandates the State the adoption of measures aimed at facing these practices and the overcoming of existent stigma[38].*

Indeed, the 1988 Constitution goes way beyond the formal vision in relation to the role of the State towards inequality and discrimination. Article 3 defines programmatically as fundamental objectives of the Federative Republic of Brazil, among others, "to eradicate poverty and

33 SARMENTO, Daniel. Dignidade da Pessoa Humana: conteúdo, trajetórias e metodologia. Belo Horizonte: Fórum, 2016, pp. 255-257.

34 BARROSO, Luís Roberto; OSÓRIO, Aline Rezende Peres. "Sabe com quem está falando?": Algumas notas sobre o princípio da igualdade no Brasil contemporâneo. pp. 8 et seq. Disponível em: <http://www.luisrobertobarroso.com.br/wp-content/themes/LRB/pdf/SELA_Yale_palestra_igualdade_versao_fina.pdf>. Acesso em: 21.04.2017.

35 LOPES, José Reinaldo de Lima. "O direito ao reconhecimento para gays e lésbicas". In: *Sur – Revista Internacional de Direitos Humanos*, ano 2, Número 2, 2005, p. 86.

36 *Ibidem*, p. 82.

37 PIOVESAN, Flávia. Temas de Direitos Humanos. 3ª Ed. São Paulo: Saraiva, 2009, p. 189

38 SARMENTO, D. Dignidade da Pessoa Humana. Op. Cit, pp. 256-257.

marginalization and reduce social and regional inequality" (subsection III) and "promote the good of all, without prejudice due to origin, race, sex, color, age, and any other form of discrimination" (subsection IV), while the preamble advocates the construction of "a fraternal society, plural and without prejudices". Thus, equality should be understood not only as a fundamental principle but also as a constitutional objective to be chased.

In this way, the constituent exhorts the State to act positively to deconstruct cultural standards which produce hierarchies and asymmetry. The constant use of action verbs to treat the theme reinforces the idea that the constituent did not resign when faced with the lack of equality of Brazilian society, crediting to the State a transformative and emancipator role which should be vigorously exercised[39]. In this scenario, the Brazilian State is seen as "an instrument to the ends of political community", among which it highlights "the promotion of effective and concrete equality".[40]

The explicit valorization of ethnical (blacks and Indians)[41] and gender (women)[42] minorities in the constitutional system comes from the perception that historically stigmatized groups oftentimes are not adequately contemplated by generic enunciations, and also their importance in the formation of a plural and tolerant society. As such, the overcoming of cultural standards which produce recognition injustices relates to the so called right to difference, which means the symbolic valorization of difference, which mandates the State to a more acting and active posture, aiming to protect the manifestations of minorities facing homogenization, assimilation, prejudice, and excluding cultural standards. In this sense, the right to difference can be understood in this double function through the classic construction of Boaventura de Souza Santos:

People have the right to be equal whenever

39 SARMENTO, D. "A Igualdade Étnico-Racial no Direito Constitucional Brasileiro". Op. Cit., p. 142.

40 CASTRO, Carlos Roberto Siqueira. "A nova dimensão da igualdade". In: CASTRO, Carlos Roberto Siqueira. Constituição Aberta e os Direitos Fundamentais: Ensaios sobre o constitucionalismo pós-moderno e comunitário. 2ª Ed. Rio de Janeiro: Forense, 2010, p. 361.

41 Thus, e.g., the criminalization of racism (Article 5, XLII); the possibility of teaching in native languages (Article 210, §2); valorization and protection of native and Afro-Brazilian cultural manifestations (Article 215); protection of native customs and communities, especially in regards to land (Articles 231 and 232); valorization of the contribution of different cultures and ethnics in teaching Brazilian History (Article 242, §1); the recognition of the property of Quilombola communities (Article 68 of ADCT).

42 In this regard, e.g., specific protection in the job market (Article 7, XX), earlier age and less contribution time for retirement pension (Articles 40, III, and 201, §7), guarantee of equality in the family (Article 226, §§3 and 5).

> *difference makes them inferior, but they also have the right to be different whenever equality jeopardizes their identity. Thus, the necessity of an equality that recognizes the differences and a difference that does not produce, feeds, or reproduces inequality.*[43]

Observing the right to difference often resignifies the difference, i.e. those stigmatizing and socially discredited attributes. Thus, if inequality in the field of recognition stems from the hierarch and homogenizing social representations of race/color, gender, sexuality, creeds etc., its facing requires the deconstruction of these negative representations through valorization and celebration of pluralism and diversity as a way to create an ethic of tolerance and auterity. Vianna affirms that:

> *Talking about a "right to difference" means, first, recognizing the possibility of cultural and social heterogeneity as legitimate in ample political universes, endowed with a supposed "unity" [...] More than apprehend the difference as an inherent condition to social groups, that equates to defend it as something relevant in the constitution of individual and collective specifics that do not wish to negate it to be recognized as legitimate participants of embracing unities.*[44]

As exposed, it is possible to conclude that, if discrimination by reason of sexual orientation is rejected by the constitutional order, which imposes to the State not only a negative duty of prohibiting exclusion, a positive duty of inclusion, the State has the duty of adopting recognition policies as a means of deconstructing social standards that produce homophobia as analyzed in the previous section. Thus, if homophobia stems from a system that hierarchs the distinct sexual orientations, choosing heterosexuality as the single standard, the right to difference struggles for the adoption of recognition policies that values other possible forms of experiencing sexuality, defending their legitimacy. Equally, if homophobia derives from a model of exclusive gender experiences, it is necessary to adopt measures that clash with this model.

43 SANTOS, Boaventura de Sousa. Reconhecer para Libertar: Os caminhos do cosmopolitismo multicultural. Rio de Janeiro: Civilização Brasileira, 2003, p. 56.

44 VIANNA, Adriana de Resende Barreto. "Direito à Diferença: introdução". In: LIMA, Antonio Carlos de Souza (coord.). Antropologia & Direito: temas antropológicos para estudos jurídicos. Rio de Janeiro/Brasília: Contra Capa, 2012, p 205.

On the other hand, the notion of recognition policies must be understood in an embracing form, grouping an infinity of possible measures for the facing of cultural injustice situations. Thus, e.g., the formal guarantee of equal rights to the same sex marriages in relation to families formed by men and women is probably the most visible recognition policy in the field of homosexual rights and a measure that has considerable potential of clashing with homophobia, questioning the gender preconceptions and familiar model that feed it and allowing people to abandon their prejudices and preconceptions towards homosexuality through living with families formed by two men or two women. From this notion, the next section will analyze one of the possible fields for these policies.

4. SCHOOL AS A PRIVILEGED SPACE TO FACE HOMOPHOBIA

As we saw, the recognition policies should be understood as measures that aim to question a certain sociocultural reality and act towards its transformation, aiming to make it more plural, tolerant, and emancipated. Also, the adoption of such measures by the State is a constitutional duty. In this framework, school and education have a central role for two related reasons. First due to the major role they maintain in the production and reinforcement of asymmetric cultural standards and, in this sense, in the reality one aims to modify.[45] Thus, as will be demonstrated, schools are spaces for normalization and production of homophobia's cultural basis. On the other hand, education also maintains a highlighted potential in intervening in this reality which it helps build, and can be a space for overcoming homophobia, not reinforcing it.[46] This situation is portrayed by Debora Diniz and Tatiana Lionço:

> *In schools, aside from the formal transmission of knowledge, public spaces for the promotion of citizenship and the exercise of human rights are born. In this sense, the school is a space that allows*

45 According to Junqueira, "the field of education constitutes itself historically as a discplinating, normalizing, and inequality reproducing space" (JUNQUEIRA, Rogério Diniz. "Políticas de educação para a diversidade sexual: escola como lugar de direitos. In: LIONÇO, Tatiana; DINIZ, Debora. (Orgs.). *Homofobia & Educação*: um desafio ao silêncio. Brasília: LetrasLivres, EdUnB, 2009, p. 162). In similar fashion, Nancy Fraser points that value standards that impede participation parity continue to regulate the most important interactions in social institutions such as education. (FRASER, N. "Social Justice in the Age of Identity Politics". *Op. Cit.*. p. 57).
46 SOUZA, Elizeu Clementino de. "Direitos humanos e diversidade sexual na escola: homofobia, trabalho docente e cotidiano escolar". Conjectura: filosofia e educação; v. 20, nº especial, 2015, p. 200.

> *for the representation of social reality in its diversity, which can be an emancipator tool. However, through the practices and content, this same space can be taken by discrimination, in a dynamic that values difference in a way that produces inequality and injury to the discredited parts.*[47]

Analyzing in which way schools act reinforcing homophobia, it should be highlighted that the school is a space of heightened construction of a general notion of the world, acting in the reproduction of notions espoused by male domination and gender role stratification, in relation to "natural differences" between genders, and male superiority. Thus, e.g., its common to resort – and, in this way, reinforcing and naturalizing – to gender division in the school ambiance in various level: from the organizational level (e.g., "boys queue and girls queue"); activities (e.g. in the division of sports for physical education); uniforms etc.[48]. Unsurprisingly, these same establishments were historically segregated based on the binary gender division, with institutions being exclusively male or female[49]. Moreover, the reinforcement of gender roles in the school ambiance occurs in a subtler – although still powerful – manner, from, e.g., the expectations of activity, agitation and dynamism linked to boy's virility in opposition to the "good behavior" or "grace" of girls (e.g. "girl's handwriting"), which puts more energetic girls and more introverted boys as gender deviants[50].

Therefore, Miskolci argues that education and school have an important role in the production, reproduction, and reinforcement of gender norms "aimed to the construction of ideal men and women, it is: 'normal', 'correct', people as our society makes us believe we should be".[51] Equally, Junqueira understands school as an "obstinate space

47 DINIZ, Debora; LIONÇO, Tatiana. "Educação, direitos sexuais, laicidade e diversidade sexual". In: RIOS, Roger Raupp; GOLIN, Célio; LEIVAS, Paulo Gilberto Cogo. Homossexualidade e Direitos Sexuais: reflexões a partir da decisão do STF. Porto Alegre: Sulina, 2011, p. 125.

48 LINS, Beatriz Accioly; MACHADO, Bernardo Fonseca; ESCOURA, Michele. *Diferentes, não Desiguais*: a questão de gênero na escola. São Paulo: Reviravolta, 2016,p. 9; JUNQUEIRA, Rogério Diniz. "Pedagogia do armário e currículo em ação: heteronormatividade, heterossexismo e homofobia no cotidiano escolar". In: MISKOLCI, Richard; PELÚCIO, Larissa (orgs.). *Discursos fora da ordem:* sexualidades, saberes e direitos. São Paulo: Annablume, Fapesp, 2012, pp. 288-289.

49 On the other hand, in spite of the new constitutional order - and even the march of history - at least one example of an institution only for boys still resists in brazil: Colégio São Bento, in Rio de Janeiro.

50 LINS, B. A.; MACHADO, B. F.; ESCOURA, M. *Diferentes, não Desiguais. Op. Cit.*, pp. 22-23.

51 MISKOLCI, R. Teoria Queer. Op. Cit., p. 12.

in the production, reproduction, and actualization heteronormativity parameters" and "as an institution fiercely working in the reaffirmation and guaranteeing the success of the processes of compulsory heterosexualization as well as the incorporation of gender norms"[52]. The guaranteeing of this normalizing function stems not only from the rigidly genderized organization, but also the rigid means of control, vigilance, and disciplinary correction of the bodies and subjects in formation.

It is no accident that the school experience is usually traumatic for people whose identities or experiences clash with traditional and hegemonic expectations of gender performance of sexuality. Thus, transvestites and transsexuals have high school evasion numbers due to factors ranging from physical and moral violence perpetrated by colleagues, to institutional violence due to the imposition in the use of restrooms, uniforms, and name not conforming to the person's identity[53].

In general, the content of sexual diversity is absent in the institutional preoccupations of schools and curricula. The theme of sexuality usually appears in class under the lens of social control and danger, and not valorization. Thus, the treatment given only in biology or general science class ignores the social and historical content of sexuality, usually relegating the theme to reproduction/contraception (turning non-reproductive sexual practices invisible) or STDs (creating a hygienist discourse of sexual repression)[54]. It is not a matter of defending that these themes are unimportant, but the perception that "reducing sexuality, desire, and pleasure to public health imperatives can be a form of violence in relation to the different individual aspirations"[55]. In this way, the treatment of sexuality in class turns homosexuality invisible in the same way it elects reproductive heterosexuality (penis-vagina) as the only healthy experience[56].

52 JUNQUEIRA, R. D. "Pedagogia do armário e currículo em ação". *Op. Cit.*, p. 281.

53 PERES, William Siqueira. "Cenas de exclusões anunciadas: travestis, transexuais e transgêneros e a escola brasileira". In: JUNQUEIRA, Rogério D. (Org.). Diversidade Sexual na Educação. MEC/Unesco, 2009. Bento criticizes the use of the term "evasion" in this context, using "expulsion" since there is a will to eliminate the subjects that "contaminate" the school ambiance (BENTO, B. "Na escola se aprende que a diferença faz a diferença". Op. Cit., p. 555).

54 According to Diniz and Lionço: "heteronormativity is founded upon the discourse on human biology, in a way to naturalize the bodies and sexual relation. There is no reference to the social and simbolic dimension of sexuality, being the sexual reproduction the standard of discussions in textbooks of junior high and high school" (LIONÇO, Tatiana; DINIZ, Debora. "Homofobia, silêncio e naturalização: por uma narrativa da diversidade sexual". In: LIONÇO, Tatiana; DINIZ, Debora. (Orgs.). *Homofobia & Educação*: um desafio ao silêncio. Brasília: LetrasLivres, EdUnB, 2009, p. 54).

55 MISKOLCI, R. Teoria Queer. Op. Cit, pp. 47-48

56 ALMEIDA, Edson Leandro de. Escola sem Homofobia: a (re)produção da identidade sexual nos discursos escolares. (Dissertação de Mestrado). Programa de Pós-Graduação em Educação,

If in the field of formal curriculum we observe the absence and invisibility of debates around sexual diversity, in the scope of the so called "occult curriculum" of schools there is a clear reproduction and reinforcement of homophobia.[57] The process of normalization often happens in this "informal" curricular sphere – albeit due to complacency of the formal/official instances – that teach those that deviate from what is considered "normal", usually in a painful way, their place in the world. If, as Eribon shows, abuse is central in the homosexual subjectivation[58], the school experience takes a crucial role in this process. Not coincidentally, Junqueira affirms the existence in schools of a "insult pedagogy", formed by a myriad of violences and dehumanizations, that produces a "closet pedagogy", understood as a tool of silencing and invisibilization[59]. An important part of this "occult curriculum" is bullying exercised by students – although not only by them – against other students considered gender deviants, especially boys. The construction of masculine subjectivation is in great measure formed from the denial of the feminine, and the violence against a feminine colleague ("viadinho") is a way for boys to reaffirm their own virility.[60]

On the other hand, although many times it acts in the reinforcement of an unequal reality, as seen, the school can also be a valorous agent in the transformation and emancipation of said reality.

Culturas e Identidades. Universidade Federal Rural de Pernambuco, Recife, 2016, p. 48. On the theme of sexual education, Elizeu de Souza points that: "it is based on matrimony as an apex of sexual expression, that school propagates sexual values through the control and 'biologization' of sexuality of subjects with self-repression, culpability, as opposed to pleasure, thus negating homosexuality as expression of the difference that does not conform to the standards of 'normality'. The 'de-sexualization' of subjects comes culturally marked by biologization and different concepts and moral councils that relate to sexuality, locking it to procreation and maintenance of the species. Emptying sexuality of its core content - pleasure - is the basic duty adopted by school through the so called 'sexual education'. [...] The negation of the idea of pleasure, transposed by duty in the conservative society, characterizes itself with sacrifice, obedience, discipline, punishment, and resignation of moral and sexual conducts and postures of the subjects." (SOUZA, E. C. "Direitos humanos e diversidade sexual na escola". Op. Cit., p. 217).

57 The notion of occult curriculum embraces all the aspects of the school ambiance that, without being a part of the official, explicit curriculum, contribute to the relevant social learning. Thus, e.g., the relation between student and tacher, between students, the organization of school space, the disciplinary norms, etc. (JUNQUEIRA, R. D. "Pedagogia do armário e currículo em ação". *Op. Cit*, pp. 277-278)

58 ERIBON, D. *Reflexões sobre a questão gay*. *Op. Cit.*, pp. 27-29.

59 JUNQUEIRA, R. D. "Pedagogia do armário e currículo em ação". *Op. Cit*, pp. 284-287.

60 BARRETO, Ana Luiza Cruz Sá. A escola e o seu papel na construção de diferentes identidades sociais. (Dissertação de Mestrado). Curso de Mestrado em Psicologia. Centro Universitário de Brasília, Brasília, 2016, p. 99.

It means to say "this same school that everyday cultivates and teaches prejudice and discrimination is also a privileged space for the critique and problematization of reification and marginalization mechanism and dehumanizing beliefs and attitudes"[61]. Said in another way, it is possible to conceive a more tolerant, democratic, and plural school, in which the educational practice – be it through formal curriculum, be it through hidden components of the occult curriculum – would be in consonance with the duties posited in the 1988 constitutional order in regard to recognition policies.

It is important to highlight that the Constitution establishes in Article 205 that the objective of education is – in this order – the "full development of the person, its preparation for the exercise of citizenship and its qualification for work". In the same way, the Law for Directives and Basis of Education (Law n. 9.394/96), although silent in regard to sexual diversity, proposes an education aimed towards tolerance, pluralism, ethical formation, and human solidarity of students. It means that more than a mere technocratic instance of content apprehension of the formal curriculum, the school is understood in the Brazilian legal order as a central space in the construction of citizenship and the development of individual capacities. A school that is not dedicated to the practice of tolerance and valorization of pluralism is subverting these commands, frustrating, e.g., the development of individual capacities in the students submitted to the "insult pedagogy" and the "closet pedagogy"[62].

Thus, some measures can be taken to transform the school's role. First, one that regards the inclusion in the formal curriculum of debates about sexual diversity, raising awareness of students about the theme and promoting a culture of tolerance[63]. In this sense, ending the monopoly of biology over the discussion of sexuality, discussing the theme in a interdisciplinary manner – or at least facing the current heteronormative-reproductive paradigm of sexual education – can help in denaturalizing heterosexuality as the only legitimate model for sexuality. An important question is in regard to the preoccupation of the theme of sexual diversity used in the pedagogic material in class. Analyzing the textbooks chosen for the "Programa Nacional do Livro Didático", Lionço and Diniz point to a scenario not only of absence

61 JUNQUEIRA, R. D. "Pedagogia do armário e currículo em ação". Op. Cit,, p. 279.

62 TEIXEIRA, Adla Betsaida Martins; FREITAS, Marcel de Almeida. "Homofobia e misoginia na escola: enfrentamento a partir dos direitos humanos". In: *Teoria & Sociedade*, nº 21.2, 2013, p. 293.

63 An interesting precedent in the Brazilian legal order was the inclusion through laws nº 10.630/03 and 11.645/08 of the compulsory teaching of Afro-Brazilian and native culture and history in an interdisciplinary manner, in a recognition policy that aims to deconstruct an Eurocentric worldview.

of the them, but also the relevant reinforcement of heteronormativity of social relations and the reduction of sexuality to its biologic and reproductive component[64]. Still about the textbook issue, Rios e Santos point that, although the directives of the Ministry of Education were successful in eliminating explicit stereotypes and prejudices from the textbooks chosen in the scope of the national program, they were not able to effectively insert in its pages a propositional discussion about the recognition of sexual diversity[65]. Due to this silencing, the debates about homophobia and sexual diversity only occur due to the initiative of educators interested in the subject.

Another essential measure related to the above is related to the necessity of policies aimed at the formation of teachers specifically in regard to the overcoming of homophobia as "normal" practice in school everyday life[66]. These policies should, first, aim at raising awareness in educators about sexual diversity and the incentive for debating it in the classroom, approaching sexuality beyond the biologizing and normalizing perspective and valorizing an interdisciplinary approach, as a means to promote a more inclusive and tolerating education[67]. On the other hand, these education professionals should also be prepared to recognize and intervene in homophobia situations. Indeed, the "insult pedagogy" often has the condescension and even complicity from the institution; teachers and directors ignore homophobic bullying or, when violence is impossible to ignore, promote victim blaming[68].

64 LIONÇO, T.; DINIZ, D. "Homofobia, silêncio e naturalização". *Op. Cit.*, pp. 52-53. Due to a series of factors that will be better explained in the next section, even the treatment of sexuality in the usual frames can be a hard subject, as a recent episode in which a group of parents of students of a municipal school in Ji-Pará, Rondônia, made a public petition trying to take away a science textbook that showed a drawing of an erect penis shows. About this case, see the reflections of Eliane Brum: (BRUM, Eliane. "Escola Sem Pinto". *El País*. Opinião. Publicado em 17.04.2017. Disponível em <http://brasil.elpais.com/brasil/2017/04/17/opinion/1492435392_872941.html>. Acesso em 21.04.2017).

65 RIOS, Roger Raupp; SANTOS, Wederson Ruffino dos. "Diversidade sexual, educação e sociedade: reflexões a partir do Programa Nacional do Livro DidáticoIn: LIONÇO, Tatiana; DINIZ, Debora. (Orgs.). *Homofobia & Educação*: um desafio ao silêncio. Brasília: LetrasLivres, EdUnB, 2009, p. 147.

66 SOUZA, E. C. "Direitos humanos e diversidade sexual na escola". *Op. Cit.*, p. 206; ALMEIDA, E. L. Escola sem Homofobia. *Op. Cit.*, p. 49.

67 About this theme, the Juvenile Statute (Law n. 12.852/2012), one of the few laws in the Brazilian legal order that expressly talk about sexual orientation, recommends in its Article 17, II that among the policies that should be adopted by the State in "effecting the right of the young to diversity and equality", the "inclusion of themes about ethnic, racial, handcap, sexual orientation, gender, and sexual and domestic violence against women in the formation of education professionals".

68 RIOS, R. R.; SANTOS, W. R. "Diversidade sexual, educação e sociedade". *Op. Cit.*, p. 144; TEIXEIRA, A. B. M.; FREITAS, M. A. "Homofobia e misoginia na escola". *Op. Cit.*, p. 298;

Finally, a revision of the school structure, highly gendered, could take students to question their own stratification of gender roles beyond the school walls. Thus, e.g., it is possible to avoid the organizational resource of division between "boys" and "girls", making the same activities available to all students, respecting the gender identity of the students in the access to the facilities and in the choosing of the uniform[69], among other. In this sense, the teachers and education professionals in general have a fundamental role in the construction and maintenance of such a stratified and stereotyped gender structure in the school ambiance[70], an issue to be addressed by the formation programs.

The main federal public policy towards recognition in this issue was the project "Escola sem Homofobia", launched in 2011, that had as an objective putting in effect the actions posited in the "Brasil sem Homofobia" program, from 2004[71]. The project had actions from various Ministries, mainly Health and Education, and had the participation of representatives from society and academia[72]. Although it encompassed various initiatives[73], the policy became famous due to the "kit" of printed and audiovisual materials that incentivized the debate about sexual diversity and gender identity with students from junior high to high school, through the mediation of teachers and schools[74]. Such a "kit", however, was vetoed and recalled by the Presidency after it was questioned by conservative politicians, as will be approached in the next section.

According to Nancy Fraser, the recognition and redistribution remedies that aim towards facing the respective injustices can be based in affirmative and transformative strategies. The remedies based on

BARRETO, A. L. C. S. A escola e o seu papel na construção de diferentes identidades sociais. *Op. Cit.*, p. 101.

69 Recently Colégio Pedro II, in Rio de Janeiro, ended the traditional gender divide of the uniform - pants for boys and skirts for girls - in a way that students can now choose which piece of clothing better fits their gender identity.

70 SOUZA, E. C. "Direitos humanos e diversidade sexual na escola". *Op. Cit.*, p. 205.

71 The "Brasil sem Homofobia" program included an array of policies and initiatives, organized in eleven thematic axis, including a specific one on right to education (CONSELHO Nacional de Combate à Discriminação. Brasil Sem Homofobia: Programa de combate à violência e à discriminação contra GLTB e promoção da cidadania homossexual. Brasília: Ministério da Saúde, 2004, pp. 22-23. Disponível em: <http://bvsms.saude.gov.br/bvs/publicacoes/brasil_sem_homofobia.pdf>. Acesso em: 21.04.2017).

72 ALMEIDA, E. L. Escola sem Homofobia. *Op. Cit.*, pp. 57-58.

73 A relevant initiative was the training of education professionals, that acted as propagators of the public policy in their own schools. Six rounds of training were made with about 200 professionals (VITAL, Christina; LOPES, Paulo Victor Leite. Religião e Política: uma análise da atuação dos parlamentares evangélicos sobre direitos das mulheres e de LGBTs no Brasil. Rio de Janeiro: Fundação Heinrich Böll, 2012, p. 203).

74 Ibidem, pp. 110-111 e 200-203.

affirmative strategies aim to correct injustices stemming from social arrangements without modifying the structures that produce them, while transformative strategies aim to transform the deep social structures producing injustice. The author understands that transformative policies are preferable to the mere affirmative, although they are harder to implement in practice[75]. In this sense, Fraser defends that the middle road of "non-reformist reform", which would be apparently affirmative measures that, accumulated and through time, have the potential of generating transformative effects[76].

According to this classification, it is possible to notice that school and education have a transformative potential capable of questioning the basis in which homophobia structures itself. The distinct, concrete mechanisms suggested, like the inclusion of the theme of sexual diversity in the official curriculum or the "degenderification" of the school ambiance, have at least the capacity of promoting a "non-reformist reform". The intervention on education, privileged space of subjectivation and construction of citizenship and social norms, has a remedial capacity of the cultural inequalities that goes way beyond that of mere affirmative. It is for this reason that we affirm that school is a privileged space for facing homophobia.

Facing this frame, the prevalence that criminalization has acquired in the organized LGBT movement as the main standard of combating homophobia should be criticized. The appeal to penal law, sometimes seem as a panacea even when faced with extremely complex social realities, is seem with reservations by some sectors of the militants, from the critique of creation of new penal types and the bloating of the Penal State[77], in itself a producer of inequality; and the idea that other mechanisms – such as education – would be more effective in facing and deconstructing prejudice[78]. Thus, Borrillo understands that prior

75 FRASER, N. "Social Justice in the Age of Identity Politics. pp. 74-78.

76 Ibidem. pp. 79-80.

77 AGUIÃO, Silvia; VIANNA, Adriana; GUTTERRES, Anelise. "Limites, espaços e estratégias de participação do movimento LGBT nas políticas governamentais". In: LOPES, José Sergio Leite; HEREDIA, Beatriz (orgs.). Movimentos Sociais e Esfera Pública: o mundo da participação. Rio de Janeiro, CBAE, 2014, p. 253. On the other hand, Vecchiatti, one of the main advocates for homophobia criminalization, denounces these discourses as "selective penal minimalism", that only happens for the protection of LGBT people, resulting in a "hierarchy of oppressions" in relation to other stigmatized groups already contemplated by the penal law (VECCHIATTI, Paulo Roberto Iotti. "Fundamentos em prol da Criminalização da Homofobia e da Transfobia". Jota. Publicado em 07.07.2016. Disponível em <https://jota.info/artigos/fundamentos-em-prol-da-criminalizacao-da-homofobia-e-da-transfobia-07072016>. Acesso em 21.04.2017)

78 . For example, Jean Wyllys: "I believe that it is not only through penal law that we will erradicate homophobia and I believe that the strengthening of the Penal State, including these cases, is not a good idea [...] We need programs against bullying in schools, national campaigns

to repressing homophobia a pedagogic-preventive action that modifies the way through which sexual diversity is socially seem is necessary, without which criminalization would be senseless[79]. In addition, in Fraser's proposed taxonomy it seems evident that criminalization is a mere affirmative answer to the issue of homophobia, since it does not deconstruct the structures that produce it, only intervening ex post facto in a situation of manifest discrimination.

5. DISPUTES AND TENSIONS

In spite of the constitutional exhortation of State intervention for the transformation of social reality aiming for the deconstruction of the social and cultural standards that produce homophobia, and the preponderance that education and school take in this frame, such confrontation finds significant resistance of conservative forces for the maintenance of the status quo. These agents dispute constitutional meanings in the defense of a moral agenda that aims at the reinforcement, and not deconstruction, of such standards.

The banner of "defense of the family" is the rhetorical umbrella under which most items of the conservative agenda are included, such as women's and LGBT rights and drug legalization. What this banner intends is, actually, the defense of a single and exclusive conception of family as "natural" or morally acceptable. This traditional model of family is that marked by stratification of gender roles and hierarchy of sexual experiences responsible for the production of homophobia. This agenda of "sexual moralism" in politics is claimed by the religious agents, especially Catholics and evangelicals.

The influence of religion in the national politic debate, although not a new process, has gained more importance since the 1990s with the occupation of legislative seats by religious people linked to Christian churches, especially neo-Pentecostals[80]. These parliament members have an agenda based on the "defense of the family" and a high organizational capacity, forming a cohesive bloc structured in the

against prejudice, public investment favoring diversity, a law that allows people to defend themselves against discrimination in the workplace, on the access of public services, and other matters of social life. We need, finally, of strong and decisive action of the State in the sense of eradicating the homophobic violence and all forms of legal discrimination that legitimize it" (WYLLYS, Jean. Tempo Bom, Tempo Ruim: identidades, políticas e afetos. São Paulo: Paralela, 2014, pp. 81-82).

79 BORRILLO, D. *Homofobia*. *Op. Cit.* p. 106.

80 MIGUEL, Luis Felipe. "Da 'doutrinação marxista' à 'ideologia de gênero': Escola sem Partido e as leis de mordaça no parlamento brasileiro". In: *Direito & Práxis*. Rio de Janeiro, Vol. 07, nº 15, 2016, p. 593. Vital and Lopes call this process "confessionalization of politics" (VITAL, C.; LOPES, P. V. L. *Religião e Política*. *Op. Cit.*, p. 171).

form of a parliament front, called "bancada evangélica"[81]. Presenting themselves as an expressive group in the National Congress, these parliament members linked directly to religions have a huge capacity of negotiating the formulation of federal public policy in the Brazilian system of "coalition presidentialism"[82].

Facing this framework, education public policies have a central role in the "defense of the family" political groups preoccupations, due to a series of factors, e.g., the effective capacity of recognition policies in this area undermine their foundations, as previously shown. Moreover, before the sex and specifically the juvenile sexuality taboo, denouncing the insertion of sexuality in the school universe can trigger moral panic and, in this way, be politically and electorally advantageous. The definition the contours between education and religious visions is in itself one of the hardest points of tension with the principle of secularism to equate in the 1988 Constitution, that expressly provides the duty of providing religious education, albeit optional, in Article 210, §1º[83].

One of the more expressive exhibition of political force of the "bancada evangélica" involved an education public policy for the struggle against homophobia. It is about the suspension of the courseware from the "Escola Sem Homofobia" project in 2011 by the Federal Government, commonly referred to as "kit gay" by its detractors. After intense pressure from religious sectors and extreme right-wing parliament members that threatened to call then-Secretary of State Antonio Palocci to explain to Congress his contested patrimonial evolution, President Dilma Rousseff suspended the project with the argument that the government would not make "propaganda about

81 *Ibidem*, pp. 156 *seq*.

82 *Ibidem*, p. 9. The idea of a "coalition presidentialism" aims to portray the Brazilian political model, in which there is ample fragmentation of power in the Legislative branch, due to party pulverization. This circumstance requires that the Executive branch make alliances with diverse political groups to form a parliament majority and approve laws and constitutional amendments of its interest, forming a foundation that is ideologically heterogenic, which would produce instability and internal disputes. Thus, e.g., the worker's party governments, although viewed as left-wing or center-left, had alliances with right-wing or center-right parties, such as PR, PP and PSC, for governability.

83 Although the provision is complemented by Article 33 of the Lei de Diretrizes e Bases (Law n. 9.304/96), the specific way in which the constitutional norm must be concretized is object of an intense debate in the scope of law, waiting a decision by STF on the ADI n. 4.439. On the theme, see: DINIZ, D.; LIONÇO, T. "Educação, direitos sexuais, laicidade e diversidade sexual". *Op. Cit.*; PEREIRA, Jane Reis Gonçalves. "A aplicação de regras religiosas de acordo com a lei do Estado: um panorama do caso brasileiro". In: *Revista da AGU*, v. 41, 2014, pp. 20 *et seq*. e SARMENTO, Daniel. "Ensino religioso nas escolas públicas". Jota. Publicado em 23.06.2015. Disponível em<https://jota.info/artigos/ensino-religioso-nas-escolas-publicas-23062015>. Acesso em 21.04.2017.

sexuality choices"[84].

The main rhetorical artifact of this religious conservationism in the field of education was the creation of the notion of "gender ideology", an idea that got traction during the long debate to approve the new Plano Nacional de Educação - PNE (Law nº 13.005/2014), and state and city plans later[85]. From a skewed, simplifying, or even caricatural vision from the discussions of feminism and queer theory[86] they defend that the discussion of gender as cultural production represents a subversion of natural sexuality and families, acting in defense of dominant sex and family understandings, with an essentialist and biologizing discourse[87]. In this sense, religious and pseudo-scientific arguments about sexuality are lapped together, from the idea that healthy behavior can only be possible in a heterosexual and Christian family, while deviant forms of sexuality are framed as sinful, anti-natural, and pathological. To its detractors, the so-called "gender ideology" represents a "unique, indistinct threat of subversion to the family arrangements that are seen as natural, divine, and indispensable to social life reproduction"[88]. Moreover, through the triggering of moral panic about child sexuality, they defend that children and teenagers would be more vulnerable to such an insidious influence, thus giving centrality to the debate in education. Another strategy is to substitute the objective of building

84 VITAL, C.; LOPES, P. V. L. Religião e Política. Op. Cit, pp. 131 et seq.

85 SOUZA, Sandra Duarte. "'Não à ideologia de gênero!': a produção religiosa da violência de gênero na política brasileira". In: *Estudos da Religião*, v. 28, n. 2, 2014, pp. 192 *et seq;* MIGUEL, L. F. "Da 'doutrinação marxista' à 'ideologia de gênero'". *Op. Cit.*, p. 599. Thus, during the debates for the approval of the PNE in the Senate, subsection II of Article 2 of the legislative project, that posits its directives, had its wording altered to remove the emphasis on the promotion of "racial, regional, gender and sexual orientation equality" to the more anodyne reference of "all forms of discrimination" (SANTIAGO, Mylene Cristina; SANTOS, Mônica Pereira dos; MELO, Sandra Cordeiro de. "Plano Nacional de Educação (2014-2024): considerações omniléticas sobre o patrulhamento ideológico e as diferenças silenciadas". In: Revista Educação e Cultura Contemporânea, v. 13, n. 22, 2016, p. 68).

86 Ibidem, pp. 596-598.

87 SOUZA, S. D. "'Não à ideologia de gênero!'". *Op. Cit.*, p. 197. Lopes questions the idea of the defense of a "natural" sexuality in opposition of an "unnatural" one questioning the notion of nature itself. If we understand that natural is that which exists in nature, homosexual behavior is observed in various other species of animals. On the other hand, if natural means "according to nature's ends", there is the problem that nature is not prescriptive, but determinant. (LOPES, J. R. L. "O direito ao reconhecimento para gays e lésbicas". *Ibidem*, pp. 80-81. It should be added that talking about "natural family" sounds like nonsense, since there is no doubt that the familiar arrangements are historical constructions.

88 MIGUEL, L. F. "Da 'doutrinação marxista' à 'ideologia de gênero'". *Op. Cit.*, p. 597. In this sense, Natividade and Oliveira highlight the use of a naturalist worldview by the religious discourse, as a means to sustain the evidence and universality of its precepts (NATIVIDADE, M; OLIVEIRA, L. *As novas guerras sexuais*. *Op. Cit.*, p. 11).

tolerance and respect to diversity of the educational policies for that of incentive of fomenting "homosexualism" or even pedophilia or persecution and intolerance towards Christian faith[89].

From 2010 onwards the conservative powers in the National Congress started to ally in a joint defense of their educational propositions. Thus, the "gender ideology" discourse joins the defense of "Escola Sem Partido". The "Escola Sem Partido" movement was established in 2004, but recently got more projection when their banners started to be embraced by conservative politicians[90]. The central goal of the movement is the idea that teachers were promoting "ideological indoctrination", linked to left-wing banners, communism, and PT, reason why they defend a so-called "neutral" education, that would respect student's moral integrity and the right of parents to give their children an education according to their own convictions[91].

With the alliance of both agendas - that of "gender ideology" and "Escola sem Partido" - the debate started to happen in the more general scope of the dispute between school authority and family authority about the moral and political formation of children, from the idea that the parents should have the power to veto discussion in the classroom about subjects contrary to their values[92]. A series of legislative projects both in the House or Representatives and the Senate has aimed to promote the ideas of the movement or facing "gender ideology""[93]. Moreover, similar proposals have been introduced in many States and Municipalities, some of which were approved by local legislative bodies[94]. Effectively, the "Escola Sem Partido" website

89 NATIVIDADE, M; OLIVEIRA, L. *As novas guerras sexuais. Op. Cit.*, p. 114.

90 MIGUEL, L. F. "Da 'doutrinação marxista' à 'ideologia de gênero'". Op. Cit., p. 595.

91 AMORIM, Marina; SALEJ, Ana Paula. "O conservadorismo saiu do armário: a luta contra a ideologia de gênero do movimento escola sem partido". In: Revista Ártemis, vol. XXII, nº 1, 2016, p. 33.

92 MIGUEL, L. F. "Da 'doutrinação marxista' à 'ideologia de gênero'". Op. Cit., pp. 596 e 601. This banner of parental authority is usually backed up by Article 12.4 of the San José of Costa Rica Pact, according to which "Parents, and whenever the case the tutors, have the right that their children or pupils receive the moral and religious education that is in accordance with their own convictions".

93 For a complete list of the projects and their individual scopes, see MIGUEL, L. F. "Da 'doutrinação marxista' à 'ideologia de gênero'". *Op. Cit.*, pp. 604 *et seq*, e SANTIAGO, M. C.; SANTOS, M. P.; MELO, S. C. "Plano Nacional de Educação (2014-2024)". *Op. Cit.*, pp. 73 *et seq*.

94 Thus, e.g., Municipal Law n. 5.165/2015, of Volta Redonda, that prohibited the "implantation of the policy of gender ideology in the Municipal Education establishments of Volta Redonda", recently found unconstitutional by the District Court of Rio de Janeiro (Representação de Inconstitucionalidade nº 0007584-60.2016.8.19.0000), that adduced that "adopting a prohibitive position towards information and dialogue would bring forth discriminatory treatment, creating obstacles to the promotion of citizenship and equality, against the State Constitution and Federal

has many "model projects" for municipal and state laws that can be put forward by assemblymen, expressly talking about the gender and sexuality discussion[95].

All these proposals are based on two pillars: that of family sovereignty that defends an idea that this is an entity with independent rights to those of their individual members, with the prevalence of parents over their children[96]; and that of education neutrality that understands that the teacher should merely "teach the book" without any kind of personal or critical opinion.

The "family sovereignty" is used to try and seal the school debate about sexual diversity and, thus, the adoption of proposals for facing homophobia. That is because this idea bases itself on the defense of the primacy of family over school in any debate of "moral" order, what ends up prohibiting an education that contributes with values of tolerance and respect towards difference. It is a dispute about the frontiers between "public" and "private". On the other hand, the gender and sexual diversity debate is seen as a strategy to destroy the "natural family" (i.e. patriarchal and heteronormative). If the traditional family and gender roles are absolute and immutable, be it through "scientific" arguments, be it through religious arguments, there cannot be a discussion, since "the natural and divine order is, by definition, indisputable"[97].

The defense of neutrality in education aims to reduce the act of teaching to the mere mechanical transmission of objective curricula, without critique and context, ignoring the interaction between the teacher and students, understood as mere receptacles and passive subjects in the educational process. Firstly, this notion ignores that knowledge is necessarily localized and thus neutrality is not possible since the selection of objective curricula is in itself a political decision. Secondly, neutrality incurs in the crystallization of inequality and injustice, since it "projects an education that is not capable of intervening in the world and, thus, is an accomplice of injustices and violences that happen"[98].

Constitution. It is without doubt, then, that the Volta Redonda City Council, in editing this norm, prohibiting the implantation of the policy of gender ideology in the education establishments of Volta Redonda violated, at once, the constitutional principle of equality in the structural aspect (right to non-discrimination), the fundamental right to difference, the republican model of the Brazilian State, based on political pluralism, and the principle of State secularism".

95 AMORIM, M.; SALEJ, A. P. "O conservadorismo saiu do armário". Op. Cit., pp. 33-34.

96 This tension between family sovereignty to one side and the State and school to the other had already been debated in the so called Lei da Palmada ou Lei Menino Bernardo (Law nº 13.010/2014) that prohibited physical punishment both in schools and families, reducing the liberty of parents in their children education.

97 MIGUEL, L. F. "Da 'doutrinação marxista' à 'ideologia de gênero'". Op. Cit., p. 613.

98 Ibidem, p. 615.

In a similar sense, Sarmento understands that beyond the quest for a supposed neutrality, oftentimes hides a defense of the maintenance of the status quo[99]. Thus, education neutrality in gender, sexuality, and family conceptions does not represent the defense of "no model", but of an hegemonic model[100]. It begs the question of to which measure this soi-disant neutral education, but actually localized and oppressive, attends to the constitutional mandate of overcoming the cultural standards that produce inequality and injustice[101].

This defense of neutrality in education, allied to the idea of "family sovereignty" aims to take moral and "political" themes from school's (public) scope and to the parent-children (private) relationship. A first reading could take us to believe that this movement adjusts itself to the liberal conceptions that value individual autonomy to decide their own existential projects against State intervention. This perspective ignores, however, that there is no real consideration for individual self-determination in this case, since the choices are made by the parents in lieu of their children. On the other hand, the fact that children and teenagers are subjects in formation imposes certain modulations to their self-determination capacity. Moreover, the 1988 Constitution posits a project of active intervention in reality to overcome prejudice and discrimination, which puts in check the absolute defense of State neutrality. According to Sarmento:

> *The guarantee of liberty itself justifies that the State abandons its supposed worldview neutrality to favor, as a rule, without coercion, "good life" understandings that, adopted by people, propitiates a more hospitable cultural ambient for the development of each member of society's personality. If the effective exercise of liberty by concrete persons is fiercely conditioned by the cultural atmosphere*

99 SARMENTO, D. Dignidade da Pessoa Humana. Op. Cit. p. 173.

100 Thus: "the school is part of a society where there is extreme gender inequality; thus if it does not defend a pedagogical proposal that intervene in these questions, it will only reproduce injustice, violence, discrimination, exclusion, and marginalization. Education, if committed to social equality and inclusion, can be a privileged path to emancipation" (LINS, B. A.; MACHADO, B. F.; ESCOURA, M. Diferentes, não Desiguais. Op. Cit, pp. 101-102).

101 In this sense: "in incorporating into legislative lingo the term 'gender ideology', MESP fights for the prohibition of the terms "gender" and "sexual orientation" in the school vocabulary, wanting to avoid any kind of questioning of the naturalized perception of gender roles. Thus, when it takes the banner of neutrality, the movement refers itself to a discourse that does not question the world as it is and blocks any potential of change. Its idea of neutrality is based on the fiction of a knowledge that is not socially localized. In reality, this neutrality does not exist, since any production of knowledge comes from a specific social place (AMORIM, M.; SALEJ, A. P. "O conservadorismo saiu do armário". Op. Cit., p. 38)

> *in which they are inserted, as mentioned above, it seems evident that a State that values individual autonomy should not be indifferent in relation to the present culture.*[102]

Thus, we can conclude that there is a contest about the role of the State and the public sphere in general should take in face of prejudice and asymmetric cultural standards born from religious or moral "private" views. School takes a central role in this tension due to its transforming role endorsed by the 1988 Constitution, that puts in check the limits and localizations of a supposed "neutrality" that education should adopt in face of an unequal reality and the imposition of values in the family[103].

102 SARMENTO, D. Dignidade da Pessoa Humana. Op. Cit., p. 174. In this sense, the author gives an eloquent example and quite related to the theme of the present article: "The State should not keep neutral in the dispute between equalitarian and sexist worldviews. It can - should - chose the first and favor them, e.g., in the definition of school curricula, in public policy, in the symbolic acts. It should do so, so that society as a whole turns into a space more conducive for concrete and real people to experience their liberty, in a cultural ambiance that does not oppress or stigmatize them" (Loc. Cit.).

103 We highlight that these conclusions were also taken by the Federal Attorney's Office for the Rights of the Citizen, linked to the Attorney-General of the Republic, in the Technical Note 01/2016 PFDC, relating to the legislative proposition that aims to implement the "Escola sem Partido" program, in verbis: "What shows, thus, in the Legislative project and its inspiring document is the nonconformity with the victories of many emancipative struggles in the constitutint process; with the formation of a society that has to be open to multiple and different worldviews; with the fact that the school is a strategic space for political emancipation and for the overcoming of sexist ideologies - that condemn women to a naturally infrior position, racists - that represent non-white as perpetual savages, religious - that presents the world as creation of the gods, and many others that aim to eliminate the contrating versions of the truths it propagates.

The Legislative project subverts the present constitutional order, for numerous reasons: (i) confuses the school education with that which is given by the parents and, with that, public and private spaces; (ii) forbids pluralism of ideas and pedagogical conceptions (Article 206, III); (iii) denies the academic freedom and possiblity of ample learning (Article 206, II); (iv) goes against the principle of State secularism, permitting that in schools, public spaces in the constitutional view, particular religious/moral views take precedence.

Finally, and graver still, the Legislative project is against the fundamental objectives of the Federative Republic of Brazil, especially those of 'building a free, just, and solidary society' and 'promoting the general good, without prejudices of origin, race, sex, color, age, and any other form of discrimination". (PROCURADORIA Federal dos Direitos do Cidadão. Nota Técnica 01/2016 PFDC. 21.07.2016. Disponível em: <http://pfdc.pgr.mpf.mp.br/temas-de-atuacao/educacao/saiba-mais/proposicoes-legislativas/nota-tecnica-01-2016-pfdc-mpf>. Acesso em 21.04.2017).

6. CONCLUSION

This article aimed to analyze the contribution the school can give in deconstructing a markedly homophobic culture. To do this, it first verified the cultural foundations in which it bases itself: compulsory heterosexuality, male domination, crystallization of gender roles, male-female hierarchy. In this sense, based on the thought of Nancy Fraser, we concluded that homophobia represents an injustice in the cultural field, which needs recognition policies for its coping, and that these are a constitutional duty from the 1988 Charter's recommendation of a more fraternal, plural, and prejudice-less society.

Facing this scenario, we examined how the school has a central role in the production and reproduction of homophobia itself, but also how it can have the opposite function. Thus, we analyzed the potential education has for questioning and deconstructing a social standard that produces homophobia, verifying some concrete measures and policies for this. The adoption of educational public policies aiming to transform schools in emancipator spaces of tolerance is, on the other hand, questioned by conservative forces and movements that aim to maintain a status quo, and fabricate the notion of a "gender ideology" as a rhetorical artifact to oppose the school's position as an instrument against homophobia.

In this sense, the discussion about the role schools should take in facing homophobia is inserted in a more general context of constitutional meaning disputes between conservative groups of "defense of the family" and groups in defense of sexual diversity, that the mobilization and debates around their banners help define the public policies adopted by the State. Thus, Junqueira understands that:

> *The creation of the conditions to deal adequately with themes related to sexual diversity and sexual rights in schools depends, mostly, on educational public policy and social mobilization that aim to destabilize the production of hierarchies, oppressions, and chasms concerning both heteronormative standards, that historically modulate gender relations, and (re) production of differences and inequality dynamics*[104].

This article, it begs to stress, explicitly takes one of the sides in this dispute, effectively defending that it is required by the 1988 constitutional order. More than that, the adoption of recognition politics in the school ambiance is a requirement of justice according to Nancy

104 JUNQUEIRA, R. D. "Políticas de educação para a diversidade sexual". Op. Cit., p. 163.

Fraser's theory, since only an education committed to tolerance and respect towards sexual diversity, in which there is no "homophobia pedagogy", can produce subjects committed to cultural standards of respect and help produce effectively participation parity.

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ON THE BALANCING OF RIGHTS AND THE PROPORTIONALITY OF JUDICIAL DECISIONS: IS IT NOT MORE FICTION THAN REALITY?

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Abstract: This is a research paper on the prevalence of interests and values of the highest social groups against the interests and values of subordinate social groups, such as migrants, even in judicial decisions of apparently individual conflicts involving only plaintiff and defendant. Individual rights, on which the modern Government was structured, tend to prevail over social rights. This prevalence is crucial even in the context of the theory of constitutional rights of Robert Alexy, who states equal importance to individual or social rights and that, because of the proportionality, there would be a chance that social rights would prevail. It is even possible to say that each collision of rights will be determined proportionally and differently, but the proportionality does not confer rationality to the discretion needed to justify the decision. The proportional decision has more to do with the chosen criterion than the conflicting rights.

Keywords: Theory of Constitutional Rights - Balancing of rights - Proportionality - Migration

1. INTRODUCTION

We address, in this article, the instrument of conflict resolution par excellence of the theory of fundamental rights – the principle of proportionality, developed in accordance with the impressive theory of constitutional rights of Robert Alexy –, from an immanent critique to the statutes of that same theory. We found that proportionality has no innovative elements in relation to other means of conflict resolution, nor it is able to solve *real* disputes. How this form of conflict solution overcomes the solutions already developed by traditional theories? It seems to us that the answer is not on the proportionality, but on the structure of the theory proposed by Alexy which, unlike the traditional theories, does not predetermine standards from a set of values, more comprehensively comprising the political pluralism of today (i.e., all interests, values, and rights, as long as provided in a constitutional standard, must be protected to the greatest extent possible).

However, the theory of Alexy, in particular for its functionalist nature, would also need to overcome the other legal theories in its *application*. As the application inescapably depends on the proportionality, it would need certain clarifications on its definition and on its use. Interpreters have complete freedom to choose the criterion by which they will make the comparison between the colliding rights and the balancing, by which they will decide for one right or another; in this way, the proportionality occurs between the criterion adopted and the decision taken, and it might have no relationship with the conflicting rights at stake.

We structure this article as follows: in item 1, below, we address the transformation of real conflicts into legal conflicts, how legal theories seek to solve the real conflict by the solution given to the legal conflict and how this happens under the theory of constitutional rights. In item 2, we address the characters that give proportionality its fictional nature (in the terms of Vaihinger, 1952), presenting it as a form of conflict resolution that is not that different from the other solutions. In item 3, we show considerations on how proportionality, even if intended as fiction, relates the decision with the conflicting rights and these with the factual reality.

We do not intend to comprehensively analyze the theory of Robert Alexy, in particular, because it is already widely disseminated and known by commentators and critics of the highest quality,[1] and also because the space of this article would not allow such intent. However, some of its features will be outlined insofar as it is necessary for the development of this work.

1 See*, e.g.* Alexy (2001 and 2002); Klatt (2012); Kumm (2004); Möller (2007 and 2012); Silva (2011); Tsakyrakis (2009).

2. SOCIAL STRUGGLES, CRYSTALLIZATION OF POWER RELATIONS IN THE FORM OF RIGHTS. THE TRANSLATION OF THE STRUGGLES IN THE FORM OF LEGAL CONFLICTS

Real conflicts could be solved through physical force or economic power. These conflicts involve the struggle for goods or social positions, contested because of the value or interest that they represent. Any good or position has a value determined by the benefits it provides to its holder (these advantages are not just economic, which is the dimension that will eventually allow the assignment of *exchange value* to the good or position).

In the context of the science of Law, both authors (researchers) and judicial actors (in particular, the judges) start from the assumption[2] from which a real conflict must be no longer understood, in the context of discourse, as a conflict, but as a discussion involving competing values and interests. Moreover, the discussion is transformed into a collision of regulatory principles. The collision of principles is how, within the Rule of Law, the discussion is understood in order to solve it, not by force, but by a decision of the authority. In a conflict to be decided by the Government, the economic or physical power of the litigants should not be considered. The determining factor of the resolution of the conflict is the identification of which one party has a title that justifies winning the dispute. This title is the legal positions called subjective rights.

Rights are the crystallization, in legal standards, of values or interests considered as important by the society that made them into positive law. From a given historical context, certain behaviors are valued as good or bad according to the possibility of such behaviors allowing the satisfaction of interests or needs. Since it is not possible that two interests are met at the same time with the same scarce resources, there is a *dispute* on the assigning of positive value to the behaviors that lead to the satisfaction of the opposing interests. This is not simply negotiated in a social contract in which all are free and equal. There are concrete social relationships in which individuals and groups, because of their specific predominant social position, are able to make this dominance as prevailing also in the establishment of abstract

2 What we say here is not new. Under the Rule of Law, conflict solution with the use of physical force by the parties is illegal, because the *monopoly of physical power* is attributed to the Government as one of its essential elements. Hence the legal impossibility of any of the parties, as a rule, to use their physical condition (or economic, or social, or political) to maintain a good or position – or take it from the other party. This is why the Government-judge turns the conflict into a discussion: because the parties, within the Government, can only argue the legitimacy of their situation from prevailing social values and justify them from positive legal rules.

and general legal standards, which, when made into positive law, are applicable to all members of the society, so that the structure of social inequality is transformed into a planning that presents itself as if it were universally fair or good to all members of that society. And the science of law ends up addressing this regulatory structure as the neutral base of every intersubjective relationship, regardless of the historical situation of inequality from which the legal system has been established and the set of values that it determines as the social standard to be followed.

Fundamental rights also refer to legal positions, but they are not characterized by the absolute and exclusive nature of the subjective rights. They are aimed at the protection of certain attributes of their holder, generally related to the principle of human dignity, which can only be limited by the incidence of another fundamental right.

Now, if a value or interest can be characterized as a constitutional standard, it cannot and *must not* be disregarded. In legal terms, all interests with this feature have dignity, because it is based on a fundamental right and, therefore, must be protected. In this sense, in a collision between principles or fundamental rights of same constitutional dignity, it is unthinkable to imagine the elimination of a principle at the expense of the other, because both principles must remain, even if one prevails over the other. Hence the rivers of ink already poured to develop theories about the *balancing between principles* – so that the prevalence of a principle, when in conflict with another, does not cause its emptying – and about the proportion or *proportionality of the decisions* that, when opting for one of the conflicting principles, should apply the decision in the least expensive way possible to the defeated party.

In a dispute involving opposing fundamental rights, what is important, according to the prominent theory of constitutional rights of Robert Alexy, is the balancing between them, so that both can be implemented to the greatest extent possible.

This theory, based on studies of judgments of the Federal Constitutional Court of Germany, has been the basis for the understanding of conflicts between fundamental rights in numerous countries, either by researchers, or by the judges of constitutional courts, or by the judges of international courts. It is not different in Brazil. The doctrine of Robert Alexy is referred to in numerous judgments of the Federal Supreme Court and, based on it, it has been understood the underlying principle character of the standards that give fundamental rights, which enforces its implementation in the greatest extent possible: unlike theoretical standards that assign subjective rights, the known rules of positive law that, according to the theory of Alexy, do not admit balancing, must be applied absolutely (as stated by Ronald Dworkin, in a condition of *all or nothing*).

Roughly speaking, subjective rights, provided for in infra-

constitutional *rules*, that were of absolute application before, are now adjudicated *if* in accordance with a fundamental right, provided for in constitutional *principle*, and *insofar as* this does not improperly restrict other principles. We live in the age of balancing.[3] In this sense, the solution of a real conflict, within the framework of the Rule of Law, will be solved from the conformation of the opposing fundamental rights at stake, in each individual case. The preset set of values in the legal system is no longer a criterion to establish decisions when the conflict between parties involves fundamental rights.

The balancing between constitutional rights suffers major criticism from moral theorists, in particular from liberals, who understand the social structure as that formed by a *contract between Kantian moral agents*. According to this understanding, the balancing of rights is something impossible, either because the rights are absolute (Nozick, 1991), or because they are trumps (Dworkin, 2001), or because they have a constant predetermined order, with the precedence of freedom over equality (Rawls, 2000). In an article that started a heated debate about the balancing of rights in a known international journal, Tsakyrakis (2009, p. 491) states that addressing the balancing of rights is the same as to stop addressing the distinction between right and wrong, to address what is appropriate and convenient. Habermas (1997, p. 318) had already presented serious criticism, in this same sense, to the possibility to relativize rights by allowing the prevalence of opposing interests or values (thus removing their force or the *strict primacy given to normative points of view*). Moreover, and as a result, Habermas claims that the balancing, by replacing the normative arguments by the functionalist ones, raises the danger of *irrational judgments*.

In fact, the theory of fundamental rights has the feature of assigning equal validity to individual rights, social rights, public interests, etc. (Alexy, 2009, p.1-2; Alexy, 2003, p. 131-132), which makes it a *unique* theory on the understanding of the object of legal science. Perhaps for the first time in history, a theoretical structure obtains some success in translating, to the field of law, the pluralist social organization formed as the result of a ceaseless struggle for goods and positions (Ihering, 2010).

In traditional normative theories, based on subjective rights rather than fundamental rights, there is an (almost) absolute prevalence of public liberties, also understood as individual rights, first-dimension rights or abstention rights. The understanding of what is the modern Government and what are the social relations is the result of the worldview captured by liberal philosophers such as Locke, Rousseau, and Kant. The abstract freedom of an individual was declared a self-

3 Phrase attributed to T. Alexander Aleinkoff and used by Tsakyrakis (2009, p. 468). The phrase age of *proportionality* has also been used in Contiades and Fotiadou (2012, p. 660).

evident human right (Hunt, 2009), although, in the practice of social relations, such right was and has been used only by those who are part of the ruling class.

Not even the struggles for equality (the second slogan of the triptych of the French Revolution), seeking better working conditions, and which aimed at the assertion of rights beyond the abstract freedom, caused the modification of traditional theories of law: individual freedoms remained prevalent in relation to any new rights that were affirmed. In fact, when social rights are presented as second-dimension rights, traditional theories have claimed that this would be an unchangeable hierarchy[4] simply by *assuming the realization* that, in the practice of social relations, they were relegated to the status of second-class rights.

The theory of constitutional rights of Alexy, without going into the discussion on the concrete historical relations that led societies to assert certain rights, recognizes that every normative principle – identified as fundamental right or constitutional precept – represents a socially relevant interest or value and that, precisely because of their relevance (as they were raised to the status of fundamental law), must be somehow considered and awarded. The theory of Alexy, in this way, allows the prevailing of social rights, albeit balanced, on formerly absolute individual rights.

However, the fact that the theory allows a social right to exceed an individual right does not necessarily result in, in real life, conflicts between individual rights and social rights being solved in favor of the prevalence of the latter, albeit balanced, especially if it is the protection of the social rights of migrants (Vedovato, 2013, p. 73). The entire social structure has been based, for centuries, on the assumptions of the economic liberalism. Thus, individual rights, as they are considered as paramount, are those who receive more protection, precisely because they represent, in the field of law, the economic structure inherent in Western societies, and because they give rationality to this structure, allowing the free operation of the capitalist system.[5]

Holmes and Sunstein (1999) have demonstrated that all rights demand social cost for their implementation, and that the costs to ensure individual rights, while very high, are not perceived because they are

4 See, for example, the lexicographical order of the principles of Justice of Rawls (2000, p. 333).

5 In this system, its rationality requires the accumulation of capital, not its distribution, hence the neglect of social rights, related to the promotion of public policies and the use of scarce resources in activities unrelated to the economic production; hence the maximum protection of the property (in particular, of the means of production), the freedom of initiative (for those who produce goods) and the freedom of contract (for those who do not produce goods, to seek employment).

embedded in the cost of the Government apparatus (regulatory agencies of protection of markets, services of police and judiciary power for the protection of the property and contracts, etc.). At the same time that does not leave many public resources to be applied to ensure social rights, it feeds back the vicious circle of perception of which social rights are not as important, or that their effectiveness is dependent upon the prior protection of individual rights.

3. PROPORTIONALITY AS FICTION; PROBLEMS IN THE FICTIONAL ESTABLISHMENT OF THE BALANCING CRITERION

Every theory, because of its subject and method, has strengths and imperfections, with the understanding of its subject being more or less consistent at one point or another. The theory of Alexy is not different. Notwithstanding its undeniable qualities, it also has a number of problems, some because of its (mis)application, other inherent to the theory itself.

About the problems that would arise from its *mis*application, Möller (2011) wrote a dense defense about the proportionality of the theory of Alexy, which states that the criticisms made were not about the doctrine, but about the circumstances in which the doctrine was misapplied. We will not extend ourselves on the topic of misapplication of the theory, which is not the object of this work, but the point of defense of Möller seems to reside in the assertion that the theory of fundamental rights would have a *perfect essence* and that the problem would be only on the application of *unattractive interpretations of the theory*. Now, no social theory shows itself capable of being applied in its purity, in this way the criticism to the application should, at least in our opinion, be considered as an important theoretical problem. The theory of Kelsen has always suffered criticism because of its methodological purity, but Kelsen had as purpose to know the law *as it is*. Alexy, by searching the *function* of the right, addresses the purpose and, consequently, its application. The disregard for the points concerning the impossibility of the full application of the theory of Alexy in practical situations is to despise the *only* attribute that legitimizes it. Similarly, to say that the problem is the *lack of practice* of the applicator – and not the actual impossibility of its application according to the canons of Alexy – is the same as to state that only the truly prepared will be able to solve perfectly the problems of application of the theory (Silva, 2011, p. 274 and 301).

On the *immanent* problems of the theory of fundamental rights, we intend to address specifically the following: although the theory

of Alexy establishes adequacy, necessity and proportionality tests in the strict sense, and it is possible to identify mild, moderate or strong levels of restrictions on rights, so as to minimize the discretion of the judge, *there is no criterion* from which two constitutional rights can be objectively measured or balanced.

In fact, it is *assumed* that the proportionality of the method assigns rationality to the choice of a decision criterion. The judge ends, in each case, *creating* a reference value to perform the comparison (and to decide whether the restriction is mild, moderate or strong), which *makes the proportionality a relation between the discretionary election of the criterion of comparison and the judicial decision*, but not between the decision and the rights at stake. Although a principle can prevail over another, or that a decision can be considered as *proportional*, the balancing/proportion criterion *refers more to the judicial decision than to the conflict itself*.

According to traditional theories, the prevailing party of the conflict has the right to keep the good being disputed because the subjective right of the prevailing party gives them this legal position. According to the theory of fundamental rights, the prevailing party also gets *all* the good object of conflict being disputed. The balancing serves to decide who fully gets the object of the legal dispute, and not to distribute proportionally the good between the parties, to the greatest extent possible. Unlike traditional theories, in the theory of Alexy, the conflict *is not solved by a knockout, but by points*. After all, the solution of the conflict is not based on all or nothing, but on the balancing.

Finally, the decision, whether *proportional, whether based on any other theory,* serves to deliver the good of life to the prevailing party. The other party, the losing one, ends up without what it wanted in practice but *comforted* by knowing that it will keep its fundamental right (after all, it suffers a constraint on a lesser extent possible) to be used in other opportunities. This is not different from what occurs in the context of traditional theories, in which the defeated party also retains all the rights that the law gives, though without the good of life litigated in the case.

In this regard, it is noted that the proportionality serves to *justify* and *legitimize* decisions made in court proceedings and in Government speeches, but is not able to solve real conflicts in order to overcome, for example, the criterion of cost and benefit that consequentialists and utilitarians use to decide, in a collision of rights, what must be benefited and what must be sacrificed. It neither overcomes the ethical theories, which give prevalence to a right against another because of its conformation to a hierarchy of values provided for in the legislation.

In any case, so that a decision is proportionate, it is necessary the establishment of a criterion which acts as a benchmark between

colliding rights, so that they can be compared and balanced, and that criterion is not given by the theory. To make the situation even more problematic: if this benchmark value is chosen randomly or based on the preferences of the judge, the decision is *arbitrary*; if it is chosen based on a fact external to the positive law, it is *undemocratic*. This is a problem insofar as the assumption of proportionality was developed precisely to avoid or mitigate the discretion of government decisions. As judicial decisions, by means of proportionality, become *policies* (discretionary, aimed at the convenience and opportunity of promoting one right rather than another, based on a criterion freely established by the judge), the prevailing normative principle removes the effectiveness of normative rules linked to the defeated principle. In a normative structure, this *replaces* the legal certainty of a predetermined set of values in law for individualized solutions depending on the most appropriate values and interests according to the criterion chosen by the judge.

According to tests of proportionality, the stage of adequacy tries to know whether the exercise of a right interferes with another; the stage of necessity tries to know whether there is any less costly form of interference and, completed the analysis of the case in this second phase, it must be clear the existence of a conflict between rights (or interests, or constitutional values). Then there is the third step, the proportionality in the strict sense, in which there will be the choice for one of the rights which "*determines which of the two (or more) values in question will have the priority in the circumstances of the case*" (Möller, 2012, p. 715).

So that the discretion is legitimized, and that the decision on the conflict is, in fact, proportional, it is necessary to leave the decision to discuss the rationality of the *criterion* by which the decision must be made. The test of proportionality in a strict sense is when we stop solving the *real problem* to solve a *game of choice of criteria* that, somehow, will be used to support the solution of the conflict. Tsakyrakis (2009, p. 474) is skeptical about the proportionality because, according to him, the moral grounds that actually decide the conflict of rights are *hidden*. Möller (2012, p. 717) says that the moral argument that establishes the criterion should be discussed at the time of proportionality in a strict sense and that this tool assists in the presentation of acceptable balancing reasons.

This shows that, in the context of the theory of the fundamental rights of Alexy, the conflict of rights is decided by something external to the proportionality, and that this serves to justify the decision making through absolutely *any criterion*. In this situation, Tsakyrakis *is right* when identifying that the criterion was created only to justify a *decision that has been made* before any balancing between the conflicting rights, which shows that the proportionality in the strict sense did not help

to solve the conflict, but covered up the reasons that led the judge to decide it. Proportionality, in this sense, is more an *argument of authority* (Atienza, 2012; Copi, 1978) than a *rational argument*.

The issue about the measurement of rights, values and interests and their consequent balancing is not based, in our view, on the theoretical incommensurability[6] between them (since the real conflict between them determines the need to choose between one and the other based on some criterion), but precisely on *how* this criterion is chosen. If there is no criterion to ground the decision, we have the issue of the *basis of the criterion*: would we have to apply the test of appropriateness, necessity and balancing to *justify the choice of the criterion?* If so, this would lead to a regression for new demands in order to decide on the basis of that decision, and this regression would never end (*regressus in infinitum*). In this sense, it seems to us that the theoretical basis that legitimizes the proportionality is as fictional as, for example, the ground norm of the pure theory of law.[7]

The parameter to decide proportionally is not given by the theory of constitutional rights. In fact, this parameter *is not given by any legal theory*, but by the bases of a certain worldview that the judge considers as valid or legitimate to consider the rights at stake.[8] Nevertheless, and based on Vaihinger (1952), it must be clear that *any worldview is fictional*, because it is based on certain interests, values, and wishes – in the form of understanding the world, not the world itself – and they are violent not only in relation to thought and reality but to the interests of other individuals and social groups on which this worldview is enforced.

The treatment given to migration and the right of entry of a foreigner fits in this scenario in which decisions relating to them are taken with a view to the training of the individuals involved in the decision, elements that are essentially from outside of the right. In fact, the decision on the entry of foreigners in the territory of the country, which is founded, supposedly, in the availability of scarce resources to effective social rights, is taken by an individual who is in the country about the possibility of entry of who is outside it. The idea of nationality and that the Government can freely control its borders are present at the time of choosing the entry or not of migrants, either legal or illegal, and the non-existence of a migratory policy allows decisions to be taken individually and freely, exclusively attached to proportionality, which deepens the opacity of human rights in that context (Rubenstein &

6 Criticism presented by Tsakyrakis (2009) to the theory of Alexy and countered, successfully in our view, by Möller (2012) and Silva (2011).

7 Kelsen, 1986, p. 328-9.

8 These considerations are clear, in the field of legal interpretation, to authors such as Ross (2000, p. 169-170 and 175).

Adler, 2000).

Therefore, the fact whether the decision maker is a migrant or not in search of a new home interferes with the result of the balancing of principles and with the result of the application of the proportionality to the case put in front of them.

If the decision of entry does not refer to the foreigner as an equal, the result will always be the one that allows the Government to preserve the possibility of barring migrants at its border, although there are a wide variety of cases of search of entry around the world. In other words, if proportionality were to be applied in its pure form, it would provide inconceivable similar results all the time, invariably allowing Governments to define freely who can join their territory, despite the rules from international human rights treaties.

In this way, it is possible to say that migration is a controversial subject for Western nations in the late 20th century and early 21st century, just as the subjects related to barriers to trade and financial movements, which are being challenged and removed, in particular, because of the communication and transport technologies, responsible for shrinking the world. Nevertheless, what we see is that, because of the worldview based on segregation from nationalities, the barriers to the movement of persons remain rigid, what challenges the applied proportionality.

4. FINAL REMARKS

Real conflicts, if there were no Governments, would be solved, ultimately, based on the physical strength of the parties in dispute. With Governments, they are determined based on legal provisions (and on the social values that give their content and meaning). However, we highlight that *standards, while formally equal, do not have the same equality in material terms*, since it is the state of social forces that imposes the effectiveness of a fundamental right over another.[9] This means that some values and some standards are historically stronger than others. For example, it is very difficult to find judicial decisions in Brazil that give prevalence to the housing law when it is in collision with the right to property, and both rights are fundamental rights equally constitutionalized. Moreover, although nationality is a legal fiction, built to define that which is foreign (Carvalho Ramos, 2008, p. 722), it is used to limit the rights of migrants, such as the access to public services, accepting, for example, how natural the possibility of preventing the entry of foreigners is, except in rare exceptions in refugee situations (Vedovato, 2013, p. 83).

9 This has been addressed in Mastrodi (2012, p. 165): *"... although the logic allows a right to be effective today, but not tomorrow, the practice shows that effective rights are always conformed to the social structure."*

If constitutional rights are endowed with equal validity, being formally equal, what gives the prevalence of one over the other in any situation, which gives each right more or less normative force in relation to the other rights, is not within the law, but out of it.[10] Normative effectiveness is a data from the social reality and not the legal reality. Although law – and the science of law – show themselves as *objective and impersonal*, as if all rights were equally relevant,[11] the practical result ends up depending on knowing *what colliding rights* are related to a greater extent to the normative standard of the society.[12] The strength of a legal norm depends more on its content (appropriateness to social values and interests that structure the society) than on its form (adequacy to the legal system).

By enabling judges to set the balancing criterion, they tend to choose a value or interest that is relevant in their point of view, which is highly discretionary, to say the least. Although judged justify the criterion based on a *universal legal conscience* or in *judicial practice*,[13] or they base it on some moral argument, this obligation to state reasons is not an exclusive requirement of the theory of constitutional rights; on the contrary, in this respect (obligation to state reasons), it *is no* different from other theories.

If both within the theory of fundamental rights and within the other theories there are no elements to identify the criterion to be decided, then Kelsen remains current, given the assertion that it is possible to decide *anyway*, even in a manner contrary to law.[14] Thus, if there is *interest* in the solution of the conflict in favor of *right A* as opposed to *right B*, it would be enough to choose a criterion that would benefit *right A* so that the resulting decision would be considered as "proportional", and the result of a "rational" balancing.

This, incidentally, is the core of the criticism made by Enrique Haba to the conflict resolution methods presented by the majority of the

10 *Validity* is the quality of the standard that formally belongs to the regulatory system. In semiotic terms, it is the *syntactic* relation of the elements of the system with each other and in relation to the system itself. *Effectiveness* is related to the meaning (*semantics*) that the standards have in their relation with the real world, and this meaning is not obtained from the syntax, and it is not created *per se*, but it is built pragmatically in the relation between the legal world and the real world (which encompasses the legal world).

11 It is important to reaffirm that, in syntactic terms, yes, all rights and all legal provisions have equal validity, equal dignity within the legal system (Kelsen, 2003, p. 387-97). The sense of rights and standards, however, is not given by the system, but derived from the relation of this legal system with the social reality.

12 See item 1 of this work and, in more detail, Mastrodi (2012).

13 Which are the bases of the two most widely known aspects of realistic positivism, the *psychological* and the *behaviorist* (Ross, 2000, p. 97-100).

14 Or *"produce a standard which is completely out of the frame that the standard to be applied represents."* Kelsen, 2003, p. 394.

legal theories. With the support in the doctrine of the American realist Jerome Frank, Haba affirms the existence of a *basic legal myth*, the belief that well-prepared judges can solve a conflict simply from their diligent action in applying an aesthetically satisfying theory, systematizing the right in a harmonious, consistent and uniform way; then the right (or the solution of the case) "*will bloom when we shake the magic wand of a rationalizing principle*."[15] According to Haba, the *pragmatic* function of this myth is to camouflage both the indeterminacies inherent to the legal language and the *personal* responsibilities of the judges. The rationalizing principle, always given as granted but never proven, is nothing more than a *rhetorical resource par excellence*.[16]

What is the advantage, then, of the theory of Alexy over the other legal theories? In our view, it is not the proportionality, which absolutely does not solve the issue of election of the criterion of the decision in a better, wider or deeper way than other theories. It is unable, by itself, to justify the choice of one criterion over another, something that, regardless of the theory, must be based on reality, and not in the narrow framework of the theory or legal system. In this sense, the proportionality is presented as the way to solve conflicts within the framework of the theory of constitutional rights, but without any possibility of, by itself, providing the establishment of a rationally justified criterion to promote its implementation.

This, however, is no reason to suggest the ruling out of the theory of constitutional rights. It addresses, as stated in the introduction, the first theoretical structure which gives importance to rights and interests, as long as they are provided by the Constitution, at the same level that the so-called individual rights, inherent from a social structure that serves to maintain the social conditions of inequality. We do not want to assert with this that the theory of constitutional rights is the *only* way of giving constitutional force to social rights and that it will *make it possible* in the practice of judicial decisions, but that this inherent feature is highly conformed to the pluralistic social structure of today, which allows different social groups to have conditions to lawfully fight for certain values and interests and see them prevail. There is no problem in addressing the proportionality as fiction. The problem is not considering this important aspect of its nature.

15 *Apud* Haba, 2004, p. 50.

16 Haba, 2001, p. 192.Then, the author states: "*Indeed, this belief realizes something, be that as it may, that it is true what presents itself as that. Such a presence is not only the effect of certain real causes, on the one hand, but it also causes, on the other hand, subsequent effects on reality itself, because of those who* work *in such way because they* see so (believe in that). *Here comes up ... the Thomas theorem: 'If men define* [i.e. imagine] *situations as real, they* are *real in their consequences."* HABA, 2001, p. 192.

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LABOR LAW, CLT AND THE 2017 BRAZILIAN LABOR REFORM[1]

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Abstract: This study seeks to present to a foreign audience a brief description of the development of the Brazilian Labor Law, up to the Labor Reform approved by Law No. 13,467/2017, which significantly altered the nature of labor relations through amendments made to the texts of the "Consolidação das Leis do Trabalho - CLT" (Consolidation of Labor Laws - CLT), of Law No. 6,019/1974 and of other labor laws. The aim of this study is to analyze the Labor Reform within the historical context, with emphasis on its material aspects especially regarding the Collective Labor Law and Labor Union Law.

Keyword : Labor Reform - Law No. 13,467/2017 - Provisional Measure No. 808/2017 - CLT - Law No. 6,019/74 - Labor Law - Collective Labor Law - Union Law - Labor Courts - Outsourcing - Unions.

1. THE INITIAL PHASE OF THE LABOR LAW IN BRAZIL (1888-1930) AND THE FIRST LEGISLATIVE STEPS

Understanding the subject of this study initially requires a brief analysis of the historical evolution of Labor Law in Brazil.

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It was only in 1888, at the end of the Brazilian imperial period (1824-1889), that the so-called "*Lei Áurea*" (Imperial Law No. 3,353/1988 – the Law that decreed the end [...]of slavery in the country) completely abolished slavery in Brazil, which was the last independent country in America to abolish the institution (whereas, in the United States, for example, abolition occurred twenty-five years earlier).

The end of slavery gave way to the expansion and development of subordinate labor. And the following year (1889), the first Brazilian Republic was proclaimed.

However, contrary to what might be imagined, the establishment of the Brazilian Republic was not the result of a popular movement, but rather of a military coup carried out on November 15, 1889, which remains a national holiday in Brazil. The 1889 military takeover did not involve the broad participation of the people, who watched and observed the event largely as spectators.

The period between 1889 and 1930 is known as the "First Republic" or the "Old Republic", and was marked by strong economic liberalism and the concentration of political control in the hands of powerful agricultural groups. The Brazilian economy was based on agriculture, with a strong emphasis on exportation.

The first Republican Constitution – the second Constitution in the history of Brazil – dates back to the year 1891.[3] Some elements of the text of this Constitution deserve mention: the transition of the form of the government from monarchy to republic; the adoption of a presidential system of government; and the transformation of the State, from a unitary to a federal model.

In the "Old Republic" (1889-1930), political power, as already mentioned, was concentrated in the hands of the agricultural exporting elite.

Following the transference of power from the military to civilian representatives, in 1894, an alliance was forged between the agrarian oligarchies of the states of São Paulo and Minas Gerais, and politicians from these states began to alternate holding the office of Brazilian Presidency, in what was then known as the "*Política do Café com Leite*" (the "Milk and Coffee Policy"), - due to the fact that the principal economic activity of São Paulo was coffee cultivation and that Minas Gerais dominated the dairy industry.

However, although political power was controlled by the agrarian elite, the liberal orthodoxy adopted in the economic sphere

3 The first Brazilian Constitution was granted in the year of 1824, by the Emperor at the time D. Pedro I, who had proclaimed the Independence in 1822, when he left the position of Prince Regent of the Portuguese Crown to self-proclaim himself as the first emperor of Brazil. Until nowadays, the Brazilian Constitutions date from the years of 1824, 1891, 1934, 1937, 1946, 1967, 1969 and 1988.

– legally enshrined in the Civil Code of 1916 – made it possible to gradually expand the urban productive sector, with its industrial base and capitalist model. The industrial bourgeoisie, thus, began to acquire greater strength and economic importance. In the words of Luiz Werneck Vianna, "in the political and social sphere, the dominance of agrarian exports did not create barriers to the emergence and prosperity of an industrial bourgeoisie"[4].

Labor relations were essentially governed by the terms of the Location of Services Agreement, in accordance with the rules established by articles 1,216 and the following of the Civil Code of 1916.

However, it was in this period, between 1888 and 1930, that labor legislation began to make tentative inroads on specific and restricted topics.[5] The first social security laws were also enacted at this time.[6]

2. THE PERIOD AFTER 1930: CONFIRMATION OF THE LABOR LAW IN BRAZIL AND THE ORIGIN OF THE CONSOLIDATION OF LABOR LAWS (CLT) IN 1943

In early 1930, in the midst of the global economic crisis, with a sharp fall in the price of coffee, conflicting political interests involving

4 VIANNA, Luiz Werneck. *Liberalismo e sindicato no Brasil*, 3. ed. Rio de Janeiro: Paz e Terra, 1978, p. 90.

5 As an example, in labor matters, we can quote some of the following legal documents: Decree No. 439/1890, with the "basis for organization of assistance to helpless childhood"; Decree No. 843/1890, granting advantages to the "Bank of Workers"; Decree No. 1,313/1891, that regulated the child's work; Decree No. 1,162/1890, which removed the criminal type of strike, maintaining as crime only the acts of violence practiced throughout the movement; Legislative Decree No. 1,150/1904, which granted facilities for the payment of debts of rural workers, benefit after extended to the urban workers (Legislative Decree No. 1,607/1906); Legislative Decree No. 1,637/1907, which stated the creation of unions and cooperative companies; Decree No. 16,027/1923, that established the National Labor Council; Law No. 4,982/1925, which granted vacation (15 days per year) to the employees of commercial, industrial establishments and banks; Decree No. 17,934-A/1927, which enacted the Minor's Code, establishing the minimum age of 12 years old for work, besides the prohibition of the night work and in mines to the minors; Decree No. 5,492/1928, which regulated the work of the artists; Decree No. 5,746/1929, which amended the bankruptcy law, granting privileged status to the credits of "agents, employees and workers".

6 In the social security scope, it must be emphasized the Legislative Decree No. 3,724/1919, on the mandatory insurance of work accidents; Law No. 4.682/1923 ("Law Eloy Chaves"), which determined the creation of the Retirement and Pension Fund for the railway workers, per company; and Law No. 5,109/1926, which extended the regime of the Law Eloy Chaves to port and maritime workers.

the presidential succession led to a rupture in the alliance between the agrarian oligarchy of Minas Gerais and the coffee elite of São Paulo.

After refusing to accept the results of the presidential election held in March 1930, political forces from three Brazilian states (Minas Gerais, Rio Grande do Sul and Paraíba) joined together to forcibly install Getúlio Vargas, from the state of Rio Grande do Sul, as President of the Brazilian Republic.

This movement, composed of heterogeneous forces, marked the end of the "*Política do Café com Leite*" ("Milk and Coffee Policy") and the so-called "First Republic".

Getúlio Vargas initially occupied the Brazilian Presidency from 1930 until 1945, during a period primarily marked by authoritarianism, an intense migratory flow of workers to the great cities, an increase in the population of urban centers, increasing industrial expansion and strict discipline and regulation of production factors, especially the industrial work force.

The establishment of a centralizing model, and state intervention in the economic sphere and in social relations, represented a break with liberal orthodoxy.

Although the movement of 1930 was not intended to enable the industrial bourgeoisie to seize political power, the interests of this economic class found support and encouragement in the prevailing political, economic and social scenario.

In 1930, the Ministry of Labor, Industry and Commerce was created. In 1931, an official union structure was established, based on the existence of a single union for each class of workers subject to recognition by the State and comprising an associate body of the State. The central government began to adopt concrete measures intended to encourage official unionism, while labor protests aimed at breaking with the officially-sanctioned union structure were repressed and suffocated.[7]

In 1932, an official system for resolving labor conflicts was founded, within the sphere of the Ministry of Labor, through the Labor Boards of Conciliation and Judgment, whereby only employees affiliated with official unions could lodge claims.

It was also this phase that saw the creation and regulation of the national minimum wage, the Social Security Card (a professional identification document still in use today), the limitation of the working day to eight (8) hours for commercial and industrial workers, and the establishment of annual paid vacation for certain classes of worker, among numerous other labor rights.

The period from 1930-1945 was marked by intense state

7 DELGADO, Mauricio Godinho. *Curso de Direito do Trabalho*, 11. ed. São Paulo: LTr, 2012, p. 110-111.

administrative and legislative activity regarding the management of labor relations, with the institutionalization and confirmation of the Labor Law in Brazil.

The Professor of the University of Salamanca Manuel Carlos Palomeque Lopez, in his classic book "Labor Law and Ideology", emphasizes the ambivalent character of the Labor Law: at the same time that it represents a "victory" for the working class – consistent with material improvements in living and working conditions – it is also the result of a "concession" from the State and the bourgeoisie, intended to create apparent harmony between social classes with different interests, thus avoiding the true emancipation of the working class and enabling the continued existence and conservation of capitalism.[8]

Bernard Edelman is more emphatic, in demystifying the view that the Labor Law was the result of a "long series of victories" on the part of the working class. According to the French Professor, these "victories" represented political "losses" that concealed the servile and submissive condition of working people in relation to those who control capital and the means of production.[9]

Moreover, in Brazil, the regulation of labor relations ended up masking and mitigating conflicts between social classes with different interests and, as a result, created an environment suitable for the country's modernization, through economic development and the expansion of industrial capitalism.

The government of President Getúlio Vargas invested heavily in propaganda. This official propaganda associated the President's image of Brazilian President with the protection of the workers and the creation of new labor rights. This helped contribute to Vargas's continuance in political power for such a long time, from 1930 until 1945, and again from 1951 until 1954.

During this period, the Government organized annual parades on the 1st of May (International Workers' Day) to announce new legislation concerning labor issues. These parades often took place at prominent venues, such as soccer stadiums. The world famous *Maracanã* stadium was not built until the Soccer World Cup of 1950, so the parades used to take place at the football stadium of Rio de Janeiro soccer team, Vasco da Gama, (the *São Januário* Stadium) or in the Castelo neighborhood (in downtown Rio).

In 1942, Vargas created a commission of top lawyers and professors to prepare a bill for the creation of a Unified Code of Labor Relations.

8 PALOMEQUE LOPEZ, Manuel Carlos. *Direito do Trabalho e ideologia*. Coimbra: Almedina, 2001, p. 123.

9 EDELMAN, Bernard. *A legalização da classe operária*. Trad. Marcus Orione. São Paulo: Boitempo, 2016, p. 8.

The most important development of this era was the enactment, by President Getúlio Vargas, of the "*Consolidação das Leis do Trabalho - CLT*" (Consolidation of Labor Laws) (Decree-Law No. 5,452/1943) on May 1st, 1943.

The CLT sought to unite and structure, in a single codified document, all the existing labor laws, in addition to regulating new issues concerning labor relations, and the procedural rules to be applied in the resolution of labor conflicts.

The CLT rules underwent hundreds of changes over the decades, and despite occasional additional legislation (separate laws approved over the years), the Consolidation of Labor Laws (CLT) remains the most important legal document for regulating labor relations, and establishing procedural rules for the resolution of labor conflicts, in Brazil.

The CLT has persisted throughout many challenging periods of Brazilian history: the democratic period of 1945-1964; the military dictatorship imposed in 1964 (which lasted until 1985); the transition to democracy in the 1980's; and the democratic stabilization following the drafting of the 1988 Constitution. Although the CLT has been amended on multiple occasions, it may be said that the basic rules of Brazilian Labor Law and Procedural Labor Law remain essentially based on the concepts and legal institutions established by the CLT and some other laws.

3. THE 1988 CONSTITUTION AND THE EXCLUSIVE COMPETENCE OF THE CENTRAL GOVERNMENT TO LEGISLATE ON LABOR LAW AND PROCEDURAL LABOR LAW

The Constitution currently in force in Brazil was drafted in 1988, during the transition to democracy following more than two decades of military dictatorship (1964-1985). On October 5, 2018, this Constitution will celebrate the 30th anniversary of its enactment.

Over the course of these 30 years, the consensus regarding the effectiveness, normative force and binding character of the rules expressed in the constitutional text has been consolidated.

Every field of Brazilian law has since been read and interpreted according to the rules and principles of the 1988 Constitution, including our Labor Law and Procedural Labor Law. The mechanisms for ensuring the constitutionality of the laws have been consolidated and improved throughout these 30 years since the Constitution became effective. Some matters concerning the constitutionality of certain laws or legal rules have attracted the attention of the Brazilian public in

recent years.[10]

The text of the 1988 Constitution is extensive and guarantees a long list of social rights, including numerous labor rights.

An important aspect of Brazilian constitutional history must be noted here: the federalist form of the organization of the State (with its division into different federal states), adopted with the Constitution of 1891 (which was strongly influenced by the North American constitutional experience). However, unlike the USA, Brazil has a long centralizing tradition, with power concentrated in the hands of a central government (initially, that of the Portuguese crown, and, following the proclamation of Independence, in 1822, of the Emperors).

In other words, in Brazil, it was not the case that previously independent states decided to join a union of federal states. The tendency was actually in the opposite direction, with the State – previously a centralizing power – proceeding to delegate competences and powers to the federal states. In the words of the Supreme Court Jutice, Luís Roberto Barroso, "the federalist formula adopted, inspired by the North American model, ignored the country's centralizing past".[11]

This continues to affect the rules of Brazilian Labor Law and Procedural Labor Law, whose legislative competence continues to be the preserve of the Union (in practice, the Federal Government and the National Congress). Which is to say, in a country of continental dimensions, with highly diverse economic and social realities, the Union (the Federal Government and National Congress) continues to enjoy exclusive legislative competence to enact rules concerning Labor Courts and Procedural Labor Law, effective throughout Brazil.

In this regard, it is worth verifying the current text of the 1988 Constitution:

> *Article 22. The Union has the exclusive power to legislate on:*

10 Nowadays, in Brazil, the Supreme Court is daily in the newspapers and many judgments may be accompanied live through the television. Matters involving subjects as the homoaffective union, research with embryonic stem cells, rules of prescription (limitation period) to legally claim as to mandatory collections to the FGTS (Workers Severance Guarantee Fund), "unretirement" (possibility of review in the value of social security benefits paid by the Social Security Public System) and criminal cases involving the high level of the government started to receive more highlight in the television, press and digital media. Currently, many Brazilians discuss, in the streets and bars, the decisions of the Supreme Court. Its eleven (11) Justices became well known to ordinary people who read magazines, newspapers and watch TV news.

11 BARROSO, Luís Roberto. *O direito constitucional e a efetividade de suas normas*, 6. ed. atualizada. Rio de Janeiro: Renovar, 2002, p. 15.

> *I – civil, commercial, criminal, procedural, electoral, agrarian, maritime, aeronautical, space and labor law; (...)*

As can be seen, the federal states and the municipalities may not, in principle, enact general additions to the Labor Law and Procedural Labor Law. In Brazil, competence for the creation of laws on these matters – to be effective throughout Brazil – is exclusively federal, which is to say, it is basically concentrated in the hands of the Brazilian President and the members of the National Congress (Senators and Federal Deputies).

Since the 1988 Constitution has been in effect, labor legislation has been expanded and improved, with the enactment of numerous laws and specific amendments, the modernization of previous laws (including the CLT) and, generally speaking, with intense state regulation regarding the nature of labor relations. Below follow some examples of legislation enacted in recent years:

- New Internships Law (Law No. 11,788, of September 25, 2008), which broadly regulates the relations of paid and non-paid student internships;
- Law of Proportional Prior Notice (Law No. 12,506, of October 11, 2011), which established the period of prior notice. According to this Law, an employee who has worked at the same company for 20 years has the right to prior notice of 90 days if dismissed without cause;
- Constitutional Amendment No. 72, of April 2, 2012, and Supplementary Law No. 150 of June 1, 2015, which extended to domestic employees' numerous rights, such as the limitation on the number of hours worked per day and per week, the compulsory payment of FGTS (Workers Severance Guarantee Fund) by domestic employers, and compensation for night work at higher rates than day work, among other benefits.

4. THE BRAZILIAN LABOR COURT SYSTEM

In parallel with the establishment and consolidation of Labor Law in Brazil, a specialist body for the resolution of labor conflicts was developed within the judiciary. In 1946, the Labor Courts stopped operating at the administrative level of the Ministry of Labor (a branch of the Executive Authority) and proceeded to form part of the Judicial Branch, thus, becoming independent.

Since then, this field has grown and developed significantly, and its existence is currently defined and regulated by articles 111 to 116 of the 1988 Constitution.

The Labor Court System (the Brazilian Federalized Labor Court System) currently comprises the Superior Labor Court, headquartered in the Federal District (Brasília) and 24 Regional Labor Courts. In 2016, the Brazilian Labor Court System also comprised a total of 1,572 functioning Labor Courts, 3,668 Labor Judges, 41,942 public servants and 10,701 assistants (outsourced and interns).[12] In the year 2016 alone, the Labor Courts received 3,700,642 new cases for judgment, in addition to the cases remaining from previous years.[13]

In the year 2017, the process of implementing the electronic procedural system was concluded in all the Labor Courts of the country. Which is to say, currently, all the suits filed before the Brazilian Labor Courts have their files stored in an electronic procedural data storage system, and no longer physically on paper.[14] This means that proceedings are all filed and analyzed using computer records, available to any device that has Internet access.

According to article 114 of the Constitution, the Brazilian Labor Court System (Brazilian Federalized Labor Court System) has competence to evaluate individual and collective labor conflicts, and conflicts relating to strikes and collective bargaining between the unions of employers and employees.

5. ECONOMIC CRISIS, SOCIAL TRANSFORMATION AND THE NEW ASCENDANCY OF LIBERAL IDEOLOGY

Since the final decades of the 20th Century, many countries have seen a return to liberal ideals.

In some of the main centers of the capitalist system, the elections of Margaret Thatcher (in England, in 1979), Ronald Reagan (in the US, in 1980) and Helmut Kohl (in Germany, in 1982) clearly showed political victories of this liberal ideology. These victories marked the rise in power of a deregulatory approach to the Welfare State.

In the 1990s, Brazil also adopted this tendency, which supports reduced state intervention in the economic domain. This was seen, in different ways and on different levels, in the governments of Presidents Fernando Collor de Melo (1990-1992), Itamar Franco (1992-1994) and Fernando Henrique Cardoso (1995-2002).

However, in Brazil, this liberal tendency diminished during a

12 CONSELHO NACIONAL DE JUSTIÇA. *Justiça em n*úmeros 2017: ano-base 2016. Brasília: CNJ, 2017, pp. 28-40.

13 TRIBUNAL SUPERIOR DO TRABALHO, Coordenadoria de Estatística e Pesquisa. *Relatório geral da Justiça do Trabalho 2016*. Brasília: TST, 2017.

14 TRIBUNAL SUPERIOR DO TRABALHO, Notícias do TST. "Processos recebidos na Justiça do Trabalho já são 100% eletrônicos". Available at http://www.tst.jus.br/noticias/-/asset_publisher/89Dk/content/id/24446854. Access on October 20, 2017.

period of more than 13 years, under the government of President Lula's Workers' Party and that of his successor Dilma Roussef.

But, since May 2016, when President Rousseff was impeached and Michel Temer became President, there has been a marked resumption of liberal policy, which argues for reduced state intervention in the economy and the carrying out of structural reforms, such as the Labor Reform and the Pension Reform.

The return of this tendency is undoubtedly the result of ongoing political and economic transformations affecting Brazilian society, such as the ageing of its population, the economic-financial crisis and the increase in the unemployment rate in recent years, the need to balance public accounts (especially regarding the social security system), the need for Brazilian companies to be able to compete with competitors on a global scale, technological innovations that have resulted in job losses, and the creation of new forms of work (home offices and work provided by companies existing only in digital form, such as Uber).

In the first half of 2017, the government of Michel Temer was in a hurry to get a Labor Reform bill passed in the National Congress. Favored by a fleeting parliamentary majority, the government managed to secure swift approval for broad, sweeping reforms to the CLT and other specific labor laws. This Labor Reform resulted in significant changes to the rules of the Labor Law and Procedural Labor Law.

The ease with which the Labor Reform bill was passed was due to the fact that the CLT and the majority of the labor laws have the status of ordinary laws. So, in the National Congress, amendments do not require high or qualified quorums to open hearings or pass bills. In this regard, article 47 of the 1988 Constitution states:

> *Article 47. Except where there is a constitutional provision to the contrary, the decisions of each House and of their committees shall be taken by a majority vote, when the absolute majority of its members are present.*

The Pension Reform bill which the Government is still trying to approve, however, has encountered more difficulties in its passage to becoming law, since it seeks to alter certain constitutional provisions, which requires amending the text of the Constitution, necessitating the approval of the proposal by three fifths of the members of the House of Representatives and Federal Senate, in two series of votes in each of the Legislative Houses.

On the Proposals for Constitutional Amendments, article 60, paragraph 2, of the 1988 Constitution states as follows:

> *Article 60. (...) Paragraph 2. The proposal shall be discussed and voted upon in each House of the National Congress, in two readings, and it shall be considered approved if it obtains in both readings, three-fifths of the votes of the respective members.*

The Labor Reform bill was approved through Ordinary Law No. 13,467, of July 13, 2017, becoming effective 120 days after its publication (which is to say, on November 11, 2017).

6. THE LABOR REFORM LAW (ORDINARY LAW NO. 13,467/2017)

As previously discussed, unlike the Pension Reform, the Labor Reform bill was approved with relative ease in the National Congress, due to the fact that the CLT has the *status* of an ordinary law, whose amendment did not require approval by special or high quorums of parliamentarians.

Favored by the momentary support of a majority of parliamentarians, the government of President Michel Temer undertook to make significant changes to the CLT and certain other specific labor laws, the President's declaring that it would be necessary to "update" supposedly "old" and "outdated" legislation, to adapt it to the present time, in order to create jobs, and generate income and economic growth. Labor Judge Marlos Augusto Melek formed part of a commission that helped draft the text of the new law. In his book, Melek criticized the existence of the "anachronistic, old CLT which refers to 'typing', when we live in an age of 'smart phones'[15].

However, the haste with which the Labor Reform bill was discussed in the House of Representatives and Federal Senate, and several incongruities and possible unconstitutionalities in its text, have been strongly criticized by Brazilian jurists. Law No. 13,467/2017 amended over a hundred different items of the CLT, so it certainly deserved a more careful and considered debate, with broader discussions involving representatives of both workers and companies, and a debate with the general public. Unfortunately, this did not happen.

The Labor Reform bill (Bill No. 6,787) was presented by the Executive Branch on December 23, 2016 and was effectively discussed in Parliament for a period of, approximately, only four months. After being approved by the House of Representatives, the Federal Senate did not amend any provisions of the bill thus enabling the swift approval and enactment of the new law.

15 MELEK, Marlos Augusto. *Trabalhista! E agora? Onde as empresas mais erram*. Curitiba: Estudo Imediato, 2016, p. 19.

In addition to this, the Labor Reform Law text stated that it would come into in effect after 120 days counted from the date of its publication, which constitutes a very short period of adaption, when compared to other laws of major importance and social consequence.

As if this were not enough, on November 14, 2017 (which is to say, less than a week after the new law came into effect), the Brazilian President issued Provisional Measure No. 808/2017, with new changes to aspects of the CLT that already had been amended by Law No. 13,467/2017.

As can be seen, the new government took advantage of the favorable political moment to approve, with obvious haste, significant changes to the Labor Law and Procedural Labor Law.

In this study, we intend to undertake an empirical and timely analysis of some of the main aspects of the Labor Reform Law, with particular emphasis on changes directly concerning the regulations of the Collective Labor Law and Union Law. We will also cite some amendments made to the Individual Labor Law that also have repercussions in the collective sphere.

As previously observed the reform was broad and amended the CLT in several areas. This study obviously does not intend to undertake a comprehensive analysis of the reform, but rather seeks to provide the foreign reader with a brief overview of some important and controversial points whose regulation was amended by Law No. 13,467/2017.

The significant changes made to the rules of the Procedural Labor Law will not be the object of the analysis of this brief study.

6.1. Collective bargaining agreements and collective agreements prevail over state legislation (article 611-A of the CLT)

The liberal character of the Labor Reform bill is clear in the many provisions that seek to prioritize clauses stipulated by contracting parties over those of the CLT and state legislation. This is referred to as the "prevalence of the negotiated over the legislated".

Within the scope of the Union Law, the 1988 Constitution and the CLT assert the existence of two types of agreements arising from collective negotiations: the *collective bargaining agreement* (a written agreement signed between the workers' union and the union representing the employers) and the *collective agreement* (a written agreement directly entered into by the workers' union and one or more companies).

These collective bargaining agreements and collective agreements create legal rules that regulate employment contracts. However, the courts and the jurists' opinions have historically imposed limitations on the terms that could be freely negotiated through these

collective arrangements, establishing a series of restrictions regarding non-negotiable rights, which cannot be the object of waivers or settlements by the parties, either in individual or collective agreements.

As an example, we cite the minimum 1 hour work break for rest and meals of article 71, of the CLT, for continuous work lasting more than 6 hours, commonly referred as the "meal and rest break".

The idea has long prevailed that this interval could not be eliminated or reduced, even through collective or collective bargaining agreements, since it concerns an irrevocable right, directly related to occupational health.

Regarding this, Judicial Precedent No. 437, II, of the Superior Labor Court stated that this 1 hour minimum break was non-negotiable, even through collective negotiation involving the workers' union:

> *II – Any clause of a collective agreement or collective bargaining agreement concerning the elimination or reduction of the work break for rest and meals is invalid, because it constitutes a hygiene, health and work safety measure, guaranteed by the rule of public order (article 71 of the CLT and article 7, XXII, of the 1988 Constitution), and is not susceptible to collective negotiation.*

However, following the Labor Reform, Article 611-A of the CLT states that the clauses of collective arrangements shall prevail over state legislation when regarding, among other subjects, work breaks, while respecting the minimum limit of 30 minutes for shifts longer than six hours.

In contrast to the text cited in Judicial Precedent No. 437 of TST (Brazilian Superior Labor Court), article 611-A of CLT proceeded to provide for the possibility of a reduction, through a collective bargaining agreement or collective agreement, of the work break for meals and rest, while respecting the minimum limit of 30 minutes for shifts longer than six hours. In other words, although article 71 of the CLT states the mandatory granting of a minimum interval of 1 hour for shifts longer than six hours, following the passing of the Labor Reform bill, article 611-A of the CLT established the possibility of reducing this interval if there were an agreement with the workers' union. The CLT is now effective with the following wording:

> *Article 611-A. Collective bargaining agreements and collective agreements, in observance of items III and VI of the head provision of article 8 of the Constitution, shall prevail over the law when*

> *concerning, among other things, the following matters: (wording provided by Provisional Measure No. 808, de 2017) (...)*
>
> *III – work breaks for rest and meals, respecting a minimum limit of thirty minutes for shifts longer than six hours; (...)*

Other examples of matters that can be negotiated through collective bargaining agreements or collective agreements, as expressly provided for by article 611-A of the CLT, include: payment of overtime through annual offsetting of overtime (the extra hours worked can be compensated by reducing the shift or granting other days off, and this compensation must occur within a period of up to one year); identification of positions of trust, without the need to control working hours (which is to say, those positions considered as management and administrative posts, with the possibility of limited work breaks and unlimited overtime); home office, on-call systems and intermittent work (zero-hours contracts); time control systems (decisions about the working hours recording system: if working hours shall be recorded through manual notes on time sheets, clocking in and out systems, electronic systems, biometrical systems, etc); holiday date flexibility (changing of dates of holidays); the selection of employees' representatives in the workplace, among other subjects.

It is emphasized that, due to the use of the expression "among others" in the text of the law, the list of matters of article 611-A of CLT has a merely exemplary character, which is to say, other matters besides the ones listed in the law have also become the object of free stipulation in collective bargaining agreements and collective agreements.

By contrast, article 611-B of the CLT was also introduced, which provides a complete list of those rights that may not be suppressed or reduced through collective bargaining agreements and collective agreements (notably those rights ensured in article 7 of the Constitution). It must be observed, in this regard, that the law uses the expression "exclusively". This means that the list of subjects is comprehensive, which is to say, only those matters covered by article 611-B may not be the object of collective rules. According to the text of the law, this allows all other matters not listed in article 611-B to be freely negotiated through collective agreements or collective bargaining agreements.

6.2. Individual agreements prevail over state legislation (CLT, article 444, sole paragraph)

The liberal idea that prioritizes free will also gave rise to the

insertion of article 444, sole paragraph, of the CLT. These new resolutions state, in individual labor agreements, that clauses established directly between employees and employers prevail over the provisions of state legislation regarding the same matters listed in article 611-A. However, this will only be possible in cases where the employee has a university degree and receives a monthly salary equal to, or greater than, twice the value of the highest pension benefit paid by the Public Social Security System.

In practice, this means greater freedom for inserting clauses in agreements entered into by employees who are college graduates and have a monthly salary equal to, or higher than, approximately US$ 3,200, according to the exchange rates currently in force (December/2017). The agreements of these employees may, for example, indicate a reduction in the work break for rest and meals (respecting the minimum limit of 30 minutes), the adoption of annual offsetting of overtime (with the compensation of overtime within a period of up to one year) and the altering of holiday dates.

The cited article 444, of the CLT, is now effective with the following wording:

> *Article 444 – Contractual working relationships may be the object of free stipulation by the interested parties concerning everything that does not contravene protective work provisions, collective arrangements that are applicable thereto and the decisions of the competent authorities.*
>
> *Sole paragraph. The free stipulation referred to in the head provision of this article applies to the hypothesis stated in article 611-A of this Consolidation, with the same legal efficacy and prevalence over the collective arrangements, if the employee holds a university degree certificate and receives a monthly salary equal to, or higher than, twice the maximum limit of the benefits of the Public Social Security System. (Included by Law No. 13,467/2017)*

6.3. Offsetting of overtime through individual written agreements (CLT, article 59, §5)

Law No. 13,467/2017 included, in article 59 of CLT, a new paragraph (§5), to assert the possibility of stipulation, through individual

written agreements between employees and employers, for offsetting overtime, providing that such compensation occurs within a maximum period of 6 months.

6.4. The 12x36 working hour system (12 hours of work and 36 hours of rest) through individual agreements of professionals in the health sector (article 59-A of CLT)

In some sectors of the Brazilian economy, it is common to adopt a scale of 12 working hours for 36 hours of rest ("12x36"). In this system, a worker, for example, works from 7:00 a.m. to 7:00 p.m. (or from 7:00 p.m. to 7:00 a.m. the day after), followed by 36 hours of rest. This shift is often adopted by doormen, security guards, watchmen, and professionals from the health sector (nursing technicians, nurses, physiotherapists, and doctors, among other).

By considering a daily shift of 12 working hours (longer than the normal 8 working day indicated in article 7, XIII, of the Constitution), the notion prevails that the adoption of such a system was only valid when authorized by the law or when foreseen in a collective agreement or collective bargaining agreement (in this sense, Judicial Precedent No. 444, of TST).

Law No. 13,467/2017, however, inserted article 59-A into the CLT, whose text now allows the adoption of this system through a simple provision in an individual agreement entered into between an employer and employee.

Provisional Measure No. 808/2017, however, again required express provision in a collective rule (collective agreement or collective bargaining agreement) for the adoption of such a system, except regarding entities operating in the health sector (article 59-A, §2, of CLT).

Which is to say, as a rule, the validity of the adoption of the 12x36 scale continues to depend on provision being made in the collective agreement or collective bargaining agreement, with a requirement for the participation of the workers' union in the negotiations.

According to the new text of the CLT, an exception occurs regarding professionals who perform their work in hospitals, clinics or other institutions of the health sector (nursing technicians, nurses, physiotherapists, and doctors, among others), where the adoption of the 12x36 scale is now valid on a simple provision being made in the individual agreement entered into between employee and employer.

6.5. Collective agreements (entered into between the company and the union) prevail over the collective bargaining agreements

(article 620 of the CLT)

As previously seen, the collective arrangements stated in the Constitution and in the CLT are the *collective bargaining agreement* (an agreement between the workers' union and the union representative of the companies) and the *collective agreement* (an agreement executed directly by the workers' union with one or more companies).

Before the Labor Reform bill, article 620 of the CLT stated that "the conditions established in collective bargaining agreements, when more favorable, shall prevail over those established in the collective agreement". By using the expression "when more favorable", the law privileged *the principle of the most favorable rule*, concluding that the collective agreement and the collective bargaining agreement should be analyzed together, in a global form, to verify which is more favorable and should prevail in a certain specific case.

However, the new wording of article 620, established by Law No. 13,467/2017, is as follows:

> *Article 620. The conditions established in the collective labor agreement shall always prevail over those established in the collective labor bargaining agreement.*

The new rule contrasts with the previous one, by stating that the collective agreement shall "always" prevail over the collective bargaining agreement.

The application of this new provision may lead to intense discussion in the Brazilian courts, especially when the collective agreement is less favorable than the collective bargaining agreement or when it limits or suppresses labor rights.

Gustavo Filipe Barbosa Garcia argues that the principle of the application of the most favorable rule should continue to prevail, due to the principle of protection guaranteed in the constitutional text:

> *The provision resulting from Law 13,467/2017 may be contrary to the principle of the most favorable rule, which arises from the principle of protection, enshrined at the constitutional level (article 7, head provision, of the Federal Constitution of 1988).*
>
> *Thus, the constitutional interpretation shows that the conditions established in the collective labor agreement (always) prevail over those established in the collective labor bargaining agreement,*

> *but providing that those of the collective labor agreement generate more benefits than those of the collective labor bargaining agreement.*
>
> *Therefore, if the provisions of the collective labor bargaining agreement are more favorable, the constitutional understanding is that it should prevail.*[16]

As can be seen, in the light of the constitutional rules, the interpretation of this provision may also generate broad discussion among jurists and in the Labor Courts.

6.6. Prohibition of the subsisting consequences of the rules of collective agreements and collective bargaining agreements (article 614, §3, of the CLT)

This discussion concerns the efficacy of the rules stated in collective bargaining agreements and collective agreements even after the expiry of their period of effectiveness.

According to article 614, §3, of the CLT, the maximum period of effectiveness of a collective agreement or collective bargaining agreement is 2 years.

However, the negotiations undertaken with a workers' union for the execution of a new agreement is often extended until after the termination of the effectiveness of the previous agreement. In such a case, the effective term of the previous agreement has already expired but the parties have not yet agreed the terms for the drawing up of a new agreement.

Regarding this matter, since the year 2012, Judicial Precedent No. 277 of the TST (Brazilian Superior Labor Court) has stated that "the clauses of collective agreements or of collective bargaining agreements form part of individual employment agreements and shall only be modified or suppressed as a result of collective labor negotiation".

Contradicting this understanding, Law No. 13,467/2017 amended article 614, §3, of the CLT, to prohibit the subsisting consequences of rules asserted in collective agreements or collective bargaining agreements:

> *Article 614. (...) §3. It shall not be permitted to stipulate the duration of a collective bargaining*

16 GARCIA, Gustavo Filipe Barbosa. *Reforma trabalhista*, 2. ed. Salvador: Juspodivm, 2017, p. 294.

> *agreement or collective agreement of more than two years, thus prohibiting subsisting consequences. (wording given in Law No. 13,467/2017).*

In other words, in opposition to Judicial Precedent No. 277 of the TST, it was sought to prevent the production of effects of collective rules or collective agreements beyond the term of their effectiveness.

6.7. Indispensable party necessary in actions that seek a declaration of nullity of clauses of collective agreements or collective bargaining agreements (article 611-A, §5, of CLT)

Initially, Law No. 13,467/2017 introduced into the CLT a provision that, in individual or class actions which sought to render invalid clauses of collective bargaining agreements or collective agreements, the workers' union should mandatorily be summoned to participate as an indispensable party (article 611-A, §5). Which is to say, if in the judicial action a worker sought – even incidentally or among other requests – the declaration of nullity of the clause agreed by the union representative of its professional category, this union should also be invited to participate in the process.

However, this provision (article 611-A, §5) was amended through Provisional Measure No. 808/2017, in the following terms:

> *Article 611-A. (...) §5. The union subscribers to collective bargaining agreements or to collective labor agreements shall participate, as indispensable parties, in class actions intended to annul clauses of these agreements, its being prohibited to appreciate individual actions. (Wording given by Provisional Measure No. 808/2017)*

This new wording provides that it is only in class actions seeking the invalidation of clauses of collective bargaining agreements or collective agreements, that the union of the professional class shall be mandatorily summoned to participate as an indispensable party.

The final part of the provision prohibits the appreciation – even incidentally – of the validity of the clause of the agreement or the collective bargaining agreement in individual actions filed by a given worker, which, from our point of view, violates the principle of access to justice and judicial review provided for in article 5, item XXXV, of the Constitution. According to its current wording (determined by Provisional Measure No. 808/2017), the constitutionality of this

provision is questionable and will lead to intense debate in the Brazilian Courts and among jurists.

6.8. Arbitration to resolve individual labor disputes (article 507-A of the CLT)

Article 507-A, incorporated into the CLT by Law No. 13,467/2017, proceeded to consider the possibility of an arbitration clause in individual labor agreements providing that the resolution of conflicts between the parties (employee and employer) occurs by means of arbitration, and provided that the presence of this clause arises from the initiative of the employee him/herself or enjoys his/her express agreement.

According to article 507-A, the existence of an arbitration clause is only allowed when the employee receives a monthly salary equal to, or greater than, twice the highest value of the social security benefit paid by the Public Social Security System (in other words, equal to or higher than approximately US$ 3,200 by current values).

It is noteworthy that, in contrast to the provision of article 444, sole paragraph, article 507-A does not require that an employee have a college degree in order to insert an arbitration clause.

Article 507-A offers no other provision regarding which party shall bear the cost of the establishment and realization of the arbitration.

Furthermore, the provision regarding the possibility of the resolution of individual labor conflicts by means of arbitration shall be questioned before the Brazilian Courts, because the Arbitration Law (Law No. 9,307/1996) itself states that only conflicts concerning freely transferable property rights may be settled through this alternative method of dispute resolution.

For this reason, regarding the Labor Reform bill, the prevailing understanding in the courts was that arbitration should be allowed only for the resolution of collective labor conflicts, but was incompatible with the resolution of individual conflicts. Subsection I for Individual Conflicts of the TST expressly adopted this understanding.[17]

As asserted by Homero Batista, "there will be great judicial controversy in this regard, considering that, in similar cases, the Labor Courts did not accept this alternative form of conflict resolution on the understanding that labor credits are defined as unwaivable rights, being adverse to arbitration as stated in Law No. 9,307/1996".[18]

17 TST (Brazilian Superior Labor Court), SBDI-I, E-ED-RR-79500-61.2006.5.05.0028, Labor Justice Rapporteur: João Batista Brito Pereira, DEJT: March 30, 2010.

18 SILVA, Homero Batista Mateus da. *Comentários à reforma trabalhista*. São Paulo: Editora Revista dos Tribunais, 2017, p. 70.

6.9. Union ratification is no longer mandatory in the termination of employment contracts already in force for more than 1 year (revocation of article 477, §1, of the CLT)

Paragraph 1 of article 477 of the CLT was revoked by Law No. 13,467/2017. This provision stated that a resignation request or receipt of a release agreement from an employment contract, signed by an employee who had provided more than one year of service to the company, would only be valid when made with the assistance of the respective union of the professional class or under the authority of the Ministry of Labor.

Thus, there is no longer any need for assistance by the union in the termination of the employment contracts of employees who have provided more than one year of service to the same employer.

6.10. Ratification of extrajudicial agreements (article 855-B and the following of the CLT)

The Labor Reform bill inserted an additional chapter into the CLT, which stated the possibility of approval, in the Labor Courts, of extrajudicial agreements entered into between the parties.

In order to avoid possible frauds, especially in cases of individual agreements, article 855-B states that the parties may not be represented by the same lawyer. It also states that the employee, if he chooses, may be assisted by the lawyer of the workers' union.

A petition where approval of the extrajudicial agreement is required suspends the statute of limitation of the action regarding the rights specified therein (article 855-E of the CLT).

6.11. Elimination of mandatory union dues

Mandatory union dues used to be payable every year. According to Gustavo Filipe Barbosa Garcia, this obligation "restricted freedom of association (labor union freedom) and was incompatible with the ILO Convention 87, as said duty was owed regardless of any declared intent or agreement between the employee or employer, or affiliation with the union."[19]

Companies were required to deduct from their employees' payroll the sum equivalent to one day's salary every March (as stated in former articles 580 and 582 of CLT).

Employers' union dues also had to be paid every January (article

19 GARCIA, Gustavo Filipe Barbosa. *Op. cit*, p. 223.

587, CLT).

The novelty introduced by the Labor Reform bill, in this regard, was the abolition of the mandatory payment of such union dues, which no longer have the status of a tax and are now optional and voluntary. By changing articles 578, 579, 582, 583, 587 and 602 of the CLT, Law No. 13,467/2017 states that union dues will only be payable upon prior and express authorization by workers and companies. In other words, the Labor Reform bill has put an end to annual mandatory union dues.

In this same regard, article 611-B, XXVI, CLT, expressly prohibits clauses in collective bargaining agreements or collective labor agreements providing for the payment of union dues.

The aim is for unions to be supported exclusively by optional and voluntary contributions previously authorized by their members, in accordance with the idea of freedom of association.

However, while the Labor Reform has granted greater powers and responsibilities to Brazilian unions (particularly with regard to the prevalence of clauses in collective bargaining agreements or collective labor agreements over state legislation, as per article 611-A, CLT), the cessation of this source of income may create serious financial problems for the unions, which have received annual union dues since the 1930's (the Vargas Period).[20]

To allow for a period of adjustment to the new rules, many people expected that the President would later enact, by means of a Provisional Measure, a transitional rule providing for the gradual termination of said union dues. Provisional Measure No. 808/2017, however, did not contemplate any such thing. Therefore, the payment of mandatory union dues was summarily terminated.

Although the ending of mandatory union dues represents progress regarding freedom of association, Brazil has unfortunately not ratified the ILO Convention 87 and the centralized union regime remains in force in Brazil.

6.12. The annual certificate of discharge before the employee's union (article 507-B of the CLT)

The inclusion of article 507-B in the CLT allows employers and

20 Platon Neto defended that the end of mandatory union dues should be gradual and slow, so that unions would have a period of adaptation to new ways of supporting their activities. He stated also "that the immediate removal of mandatory union dues will be extremely cruel to the union system and that the ideal scenario would be its gradual termination, so that it would end within three years, minimum, or five years maximum." [AZEVEDO NETO, Platon Teixeira de. (Comentários ao art. 578 da CLT). In: RODRIGUES, Deusmar José (Coord.). *Lei da reforma trabalhista:* comentada artigo por artigo. Leme/SP: JH Mizuno, 2017, p. 223].

employees to call on the assistance of the union to secure an annual general release agreement regarding labor obligations. The new article states the following:

> *Article 507-B. Employees and employers may, during the term, or following termination, of an employment contract, sign an annual agreement of release from labor obligations before the workers union.*
>
> *Sole Paragraph. The agreement shall specify the monthly obligations fulfilled and shall include the annual release granted by the employee, effective for the release from the sums specified therein.*

As has been observed, the assistance of the unions in the termination of employment contracts effective for more than one year is no longer necessary, due to the repeal of article 477, paragraph 1, of the CLT. However, the Labor Reform law now provides for the assistance of the unions in the execution of an "annual release agreement regarding labor obligations". And the law states that this agreement "is effective regarding release from the sums specified therein". In other words, the sums listed in said release agreement (e.g., vacation, thirteenth salary, FGTS, profit sharing, transportation vouchers, meal tickets, etc) cannot, in principle, be subsequently challenged and claimed by employees, even if the sums have been paid incorrectly.

Most employees – as they are subject to the employer's rules, due to their economic subordination and fear of losing their jobs – will have little power to refuse or question their employers when invited to sign such release agreements before the unions. This fact will likely give rise to discussions regarding effective freedom and absence of coercion or consent by the employee in the execution of said release agreements.

The annual release agreement cannot serve as some kind of pretext for granting remission or forgiveness to defaulting employers who incorrectly perform labor obligations guaranteed by the law or Constitution.

According to Vólia Bomfim Cassar,

> *the possibility of an annual release regarding every payment mentioned in the agreement, during the term of the employment contract, when the employee is under the employer's rules, raises questions about free will. In fact, if the receipts are sufficient*

> *to prove compliance with labor obligations, what is the reason for the release regarding the union? Clearly, the intention is to secure a general release for unpaid amounts, which leads to unjust enrichment. Thus, the effectiveness of the annual release before the union must be discussed.*[21]

As can be seen, the new provision included in article 507-B of the CLT has already come under severe criticism from jurists. Daniel Lisbôa is even more critical in arguing for the unconstitutionality of this article:

> *At the employee's expense, the 'annual labor release agreement' imposes an implicit waiver on rights, as it places the employee in a worse situation than provided for by civil legislation in contracts in general.*
>
> *By authorizing the implicit waiver in the release, the reforming legislator created a legal situation worse than the previous one and worse than the situation provided for by civil contracts in general. Thus, in view of the head provision of Article 7 of the Federal Constitution, this provision is unconstitutional, based on the principle that there cannot be social regression in labor matters.*[22]

Note that article 507-B says nothing regarding the gratuitousness of this provision of accounts to be made before the unions nor about the loss by the unions of their main source of income (due to the cessation of the mandatory payment of union dues). Thus, unions will be potentially free to charge fees for these new services, which will certainly be object of much criticism and discussion.

In our opinion, due to the constitutional principle of access to justice and judicial review (article 5, XXXV), the principle that orients Labor Law and the assumption regarding the absence of free will if workers are called to sign such annual release agreements, this document cannot be used to forgive employers who make payments

21 CASSAR, Vólia Bomfim; BORGES, Leonardo Dias. *Comentários à reforma trabalhista*. Rio de Janeiro: Forense; São Paulo: Método, 2017, p. 65.

22 LISBÔA, Daniel. Desacertos da quitação trabalhista: a vontade contemporânea e a quitação civil. In: FELICIANO, Guilherme Guimarães; TREVISO, Marco Aurélio Marsiglia; FONTES, Saulo Tarcísio de Carvalho (Org.). *Reforma trabalhista*: visão, compreensão e crítica. São Paulo: LTr, 2017, p. 163.

incorrectly or insufficiently, or who seek to use such a procedure in order to avoid probable adverse judgments in Labor Courts.

6.13. General discharge in Voluntary Redundancy Plans (article 477-B, of the CLT)

The Labor Reform added to the text of the CLT an understanding already adopted in 2015 by the Full Bench of the STF:

> *An out-of-court settlement regarding the termination of the employment contract due to the employee's voluntary adherence to a voluntary redundancy program entails a full and general release from all payments in the employment contract, if this condition is expressly included in the collective agreement that approved the plan, as well as all other arrangements agreed with the employers.*[23]

Law No. 13,467/2017 included the following article in the CLT:

> *Article 477-B. Voluntary Redundancy Program for individual, multiple employees or collective dismissal, provided for in collective bargaining agreements or collective labor agreements, entails a full and general release from the rights resulting from the employment relationship, except when agreed to otherwise by the parties.*

Therefore, as long as the Voluntary Redundancy Program (a program that offers advantages and consideration for employees that leave the company) results from collective negotiation and is duly provided for in a collective agreement or collective bargaining agreement subscribed to by the workers' union, the employee's voluntary and spontaneous adherence to such a program entails a full, general and irrevocable release from the rights arising from the employment contract. This means that the employee will have no further claims following the termination of the employment contract.

6.14. Collective or multiple dismissals without the need for previous negotiation with the employee's union (article 477-A of the CLT)

Article 477-A was added to the CLT stating that collective

23 STF (Brazilian Supreme Court), Sitting *en banc*, Extraordinary Appeal 590,415/SC, Justice-Rapporteur Luís Roberto Barroso, judged on April 30, 2015.

dismissals or multiple employee dismissals do not depend on previous negotiation with the workers' unions, as occurs in individual dismissals.

A collective dismissal is the dismissal of a large number of workers for the same reason: the company's need to reduce employee numbers due to economic, technological, structural or related reasons.

Multiple employee dismissal is the dismissal of several employees at the same time, but for specific reasons, related to each employee's specific conduct, which is to say, there is no common motive for the different individual or singular dismissals.

Article 477-A of the CLT provides that neither collective nor multiple employee dismissals depend on prior communication or negotiation with the workers' union:

> *Article 477-A. Groundless individual, collective or multiple employee dismissals are considered equivalent for all intents and purposes, and there is no need for previous authorization by the union or the execution of a collective bargaining agreement or collective labor agreement for their effectiveness.*

This article tends in the opposite direction of the prevailing understanding of the Brazilian Labor Courts, including the Superior Labor Court, which required prior collective negotiation before mass dismissals.[24]

It also tends in the opposite direction of the ILO Convention 158. It should be pointed out that Brazil has ratified Convention 158 and has incorporated its terms into Brazilian legislation by Decree No. 1855/1996. However, soon afterwards, the Brazilian Government denounced this Convention through an act registered before the ILO on November 11, 1996. To date, the Action for a Declaration of Unconstitutionality No. 1625-3 challenging the validity of said denunciation is pending trial before the STF.

Despite the statements of article 477-A of the CLT, cases have been filed in the courts and there is already a debate as to whether this new provision of the CLT is valid and constitutional.

6.15. Moral damages (article 223-A and following of the CLT)

The question of moral damages is one of the most controversial ones regarding the Labor Reform bill and merits specific and thorough analysis, which goes beyond the scope of this study.

However, one important aspect regarding Collective Labor Law should be noted. According to the changes introduced by Law No.

24 TST (Brazilian Superior Labor Court), SDC, RODC 309/2009-000-15-00.4, Labor Justice Rapporteur Mauricio Godinho Delgado, DEJT: April 9, 2009.

13,467/2017, new article 223-B of the CLT states that the aggrieved individual or legal entity is entitled to damages:

> *Article 223-B. An action or omission that offends the moral or existential sphere of an individual or legal entity causes material damage and shall exclusively entitle such persons to the right to compensation.*

This article apparently intended to restrict the right to damages to the directly aggrieved individual or legal entity, excluding collective moral damages (when a group of people is aggrieved) as well as reflexive moral damages, when a person's right is damaged and such damage affects other people who live intimately, or have an affective relationship, with the aggrieved person (*e.g.* occupational accidents that cause workers' deaths and where family members seek compensation for possible moral damages).

In view of the special protection granted by the Constitution to the dignity of the individual and the social value of work (article 1, III and IV, and article 170), and provisions regarding damages set forth in article 5, X, of the Constitution, article 6, VI, of Law No. 8,078/80, and article 1, IV and V, of Law No. 7,347/85, it is understood that the wording conferred by Law No. 13,467/2017 on article 223-B of the CLT does not exclude the possibility of awarding collective work-related compensation for pain and suffering.

Moreover, since the Constitution (article 5, X) ensures, without limitation, the right to damages to whomever is aggrieved (directly or indirectly), in addition to affirming that the law shall not exclude consideration by the judicial branch of harm or threat to a right (article 5, XXXV), it is understood that the Labor Reform did not exclude the right to reflexive moral damages sustained by persons living closely to, or having a close affective relationship with, the direct victim.

6.16. Outsourcing (amendments to Law No. 6,019/1974)

Although a thorough analysis of this subject is also beyond this study's scope, it should be noted that the Labor Reform allowed the outsourcing of any activity, including the company's main activity, according to article 4-A of Law No. 6,019/1974:

> *Article 4-A. Outsourcing is considered as the transfer by the contracting party of the performance of any of its activities, including its main activity, to a private legal entity that renders services and*

> *possesses economic capacity compatible with the performance of such activities. (Wording by Law No. 13,467/2017)*

In other words, employees from external companies are now allowed to provide all services. For example, a school may now choose not to have any direct employees and to hire an outsourcing company to provide the teachers, inspectors, receptionists, doormen and cleaners necessary to render the services.

The Labor Reform bill (Law No. 11,467/2017) enacted these changes by amending Law No. 6,019/1974, which previously only provided for temporary work.

These changes represent a huge backward step and will damage employment relationships.

It should be noted that the new wording of the law (article 4-C of Law No. 6,019/1974) does not even ensure equal pay for the contracting company's direct employees and the outsourced employees, even if they perform identical activities at the same workplace, in violation of the provision of the Universal Declaration of Human Rights (UN, 1948) in its article 23.1. According to this article, equal pay is only a choice, not an obligation:

> *Article 4-C. (...) paragraph 1. Contracting party and outsourcing company may establish, if they so wish, that the outsourcing company's employees be entitled to payment equal to that received by the contracting party's employees, in addition to other rights not foreseen herein. (Added by Law No. 13,467/2017)*

Understandable, this amendment has been object of harsh criticism, such as that expressed by Fábio Villela:

> *(...) it is now been shamelessly authorized to lease out labor, as if an outsourced worker were merchandise or commercial property. The human being is being reduced to the status of a material object in employment relations.*
>
> *Thus, it is now possible to open companies without employees or even for workers to coexist in the same environment and perform the same activities, but receive different treatment, in flagrant violation*

of the principle of equal protection (...).[25]

With regard to Collective Labor Law, it should be pointed out that outsourced companys' employees are, in principle, affiliated with unions that are different from those of employees working directly for the companies where they perform their activities.

This fact will create further inequality between workers who perform identical activities for the same company, since the rights and benefits foreseen in collective agreements or collective bargaining agreements executed with the respective labor unions will be different.

7. CONCLUSION AND FUTURE PERSPECTIVES

This study is not comprehensive and does not cover all the issues included in the 2017 Labor Reform bill. Some equally important aspects – such as the creation of so-called "intermittent employment contracts" and the possibility of the termination of employment contracts by "mutual agreement" between the parties – were not even mentioned here, likewise changes regarding Procedural Labor Law and the new rules applicable to judicial resolution of labor claims.

However, the issues included here demonstrate that the Labor Reform bill enacted by Law No. 13,467/2017 has a strongly liberal tendency and seeks to give prevalence to rules negotiated by the parties themselves (both in the collective and individual sphere) over statutory rules. In other words, the reform clearly aims at reducing government interference in employment relationships.

They represent a clear effort, regarding employment relationships, in order to leave the public into the private sector, which is – in some ways – highly risky in a country still marked by extreme social inequality and where workers generally do not negotiate on equal terms with the other contracting party.

It is also evident that the Labor Reform, in many regards, sought to challenge prevailing precedents of the Superior Labor Court.

The possibility of outsourcing all of a company's activities (amendment to Law No. 6,019/1974) will produce potentially adverse consequences that represent an affront to the principle of equal pay (equal pay for equal work), and may cause a deterioration in employment relations.

Throughout the swift processing and approval of the Labor Reform in the Brazilian Congress, the government alleged that the CLT

25 VILLELA, Fábio Goulart. A terceirização na reforma trabalhista: a "legalização" da intermediação de mão de obra. In: TUPINAMBÁ, Carolina; GOMES, Fábio Rodrigues (Coord.). *A reforma trabalhista*: o impacto nas relações de trabalho. Belo Horizonte: Fórum, 2018, p. 153.

was "old" and was one of the causes of the high unemployment rate and the country's huge number of labor claims. The government stated the need for "modernization" in order to improve employment opportunities, income and economic development. Such claims, however, have no empirical or scientific basis[26], despite being repeated like mantras.

Although the 2017 Labor Reform may seem, in many regards, to be a backward step regarding the protection of social and labor rights, the information contained in this study is not intended to cast Brazil in a negative light or as representing a negative view of the country's future.

If, on the one hand, the Reform is considered a regression, on the other hand, in recent decades, institutions like the Labor Prosecutor's Office and Labor Inspection Agencies have become much stronger, better prepared and better organized. They have also hired more staff and gained greater autonomy.

Labor Prosecutors and Labor Inspectors already play – and will continue to play – a very important role in monitoring the main challenges in the labor sector, including the guarantee of dignity in the workplace.

Over the last thirty years, ideas regarding the recognition of the effectiveness, normative strength and binding nature of constitutional rules have gained strength, which is extremely important. All areas of Brazilian Law are now governed and construed in accordance with the rules and principles of the 1988 Constitution, including the Labor Law and Procedural Labor Law.

According to Justice Luís Roberto Barroso, the emergence of a *constitutional feeling* in the country – creating a sense of respect and even affection towards the Constitution – must be celebrated.[27]

So, some legal provisions included in the Labor Reform should be read and interpreted according to the rules and principles of the 1988 Constitution and to International Conventions ratified by Brazil.

Brazil currently possesses a well-developed structure for resolving labor claims, with specialized and independent Labor Courts and Judges.

The Brazilian Supreme Court has performed a consistently important and admirable role as the guardian of the Constitution, including in Labor Law matters.

Despite its many challenges, Brazil has overcome difficult periods in the past, including dictatorships. But, inspired by the 1988 Constitution, Brazilian society is being built on republican and

26 FRAGALE FILHO, Roberto; SIQUEIRA NETO, José Francisco. Reforma trabalhista: uma cartografia das discussões equivocadas, esquecidas e frustrantes. In: TUPINAMBÁ, Carolina; GOMES, Fábio Rodrigues (Coord.). *A reforma trabalhista*: o impacto nas relações de trabalho. Belo Horizonte: Fórum, 2018, p. 425-426.

27 BARROSO, Luís Roberto. *Op. cit.,* p. 322.

democratic values.

Brazil has made significant progress in reducing child labor and eliminating degrading working conditions, thanks to the important work performed by the Labor Prosecutor's Office, the Labor Inspection Agencies, Police, Unions and the Courts.

Among many other issues, the country has made progress in regulating domestic employment relationships, student internships, prior notice in the termination of employment contracts without cause, and parental protection issues (including adoption).

The same applies to other areas, such as the fight to reduce corruption, inflation rates and extreme poverty.

According to the former President of the Brazilian Supreme Court, Justice Carlos Ayres Britto, "democracy does not win by knockouts, it wins on points, it is a process...The implementation of Democracy is gradual."[28]

Despite the challenges and obstacles along the way, we believe that Brazil remains resolute in its arduous and daily struggle to consolidate its democracy.

Japanese use to say that it is necessary to work hard and tirelessly – with focus, patience and resilience – in order to overcome difficulties and, thus, to achieve important goals.

As the Japanese say, ローマは一日にしてならず (Ro-ma wa ichinichi ni shite narazu).

In other words, "Rome wasn't built in a day."

The same principle applies to the Brazilian Democracy.

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28 BRITTO, Carlos Ayres. Carlos Ayres Britto: interview [May 2017]. Interviewer: Pedro Bial. São Paulo: Globo, 2017. Interview aired on May 22, 2017 in TV program "Conversa com Bial".

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NATIONALITY IN BRAZILIAN LAW

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Abstract: This paper aims to present the rules of nationality in brazilian law. Therefore, it will demonstrate the constitutional cases of how nationality can be acquired and lost; and the possible distinctions between birth and naturalized nationals in the brazilian law.

Keywords: nationality - brazilian law - naturalization

1.NATIONALITY

Nationality[1] is the legal and political bond that links an individual

1 MARINHO, Ilmar Penna. *Tratado Sobre a Nacionalidade*. *Volume Primeiro. Direito Internacional da Nacionalidade*. Rio de Janeiro: Departamento de Imprensa Nacional, 1956. pp. 13-15: "Nationality is a word that can be understood in two different meanings: a broad, sociological meaning; the other, restricted, legal.
In the first sense, the word nationality lends itself to numerous literary dilettantes and extensive philosophical ramblings. Therefore, they have many dedicated writers, philosophers and sociologists who, in fascinating musings, run background ethnic through all ranges of people.
In the legal sense, which only interests us in this work, nationality has a precise character, a defined concept, a limited field of action. It appears as a political quality of socialized man. The man who abandons the tribe, the clan. The man who is part of the perfect social organization - the State.
This basic difference between the two notions of nationality is absolutely essential because, through it, we are able to see how and why the terms nationality, nation and national are used to determine two quite distinct phenomena: one, the ethnic group; the other, the political group. [...]"

to a sovereign state. It is a bond because it entails rights and obligations. Rights as to enter and stay in the territory and to receive diplomatic protection; obligations such as military service and, in Brazil, to vote[2]. It is legal because it's regulated by law, while other areas of the humanities it is occupying. It is political because pointing out who is a national, is a political choice. Legally, as a rule, the constitutional order of the State is what establishes who are its nationals[3]. Politically, deciding who they are is the decision taken at the very formation of the state. This decision is taken both at the creation of the state, by the ordinary constituent power; and in its possible subsequent configuration, via the derived constituent power.

The state is made up of three elements: territory, government (or sovereignty) and people. People are the set of nationals which in addition to the mentioned legal and political bond, generally have a common identity: ethnic, cultural, religious and idiomatic. However, the nationality is much more closely related to the concept of State, as a political organization than with the idea of a nation as a cultural or sociological phenomenon[4].

The concept of sovereignty can be understood under dual focus: (i) internally, as a monopoly of the legitimate use of violence and force; and (ii) externally, as insubordination to a foreign State. The concept of sovereignty in the external perspective, understand, includes the right to decide who is its national, not admitting that another State determines who will be its national other than its own self.

It is important to note that not everyone who occupy the territory of a State are its nationals. The number of people in the territory of a sovereign State form the concept of population. People, as a State element, is the national assembly. All others will be foreigners. It is the opposite of the national that we extract the concept of the foreigner[5], no matter what condition the individual who is not a national is on the territory: in a regular or an irregular situation, national of this or that country, or even if does not bear any nationality. National of another State, refugee, asylum, stateless, regular, temporary or permanent,

2 Article 14, §1º, I, of the Brazilian Constitution.

3 In Brazil, article 12, section I and II of the Constitution establishes who are Brazilian nationals.

4 Phenomenon that can be perceived in an objective form, as a group of individuals who have the same language, ethnicity, religion, culture and shared history; and, in the subjective aspect, as a group of individuals who perceive and declare themselves as a nation. What is important, therefore, to the legal concept of nationality, is to linked the individuals legally and politically to a sovereignty, so that, the nations are not what make states and nationalisms, but the opposite. HOBSBAWM, Eric J. Nações e Nacionalismo desde 1780. 5ª ed. São Paulo: Paz e Terra, 2008. pp.14-20.

5 CAHALI, Yussef Said. *Estatuto do Estrangeiro.* 2ª ed. Revista, atualizada e ampliada. São Paulo: Editora Revista dos Tribunais, 2010. p. 26.

merely irregular or illegal, tourist, businessman or religious missionary, everyone who is not a national is a foreigner.

1.1. General Doctrine

The right to nationality bears legal nature to fundamental rights, recognizing in its concession, compliance with universally recognized as protective values of human dignity.

The Article 15 of the Universal Declaration of Human Rights states: "Everyone has the right to a nationality". The American Convention on Human Rights, in its turn, establishes in its Article 20, which deals with the right to nationality that "1 - Everyone has the right to a nationality; 2 - Everyone has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality; 3 No one shall be arbitrarily deprived of his nationality or of the right to change it".

Nationality provides people with a sense of belonging, of identity, of communion with a particular community, but not only this. It creates a series of obligations and duties and, more importantly, allows the exercise of any number of rights which they would be denied if they were considered foreigners.

Aware of these issues, the United Nations urged the States in two Conventions (the 1954 Convention on the Status of Stateless Persons and the 1961 to Reduce Statelessness) that they should not cease to give, with the most generous possible criteria, the fundamental right to nationality.

The right to a nationality corresponds also to the rights to change one's nationality and not to change it. The right to change acknowledges the right to renounce a nationality and the right to acquire another nationality. In this last situation, most times, the acquisition of a new nationality (right to acquire) means the loss of the previous nationality (right to lose). The right not to change is identified with the right not to acquire, as with people who are in annexed territories by other States; and the legal status of married women who recognize the right not to acquire the nationality of her husband by marriage (in this case, when there is the acquisition of nationality by women, because marriage, has the granting of nationality by the will of the law). The right not to lose can be illustrated with the example of annexation of territory, in which the national of the former State intends to remain a national of the former[6]. Also with respect to the right to not lose, Article 15 of the Universal Declaration of Human Rights, in addition to providing that "Everyone has the right to a nationality", states that "No one shall be

6 DOLINGER, Jacob. Direito Internacional Privado. Parte Geral. 7ª ed. Ampliada e Atualizada com as Emendas à Constituição e o novo Código Civil. Rio de Janeiro: Renovar, 2003. p.163.

arbitrarily deprived of his nationality nor denied the right to change nationality".

In relation to the right not to acquire, the 1930 The Hague Convention on Nationality, states that the children of diplomats on mission abroad have the right not to acquire the nationality of their place of birth, just the mere resignation of it is enough for them to get rid of the nationality and the obligations that came along.

Two concepts usually confused, but that do not have anything in common are nationality and citizenship[7], although lots of countries call their nationals citizens. Nationality, like we saw, is a legal and political bond between an individual and a sovereign State, while citizenship is, in the legal sense, the ability to exercise political rights. The confusion between the terms[8], in the States that identify, would entail, among other things, the historical construction of citizenship in American law, some national - the native Indians of the North American territory - would not be citizens, so-called *noncitizen nationals*. Extended citizenship to all nationals without distinction of origin, became taking a term to mean another, identifying nationals as citizens.

To understand the distinction clearly, just consider the situation of a Portuguese living in Brazil, under the Federal Constitution, he has equal rights like those of a naturalized Brazilian[9]. This Portuguese national can exercise Brazilian citizenship, vote and be voted for, and will not be a Brazilian national. The same happens with the nationals of members states of the European Union that while they are not nationals of the union, because Europe is not a State, they are European citizens, because they exercise political rights together with this legal body of public international law.

Even today, there are grey areas between the two concepts. Antony Aust, studying the different species of British citizenship, states that the term citizenship usually denotes broad enjoyment of civil and political rights in a national state, and citizenship and nationality generally coincide.[10]

7 Ibidem pp. 156-160.

8 In the Classical Antiquity, prior to the formation of modern states, citizenship was a condition, a position in society. It was the linking of the individual with the things of the city, their ability to participate in decisions that concern everyone in the city. Fustel de Coulanges remembers that this position stems, especially in Greece, the participation of the individual in the service of their religious practice in the city. In Rome, issues such as the origin, precede religious communion which gives the social status of citizen, with all its legal consequences.

9 Friendship, Cooperation and Trade Treaty between the Federative Republic of Brazil and Portugal. Article 12

10 AUST, Antony. *Handbook of International Law*. 2ª reprinted. Cambridge: Cambridge University Press, 2009. p. 180: "The term 'citizenship' usually denotes entitlement, under the law of a state, to full civil and political rights, and citizenship and nationality normally coincide.

The doctrine stresses a need for a greater separation of concepts, distinguishing, nationality and citizenship[11], so that, in addition to the distinction already made between the concepts of nationality and citizenship, the place of birth would be a territorial concept (naturality), referring only to the place where the person proceeds, which may possibly coincide with the government granting him citizenship. Thus, a person may have the nationality of the country where he was born; can possibly be a citizen of the place where he was born and from where he is a national, but that does not necessarily mean that this person will be natural, national and citizen of the same country, the three concepts should not be confused.

Finally, the distinction of the concepts of nationality and citizenship, relevant to note that article 22 of the Federal Constitution, which provides for the legislative competence of the Union, establishes in section XIII, as being the competent Union to legislate on "nationality, citizenship and naturalization," indicating that they are separate legal categories.

2.NATIONALITY IN THE BRAZILIAN LAW

2.1 The criteria of concession and distinctions between birth and naturalized nationals

In Brazil, the article 12, section I and II, the Republic Charter, defines who is a Brazilian national, and thus, who is a foreigner[12].

In the law of a state which still has the remnants of a colonial empire, 'citizenship' may be limited to person with close connections with ('belongs to') the metropolitan territory, those belonging to its overseas territories having a separate status. Thus, the British Nationality Act 1981, as amended, distinguishes between three main categories: (1) British citizens - those belonging to the metropolitan territory of the United Kingdom, to the Channel Islands or to the Isle of Man, and now also to all remaining British overseas territories; (2) British Overseas Territories Citizens - persons who belonged to a former overseas territory but did not acquire the citizenship of that country on independence; and (3) British Nationals (Overseas) (former belongs of Hong Kong). Neverless, in international law, all those in the various categories are nationals of the United Kingdom, even though only British citizens are free of all UK immigration control."

11 TIBURCIO, Carmen. *Human Rights of Aliens in International and Comparative Law.* Haia: Martinus Nijhoff Publishers, 2001. p.1.

12 Article 12. "The following are Brazilians: (RCA No. 3, 1994; CA No. 23, 1999; CA No. 54, 2007) I – by birth: a) those born in the Federative Republic of Brazil, even if of foreign parents, provided that they are not at the service of their country; b) those born abroad, of a Brazilian father or a Brazilian mother, provided that either of them is at the service of the Federative Republic of Brazil; c) those born abroad, to a Brazilian father or a Brazilian mother, provided that they are registered with a competent Brazilian authority, or come to reside in the Federative Republic of

The criterion for granting Brazilian nationality is primarily, the right of the soil (*jus soli*), there is, however, forecast of it being granted by the criterion of the right of blood (*jus sanguinis*).

Brazilian nationals are separated into two major groups in the constitutional provision: the native, whose nationality is original; and naturalized, whose nationality is acquired. The constitutional differentiation allows for the establishment of which rights are granted to one group and another. The § 2 of Article 12 states that the law cannot make distinction between native and naturalized national, but the Constitution is allowed to do so. And it does so. The § 3, of the same instrument, states that the President and Vice-President of the Republic; Presidents of the Chamber of Deputies and the Senate; Justice of the Supreme Court; and member of the diplomatic career; officer of the Armed Forces and State Defence Minister are exclusive for Brazilian born nationals.

As a result, the naturalized Brazilian could only occupy a seat in the Council of the Republic[13], superior body for the consultation of the President, in the condition of deputy or senator or Minister of Justice, to the extent that the other participants (Vice-President of the Republic, President of the Chamber of Deputies, the Senate President and six native Brazilians[14] older than thirty-five, two of which were appointed by the President, two elected by the Senate and two elected by the House) must be Brazilian born nationals.

The reason for these distinctions is strategic and intuitive, based

Brazil, and opt for the Brazilian nationality at any time after reaching majority; II – naturalized: a) those who, as set forth by law, acquire Brazilian nationality, it being the only requirement for persons originating from Portuguese-speaking countries the residence for one uninterrupted year and good moral repute; b) foreigners of any nationality, resident in the Federative Republic of Brazil for over fteen uninterrupted years and without criminal conviction, provided that they apply for the Brazilian nationality. Paragraph 1. The rights inherent to Brazilians shall be attributed to Portuguese citizens with permanent residence in Brazil, if there is reciprocity in favour of Brazilians, except in the cases stated in this Constitution. paragraph 2. the law may not establish any distinction between born and naturalized Brazilians, except in the cases stated in this Constitution. Paragraph 3. The following of ces are exclusive for born Brazilians: I – those of President and Vice-President of the Republic; II – that of President of the Chamber of Deputies; III – that of President of the Federal Senate; IV – that of Justice of the Supreme Federal Court; V – those of the diplomatic career; VI – that of of cer of the Armed Forces; VII – that of Minister of defense. Paragraph 4. Loss of nationality shall be declared for a Brazilian who: I – has his naturalization cancelled by court decision on account of an activity harmful to the national interests; II – acquires another nationality, save in the cases: a) of recognition of the original nationality by the foreign law; b) of imposition of naturalization, under the foreign rules, to the Brazilian resident in a foreign state, as a condition for permanence in its territory, or for the exercise of civil rights."

13 Article 89, of the Constitution

14 Article 89, section VI, of the Constitution

on the commitment of what the constitutional legislator believes he has with the Federative Republic of Brazil, such, he has with this state a legal-political link originating at birth in the land or by the blood of his ancestors.

With regard to extradition, it is that a naturalized Brazilian, unlike the born Brazilian - who can never be extradited on any ground - can be delivered to a foreign jurisdiction provided that the extradition request is based on a previously committed crime prior to naturalization or in the case of request based on the charges of drug trafficking.

These are not the only distinctions. Article 222 of the Constitution establishes that the ownership of a newspaper, sound broadcasting, or any mass media must be exclusively by native Brazilians or those naturalized for more than ten (10) years. The distinction here is also strategic, with the aim of protecting national interest. With this, the prevention of a naturalized national or whose bond with the country is less than 10 years, to control the information flow in the country, through the mass media company of his possession.

The law, in turn, also makes distinction between birth or naturalized nationals. This is the case, for example, of the Consolidation of Labour Laws, Labour Code, which, in its article 353, establishes the protective regime to the Brazilian worker, that foreigners are second to Brazilians, subject to the exercise of professions reserved for native Brazilians or the Brazilians in general, it should be noted, in fact, that this distinction between born and naturalized nationals can never be done by infra standard for express constitutional provision.[15]

And when is a Brazilian a born or naturalized national? As mentioned, it is the Constitution that, in the exercise of Brazilian sovereignty, establishes who is the national, born or naturalized, and by exclusion foreigners. Also as we have seen, two criteria are used in Brazil for granting nationality by birth or original: the right of the soil, as a major criterion; and the right of blood, as a supplementary criterion. Anyway, before entering the constitutional formula, one must still make a last but relevant note about what is nationality by birth or original; and naturalization, or derivative.

The nationality by birth has a declaratory nature. In other words, is the one that we always recognize to have existed, even though such recognition can be given later in life, even in old age. It is the nationality by birth that allows, as a rule, the dual nationality phenomenon, insofar as, it is for each sovereign State to determine who is its nationals in the exercise of its sovereignty, not allowing a foreign state to determine who is or is not a national of another country, may be more than one sovereign state, by different criteria (right of blood, land rights,

15 Article12, Section 2, of the Constitution: "the law may not establish any distinction between born and naturalized Brazilians, except in the cases stated in this Constitution."

marriage, adoption, religious criteria), bestow original nationality to the same individual, which makes one bear, different nationalities at the same time.

The nationality derived, or naturalization, is constitutive. Specifically, it is whereby one has a particular nationality, or no nationality (statelessness); and decides, at any given time, to establish legal and political relationship with a sovereign state, acquiring the nationality that one did not previously have. It is an acquired nationality.

2.2. The constitutional rules

2.2.1. The acquisition

The heading of Article 12 of the Political Charter says: " The following are Brazilians:". The section I reveals, in its three paragraphs: *a*, *b* and *c*, the chances that a Brazilian will be born a Brazilian. Let´s us take a look at them. Paragraph *a*: those born in Brazil, even if the parents are foreigners, provided they are not in the service of their country; paragraph *b*: those born abroad, with a Brazilian father or mother, with either of the parents in the service of Brazil and paragraph *c*: those born abroad of a Brazilian father or mother, provided they are registered in the office concerned or come to reside in Brazil, and in the latter case, choose, at any time after reaching the majority age, the Brazilian nationality.

Observe then let us find out what are the chances of a born Brazilian national examining closely, each of the possibilities of the constitutional text in its multiple regulatory possibilities.

The first hypothesis of nationality concession by birth is paragraph *a*, which adopts the criterion of right of the soil to grant it. A native Brazilian is one who is born in Brazil, even to foreign parents, except when they are in the service of their country. What is to be born in Brazil? A birth throughout Brazilian territory, which includes airspace and territorial sea, considered also are Brazilian ships and aircraft, public or in the service of the Brazilian government, wherever they are, or these same vessels and aircrafts, merchant or privately owned, which are in territories, airspace or the high seas that belongs to no sovereign State. This is the understanding that is extracted from the Brazilian legal system, considering, for example, legal rules of territoriality and extraterritoriality of the Brazilian criminal law. Article 5 of the Brazilian Penal Code states that, the Brazilian criminal law applies to crimes committed in the country, and then in § 1 and § 2, the Brazilian criminal law explains what it considers as national territory, incorporating in this concept, Brazilian ships and aircraft in the above situations. The Article 7 of the same Penal Code, reveals situations where, although committed abroad, the Brazilian criminal law can judge offenses, allowing us to

conclude that, in the first case (art. 5) has the definition of the national territory as opposed to situations even abroad (art. 7), are considered crimes which could be judged by the Brazilian criminal law.

And the constitutional provision continues: even of foreign parents. That is, even though the parents of the new-born are both foreigners of the same nationality, or of different nationalities, or even without any nationality, and are only passing through the territory, the child born in Brazil will be Brazilian. At the point, we must remember what is seen as the dual nationality phenomenon. Will they just be Brazilians? To Brazil, yes; which does not stop, for example, the daughter of a French mother and German father, is also considered respectively in France and Germany, French and German, the criterion for granting nationality by birth or original, and by the right of blood.

However, the constitutional provision adds a caveat: will be Brazilian the new-born in the national territory, even if, of foreign parents, provided that they are not in the service of their country. Here, some questions arise in understanding the scope of the constitutional rule. Just one of the parents needs to be in service of their country, or both parents need to be the foreign service of their country? With the two being foreigners of different nationalities, finding just one of them in the service of their country, can one observe the constitutional restriction in the granting of original nationality to the child born here? It is necessary for the parents of the new-born to be in the service of their own countries or that they can simply be in the foreign service of any country? And even if, one of the parents, is in the service of his country, and the other is Brazilian? It is necessary that both parents are foreigners when one of them is in Brazil in the service of their country.

Taking premised on the legal nature of the fundamental right of nationality, it has the interpretation that the relevant constitutional provisions should always be less restrictive as possible. This framework, the standard that is extracted from the constitutional text should be understood this way: the new-born in Brazil will be a Brazilian, even if the parents are foreigners, except when both parents are foreign nationals and one or both are in the service of their country. So the new-born will be a Brazilian born in Brazil, even if: (i) one of the parents is a foreigner, in the service of their country, and the other is Brazilian. In this case, it must be considered that the child will be Brazilian by right of the soil, paragraph *a*, and by right of blood, paragraph *c*. It must also be considered that, otherwise, in the unusual situation where the same couple had this same child abroad, he would be Brazilian, based on paragraph *c* of the same item I of Article 12, which is clearly not the same situation in relation to the equal treatment as to the child born in the country. Finally, one should not disregard the constitutional text, in paragraph *a*, which makes mention of both parents as foreigners "since

these" and in the other paragraphs, *b* and *c*, refers always to, father or mother, expressly; (ii) both parents are foreign nationals and one of them, or both, are in the service of a foreign state, which is not their country of nationality, so that an Arab, who represents in Brazil the interests of Egypt[16], and has a child here, can have this child recognized as a born Brazilian. In this case, the seal is not strategic as in protecting national interests. It would deal, merely with, the profession of both or one parent.

The paragraph b, of section I of Article 12 states that new-borns overseas, to a Brazilian father or mother are Brazilians, provided that any of these is at the service of the Federative Republic of Brazil. This is the granting of original nationality by the criterion of the right of blood, in what is called jus sanguinis functional. And what is meant by being in the service of the Federative Republic of Brazil? Here, the criterion is the relationship of law under the legal and administrative system. In other words, the genitor must serve the interests of the country on official business. By the Federative Republic of Brazil, one must understand the Union and federal agencies, states and municipalities, and legal entities of public law that comprise the direct and indirect administrations, municipalities and public enterprises.

The paragraph *c*, of the same instrument provides that, those born abroad of a Brazilian father or mother are born Brazilians, provided that it is registered in the office concerned, or that resides in Brazil, and here, at any time after reaching legal age limit, might opt for Brazilian nationality. In the first case, there is the so-called *jus sanguinis* registry, i.e. the nationality by birth or original is granted by the criterion of the right of blood, therefore, the new-born in a foreign land is registered with the diplomatic mission office. This form of granting nationality, although traditional in the Brazilian Constitution, was withdrawn from the original 1988 Constitution and only reintroduced in 2007. This lapse has resulted in a multitude of problems that culminated in the jurisprudential construction, the Supreme Court, what is called *original nationality under a suspensive condition*. The record in the office concerned, which, as stated, was reintroduced in the Constitution by Amendment No. 54, 2007, gave rise, in law cases, the question of whether the text refers only to Brazilian diplomatic or consular offices abroad or also the individual notary registries in Brazil. It is that the transitional rule in Article 95 of ADCT[17], also introduced in the Constitution by the such mention amendment, diplomatic and consular offices, or registry

16 In the case of diplomats, one cannot ignore that The Hague Convention on Nationality, 1930 provides that the children of these agents can break free of nationality acquired by right of the soil, when on mission, through mere resignation, freeing up thus also of the duties pertaining to nationality.

17 Temporary Constitutional Provisions Act (ADCT)

office, if the child comes to live in Brazil. Thus, although it appears to have the intended constitutional legislator, resulting to refer only to Brazilian diplomatic or consular offices abroad, either because the registry in Brazil, although delayed, was always possible, by itself, and was never a concessive nationality criteria; that's because the rule of Article 95 of ADCT refers only to children born between 7 June 1994 and 21 September 2007, the fact is that a less restrictive interpretation would lead to the conclusion that one must understand the registry offices in Brazil are also attained by the text of paragraph *c*.

And the constitutional provision continues mentioning those born abroad, the children of a Brazilian father or mother, who come and reside in the country, at any time after the majority age limit, may opt for Brazilian nationality. In this case, no matter what age (from 18 years) the child of a Brazilian resides in the country. Equally it is unimportant whether or not he has mastered the language. Residing in Brazil, the child of a Brazilian may opt for nationality by birth or original. This nationality option is a judicial measure of voluntary jurisdiction, the authority of the Federal Court, for which it is legitimized for one to opt in his own name. In these procedures it is essential for the manifestation of the Federal Prosecution Service as a fiscal of the law, considering the nature of the action.

At the point, there is still the need to point out that Brazilian law does not confer nationality, original or derived, by adoption or marriage.

Now let's see when the Federative Republic of Brazil grants derivative nationality through naturalization. In other words: how do people who were not and want to be, become Brazilians.

Paragraphs *a* and *b* of section II of Article 12 of the Charter of the Republic, bring the chances of granting derived nationality. This nationality, as stated above, is constitutive, i.e., a foreigner becomes a national, distinguished, so that at some point in life, the Brazilian State has recognized this national as one, who had a different nationality from birth.

The paragraph *a* refer to those who require it, according to the law. In this case, any foreigner can, following the requirements of sections I to VIII of Article 112 of Law 6.815/80 apply to the Minister of Justice for naturalization, basically, to foreigners originating from Portuguese speaking countries they only need to prove residence in Brazil for one uninterrupted year, and be of good moral character.

Having submitted the request to the Minister of Justice[18], its

18 The procedure is governed by Law 6.815/80, in Articles 111 and later 116 and subsequent. Also by Decree 86.751/81, in Articles 119 to 134. The granting of derived Brazilian nationality is given by the administrative rule of the Minister of Justice, which, pursuant to Article 119 of Law 6.815/80 shall issue a certificate on behalf of the naturalizing and will forward to the federal judge of the city where it is domiciled. It is in this locality, the 1st Court, where there

concession is discretionary, because it is a sovereign act.

Naturalization doesn't matter if it is an acquisition of the Brazilian nationality by the spouse and the offspring of the naturalized, under Article 123 of the said legislation.

The paragraph *b* of the same section II, takes care of the hypothesis of naturalization of a foreigner provided that he requests, of any nationality or no nationality, who is in the country for over fifteen uninterrupted years and without criminal conviction.

In this case, there is the *amnesty naturalization call*, which is the disregard of any irregularity in the permanence in Brazil. Here, with the constitutional requirements met, there is no discretion on the part of the Brazilian state. It is a subjective, constitutional right, to the Brazilian nationality. If the Constitution established the requirements for the obtainment, no margin was left to the Executive for considerations and opportunity convenience. But in the case of foreigners with Portuguese as the first language, referred to under paragraph *a*, would they also have a constitutional subjective right? No, because in this case there is an express reference to the law, which says "according to the law" and the law claims to grant derived nationality with a description of the Brazilian state.

In the case of *naturalization by amnesty*, there has to be a link established by the foreigner, who has to live here for over fifteen years, without any criminal conviction which is strong enough to allow him to obtain Brazilian nationality, regardless of the will of the governing, insofar as, the prediction is constitutional and does not refer to any law or regulation.

The question that arises is whether the settlement mentioned in the constitutional provision means formal and regular authorization to reside or just finding a legal fact, consistent in the foreigner's stay in the territory for a period established constitutionally, no matter their immigration *status*. A teleological interpretation of the rule does not authorize the exclusion of irregular immigrants from this constitutional case. If the intention is to grant amnesty, which is to regularize the situation of those who have established strong ties with the Brazilian government, then there is no reason to require of them an authorized and regular period of stay, so they can benefit from the constitutional

is more than one Federal Judgment, or at the Single court, where there is only one, the federal judge will deliver by filing of the requirements already mentioned in note nº 95. It should be noted that, according to settled law - case of the Supreme Court (Extradition nº 1074, judged on February 14, 2008), "the granting of naturalization in our legal system, is an act that is within the mandate of the Minister of Justice, qualifying as an exclusive authority of the Executive Branch (Law 6.815/80, article 111.) -. the acquisition of the condition of a naturalised Brazilian, despite already granted by the Minister of Justice, will only occur after delivery, of the concerning naturalization certificate by a federal magistrate."

permissive. This question, concerning the idea of residence in Brazil as a concept of authorized residence or a mere factual stay is, as we shall see, really relevant to inform the observance of rights and guarantees to the irregular foreigner who is in the territory, since it can anticipate the work that the Constitution considers when it refers to the foreign resident, this conceptual element of the instrument, *residence*, must be understood as a mere stay, for the purpose of obtaining rights.

Finally, in the case of public right, subjective, constitutional, to the Brazilian nationality, such that the derived nationality cannot be refused by the Brazilian State, to who fulfills the constitutionally listed requirements, it follows that the administrative rule of the Minister of Justice which grants naturalization in these cases is merely a declaratory character.

2.2.2. Loss

The Brazilian nationality is lost, constitutionally, in two cases, in accordance with sections I and II, and paragraphs *a* and *b*, of the latter, § 4 of Article 12: when, in the case of a naturalized Brazilian, the naturalization has been canceled by a court decision on account of an activity dangerous to national interest or; in the case of any Brazilian, born or naturalized, acquire another nationality, except in the case of recognition of foreign original nationality, in cases as we have seen, positive conflict of nationality, a phenomenon known as dual nationality, or by a foreign state imposing the exercise of any right to the Brazilian resident there.

In the case of a naturalized Brazilian, cancellation of the naturalization can only occur in a judiciary process. It is an action that investigates the harmful activity to national interest, allowing the naturalized Brazilian to defend himself. The judgment of the hurtful activity is made by the Federal Prosecution Service, which is legitimized for this action. The federal *Parquet* can act on its own initiative or caused by representation. The Federal Court is responsible for the prosecution and trial, which shows the obvious interest of the Union.

The wording of paragraph *a* of section II, disregards the declaratory nature of the recognition of nationality by birth or original. It is that, the instrument talks about the acquisition of another nationality, when, in fact, technically, the dual citizenship phenomenon is found in the fact that the individual bear more than one original nationality, although this has not yet been recognized. As has already been said, the nature of the original nationality is declaratory. Its formal recognition by a foreign state operates as *ex tunc*, to the extent that it is not granted, but for mere recognition. The original nationality accompanies the individual from birth, and therefore does not interfere in constitutional terms, the legal and political relationship established between the

Brazilian state and those bearing Brazilian nationality from birth.

The acquisition of another nationality by naturalization has always been, under Brazilian law, a form of losing the Brazilian nationality. In this situation, in which a new nationality is acquired, and the Brazilian nationality is lost, it values the volitional element to acquire it, to show some disregard for Brazilian nationality, birth or acquired by the Brazilian who acquires a new nationality. It is to say: who naturalizes assumes a new commitment to another sovereignty, which is not possible for the Brazilian constitution, to maintain its commitment to the Brazilian State as a result of this choice. Still based on the volitional element, is that the Constitution caveat of this loss, those who naturalize abroad not by their will, but pressed by circumstances, which can be checked by the terms "as a condition of residence in their territory" and " exercise of civil rights". This exception, introduced in the Constitution by the Constituent Reform Power, the Revision nº 03, of 1994, aimed to ensure the many Brazilian immigrants who were compelled to naturalize abroad so as to live in minimum conditions of dignity in the countries where they go, and did not lose their original Brazilian nationality, to the extent that, they truly never wanted to miss it.

It turns out that the statement has a broad spectrum that, in practice, the Ministry of Justice rarely opens administrative process for loss of Brazilian nationality due to naturalization. In the vast majority of cases, it appears that the factual situations subsume to the hypothesis of paragraph *b*, section II of the § 4 of Article 12, the Constitution.

Brazil admits, for over a century, the loss of nationality but; on the other hand, today, considered the legal nature of a fundamental right, it is as if they had not overcome the principle *once subject, always subject*.

3. CONCLUSION

Brazilian law has the rule of the right of the soil as a major criterion for granting Brazilian nationality, without, however, dispense with the additional criterion of the right of blood.

Brazilian nationality is not acquired by marriage; either by adoption.

The bond of nationality, as well as rights derive some obligations such as the obligation to vote, in which coincides with the concept of sovereignty, or serve on a jury.

Only nationals have constitutionally political rights[19].

Possession of other original nationalities do not spring legal

19 Article 14, paragraph2: "foreigners cannot register as voters and neither can conscripts during their period of compulsory military service;

consequences relating to the Brazilian nationality; however, the voluntary acquisition of another nationality through naturalization triggers their loss.

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GLOBAL ENERGY GOVERNANCE THROUGH INTERGOVERNMENTAL ORGANIZATIONS: ANALYSIS OF THE FEASIBILITY OF IMPLEMENTATION

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Abstract: This paper analyzes the current factors causing an energy crisis, including depletion of the natural resources, geopolitical tensions, energy security, search for climate stability and absence of universal access to energy. Through the deductive method, the study analyzes if investments are considered as a possible solution to promote sustainable energy. It assesses the current position of intergovernmental organizations linked in some way to the topic of energy, such as the WTO, ECT, G8, G20, IEF, IEA and OPEC, to identify whether the initiatives are being developed and the political will to do so. Some organizations are connected but with limited and insufficient focus. Funding initiatives are below of what is necessary to achieve the goals considered relevant. In the absence of a global governance of energy due to the lack of sufficient cooperation and collaboration of international actors to efficiently mitigate the energy crisis. The challenge is to alter from high to low carbon economy, and the shift from fossil fuels to renewable energy will contribute substantially to this transition. It concludes the necessity of cooperation between organizations such as IRENA and ONU's programme Sustainable Energy for All, which have

the potential to become catalysts for a new trend.

Keywords: Energy – global governance – intergovernmental organizations – natural resources — sustainability

1. INTRODUCTION

On a global scale, the energy sector involves multiple actors, such as States, transnational corporations, international organizations, nongovernmental organizations, and others to be not exhaustive.

The present study is focused on the evaluation of the effectiveness of a global energy governance delimiting as subject intergovernmental organizations (IGOs), such as the World Trade Organization (WTO), Energy Charter Treaty (ECT), Group of Eight (G8), Group of Twenty (G20), International Energy Forum (IEF), International Energy Agency (IEA) and Organization of the Petroleum Exporting Countries (OPEC), which are somehow connected with the theme of energy. This choice is justified by the fact that these organizations operate in a broader perspective than States, for example, and are not seeking merely economic activity, such as transnational companies, emerging the possibility they can issue rules to minimize or resolve emerging issues in the current scenario, which deserve appropriate global treatment.

This research starts from the perspective of identification of an energy crisis sector. The most relevant indicators of an energy crisis were considered to influence the energy framework, such as: (i) tensions between actors, caused by conflicts of interest involving the field of energy geopolitics, (ii) depletion of natural resources, essential for power generation, (iii) energy security, fundament for the society maintenance; (iv) climate change mitigation, (v) difficulty on energy access and (vi) investments security.

Unfortunately, the perspective of a regulation or a single overall States agreement to solve or address these issues is utopic, due to the disinterest to create a global supranational organization, and given the current international scenario, which can be demonstrated by lack of consensus on important issues, for example, those discussed in the WTO Doha Round.

Accordingly, to facilitate a solution to this deadlock, this paper inquires whether global governance of energy, led by IGOs connected with the energy issue, could become the appropriate forum to deal with those elements more seriously and efficiently. These organizations, sources of rules, can and must be connected in order to assess whether there is effectiveness in decision-making or not, or whether these organizations are failing in implementing policies necessaries to

alleviate or solve the energy crisis and promote low carbon economic activity.

Lastly, this paper seeks to briefly identify new perspectives from an eventual global energy governance from the UN program Sustainable Energy for All (SE4All), the International Renewable Energy Agency (IRENA) and how it would be possible to implement a Plurilateral Agreement in the WTO. The challenge is to alter from high to low carbon economy, which the shift from fossil fuels to renewable energy will contribute substantially to this transition.

2. BRIEF ANALYSIS OF THE ENERGY CRISIS INDICATORS

Geopolitics considers the territorial aspect essential for the growth of a nation, which stretching its borders demonstrates its expansion. Natural energy resources are elements which increase the power of a nation and its domain became a relentless ambition.[1]

The growing interest in natural resources has increased its extraction volume to meet demand. It has been observed regarding coal (up to half of the twentieth century), oil and gas (from the second half of the twentieth century onwards). Studies have shown that the growth of production (extraction) reaches a peak and then tends to decline, which was confirmed with coal in England, and with the peak oil in the U.S. in the 1970s.[23]

The theory from the book «The Limits to Growth» advocates that the uncontrolled economic growth would lead to the depletion of natural resources, not just energy ones.[4] Eventual exhaustion of resources explicitly violates one of the most important principles of environmental law, which is to preserve the environment for future generations.

By pressure from developing countries, there was a strong call for adoption of the Resolution n.1803/1962, which granted total control (propriety) of resources located in their territories. However, foreign investment was significantly reduced, due to the lack of legal security in case of expropriation or nationalization by the host countries, emerging a race to bilateral investment treaties (BITs).[5]

1 MORGENTHAU, Hans. **A política entre as nações.** Brasília: UNB, 2003.

2 HUBBERT, M. K., Nuclear Energy and the Fossil Fuels, Washington DC: American Petroleum Institute, 1956. In: WTO World Trade Report 2013. p. 173.

3 BARDI, Ugo. **The Limits to Growth Revisited**. New York: Springer, 2011. p. 7.

4 MEADOWS, Donella; RANDERS, Jorgen; MEADOWS, Dennis. **Limits to Growth: the 30-year update.** London: Earthscan, 2004.

5 GUZMAN, Andrew T.. Why LDCs sign treaties that hurt them: explaining the popularity of bilateral investment treaties. **Virginia Journal of International Law**, v.38:639, January, p. 639–688, 1998.

Energy security is a crucial factor for the States autonomy due to their energy dependence to keep its economy. And this reliance between countries is definitely a vulnerability, which can be mitigated by access to energy resources. Thus, external policies have become the strategic core of the countries in this type of endeavor.

Since the 1990s, other factors have emerged. After the Soviet Union disintegration, globalization has engulfed the scene, with the multiplication of financial and commercial transactions. There was a significant development in the energy sector, due to the large investments in oil and gas countries producers, mostly, but there was insufficient political or interest in investing in energy access for all.

Moreover, it is believed climate change is increasing earth temperature, affecting all. Fossil fuels, due to their use, are major emission contributors.

Regarding the investment sector, some parameters must be analyzed as for whether the legal framework is favorable, whether bilateral treaty between countries exists, and if institutions are strong. It must be checked if such investments are sustainable, with low emissions, and if they bring development and energy security.

Thus, from this energy crisis scenario, some points emerge: how does the IGOs act? Is there today an effective global energy governance (GEG)? If not, is it feasible to implement a GEG? The following will discuss these points emphasizing if a global governance could deal with the energy crisis indicators.

3. GLOBAL GOVERNANCE CONCEPT

There are two insights related to the global governance problem. The first is governance should be pursued increasing the system, based on existing regimes and institutions, since do not affect the State as a key actor in international relations. On the other hand, some claim the known State is an archaic institution in the 21st century, unable to deliver the levels of governance required for a world facing environmental problems, endemic poverty, resource depletion, and increasing population.[6]

A more precise governance concept is issued by Rosenau, who distinguishes government from governance, the last broader than the first one since it can also encompass a government and other actors. But the main difference is coercion. While the government requires police power to enforce the law, governance is based solely on the expectation of the fulfillment of rules, informally, based on the will and interest. Thus, it is assumed in this study that global governance must

6 GRIFFITHS; CALLAGHAN, **International relations: the key concepts**. p. 124-126.

be understood as global management rather than a global government.[7]

The concept of global governance is also formulated by Karns and Mingst, which defined as acts of coordination at many levels, using existing pieces linked to activities, rules and mechanisms, with the absence of a hierarchical structure of authority and without a central global government. And one of these pieces are the intergovernmental organizations.[8]

Another point of view is elaborated by Pascal Lamy, who states that still remains an international order based on the principle of national sovereignty, and global governance could only result from the action of sovereign states: *In other words, that global governance is the globalization of local governance*.[9]

4. THE CURRENT GLOBAL ENERGY TREATMENT

It is possible to identify today a wide gamma of institutions acting on many levels (bilateral, regional, multilateral), each with its specific members. The several initiatives form a constellation of issues related to energy, such as trade, investment, environment, with no coordination between related rules, leading to a system of global energy governance highly fragmented.[10]

The governance regime (considering its feeble existence) have been failing to coordinate the elements of the energy economy, including energy security needs. One solution is to promote cooperation between actors, especially IGOs, to implement a more connected and cohesive model to address the weaknesses and vulnerabilities of current energy governance.

Given this scenario, five obstructive factors to an effective global energy governance are listed below:[11]

a) The lack of cohesion of the energy governance system. It means the system exists indirectly, as an aggregation of several organizations and processes related to energy economy. The international community has no interest in dealing with the global energy economy as a cohesive entity, which facilitates

7 ROSENAU, James N.; CZEMPIEL, Ernst-Otto, **Governance without government: order and change in world politics**, New York: Cambridge University Press, 1992. p. 4.

8 KARNS, Margaret P.; MINGST, Karen A. **International organizations: the politics and processes of global governance.** 2 ed. Boulder: Lynne Rienner Publishers, 2010. p. 4.

9 LAMY, Pascal, Global Governance: From Theory to Practice, **Journal of International Economic Law**, v. 15, n. 3, p. 721–728, 2012. p. 721.

10 LEAL-ARCAS, Rafael; FILIS, Andrew, The fragmented governance of the global energy economy: a legal-institutional analysis, **The Journal of World Energy Law & Business**, 2013. p. 3.

11 LEAL-ARCAS; FILIS, op. cit., p. 5-7.

individual actions and allows "no accountability" to other actors.
b) The fragmentation of GEG regime, in which many actors operates in several layers, often with contradictory behaviors, with separate interests, and sparse foci.
c) The plurality of actors, such as States, IGOs, NGOs, TNCs, affect the overall energy economy. As a result, a variety of interests, including conflicts at the national, regional and international levels, caused by instability and inconsistency of standards arises. This plurality of international organizations, as well as the diversity and variety of sophisticated energy interests illustrate the complexity and fragmented global governance of energy.
d) The diversity of energy sources, with a strong reliance on traditional sources like coal, oil and natural gas, which are exhaustible, generates greater competition and obstructs energy stability. The trend of an establishment of a transition to an energy matrix with renewable sources is a way to reduce dependence on fossil fuels and increase security on energy supply.
e) The authority of States undermines the possibility of further evolution of GEG. The international community is a set of distinct actors in which sovereign States have different interests, with power levels and disproportionate economic power. Possible international cooperation arises when the interests of the most influential States sufficiently match. In certain parts of the global energy economy, such as trade (WTO and ECT), there is a greater consensus of interests which resulted in satisfactory levels of global governance, in others there is not, like environment, exploration, extraction, production, and allocation of energy resources.

Thus, it appears that, unfortunately, does not exist today a cohesive unit for GEG. However, it is believed that a governance on the energy sector is essential, which feasibility of implementation will be evaluated next.

5. FEASIBILITY OF A GLOBAL ENERGY GOVERNANCE IMPLEMENTATION

IGOs act differently on different aspects, and it is interesting to check how open they are to a more cohesive governance on the global energy economy and if their actions lead to greater global energy security.[12] In general, IGOs and processes related to energy can affect global energy security as the following manners:

12 LEAL-ARCAS; FILIS, op. cit., p. 19.

a) Negative way, by creating obstacles to quantitative restrictions on production, or obstructing relationships with institutions related with the promotion of the crisis indicators, such as security, energy access, investment, which can compromise the global energy security, for example, the OPEC.

b) Positive way, by the creation of precautionary measures, such as emergency oil reserve by IEA, removing the effects of interruptions, ensuring energy security and reducing price volatility. Another positive development is the cooperation between producing and consuming countries by IEF, in which 89 countries come together to promote global energy security through sharing and analysis of data. Another example of positive global cooperation is the joint report[13] of the IEA, OPEC, OECD and World Bank on fossil fuels and other energy subsidies, demonstrating the importance of the subject in the production and consumption.

c) Ambiguous way, by aspects which can be considered both support and undermine global energy security. For example, the WTO acts positively simplifying the energy trading, but on the other hand, acts negatively facilitating the allocation of energy resources to large buyers, who can oligopolize and harm global energy security.[14]

To reach a GEG, positive conducts must be adopted by IGOs and other actors, precisely, to solve or mitigate the energy crisis indicators.

About international investments, the regime is based today on bilateral treaties (BITs) and on the ECT, which resembles a BIT. The downside is the limitation of the scope of protection: BITs are limited by two contractors and the ECT address only to its members. However, due to the large quantity of instruments, it can be affirmed the existence of an international investment regime, even without forming a single multilateral agreement. One difference between them is specificity: BITs address investments in a generic way, no matter the industry sector; whereas the ECT nature's investment approach is the energy sector.

Natural resources are energy key elements and are treated as assets owned by States, following the principle of State sovereignty, provided by UN Resolution n.1803/1962. For effective global governance, States necessarily have to participate more actively to improve the extraction, production and distribution organization of these resources.

It is not the purpose of this paper defend that natural energy

13 OCDE. Joint report by IEA, OPEC, OECD and World Bank on fossil-fuel and other energy subsidies: An update of the G20 Pittsburgh and Toronto Commitments. Available at: http://www.oecd.org/env/49090716.pdf. Access on 08/11/2013.

14 LEAL-ARCAS; FILIS, op. cit., p. 19.

resources should escape of the sovereign State power, but indeed to assert that more dialogue is needed on how to prevent depletion of these resources, or how to use them more efficiently, without wasting. The theory of the research «Limits to Growth» hardly will prevail in developing countries, claiming for development, as well in developed countries, claiming financial difficulties. But the international community could make efforts to equalize this growth sustainably.

Energy plays a big role in GHG emissions. The climate change is a growing concern due to the time factor. This is explained by the fact that many years will be needed to reverse the global warming, with a substantial reduction of greenhouse gases (GHG) emissions in the atmosphere. The problem is that it would be necessary emit GHGs at a lower amount than the environment can absorb, in order to quantitatively reduce the concentration of these gases, without jeopardizing the livelihood of society, which generally consumes more than needs.

Some organizations have been taking initiatives to fund projects to mitigate emissions, such as the G8 and G20. However, few have been done effectively in this direction. Renewable energy is a perfect outlet to replace part of the fossil fuels, but needs more regulation, especially in developing countries.

The energy access indicator is rarely considered by IGOs and by its members. Despite the abundance of energy resources, as well as the generation of electricity, it does not exist a joint international politic to ensure and provide electricity in remote and urban areas for 1.3 billion people energy deprived and other 2 billion who still use biomass for domestic purposes (cooking), harming families health.

A GEG could emerge from a core, which would centralize decisions, or at least on the first moment, the discussions involving all elements related to the energy issue. It doesn't mean to create another international organization specifically for each indicator, but rather to use or manage existing ones, whether expanding the scope of acting, whether creating joint actions between them, as was done between the IEF and the G20 in preparing a data report.

There is no international regulation to govern exclusively global trade in energy. In this context, the WTO came to occupy a legislative vacuum, applied to all goods and services. Global governance could coordinate energy trade and other schemes, and might address trade aspects of several Preferential Trade Agreements (PTAs), Free Trade and Regional Agreements (FTAs/RTAs) such as North-American Free Trade Area (NAFTA) and the Association of Southeast Asian Nations (ASEAN), and might consider specific agreements on energy, as the ECT. None of these agreements address exclusively global energy trade (except ECT). Rather, the interaction between them could provide a degree of global governance on energy trade, limited to the scope of

each regime.[15]

Despite being a limited organization considering the member's coverage and its scope, we see the ECT, which deals with the promotion of trade interests and investment in the energy industries of its members, as a trend to become the adequate forum for discussion and decisions. The argument for this assert, initially, is due to the specificity of the agreement addressing energy framework.

Second, because of the ECT address investment rules, which can be the core to mitigate or (being optimistic) to solve issues involving energy access, energy security, climate change, reduction of resource scarcity, or acting on diversifying energy generation sources, focusing on renewable energy and efficiency.

Thirdly, by covering specific energy provisions, as trade in energy goods, based on GATT/94, adopted by most of the States; transit; environmental protection and efficiency, which make this IGO quite specific and suitable for any governance arrangement. Finally, I emphasize that governance must be established by the presence of qualified staff, and it has been proved ECT has a strong secretariat and structure. The downside is that the ECT regime is limited to its members, meaning it is not a universal regime.

Despite few joint actions, there is a lack of cohesion between organizations, emerging a disorderly on international law, reflected by this lack of cooperation.[16] One question was raised: how bind actors to any commitments made in the context of global governance? Today, global energy governance is merely a constitution of sparse rules, with little cooperation, whose connection between levels is insufficient. This leads to the fact that actors continue to engage in bilateral, regional and multilateral relations. This type of approach is called by "bottom-up", or upwards.

Finally, energy security is a strategic topic directing and justifying many actions in States foreign policy. This is the basis for the relationship between energy producers and consumers. However, it lacks a joint policy. Except for the IEA, composed of OECD members, there is no energy security collective goal, as it stands with the Human Rights under the UN Charter.

It can be identified the task of achieving an energy crisis solution through GEG is not simple, emerging the necessity to cooperate and coordinate several actors and numerous regimes, which can be overlapped or partially complemented between them. It seems there is no interest to promote universal energy security, but only to ensure local supplies. Perhaps the overcoming of egoism, individualism and competitiveness among States is the great challenge for the GEG

15 LEAL-ARCAS; FILIS, op. cit., p. 20.

16 LEAL-ARCAS; FILIS, op. cit., p. 53-55.

establishment.

6. PERSPECTIVES

At the launch of SE4All in 2011, the UN intention was to catalyze actions around three objectives to be achieved by 2030:

- Grant universal access to modern energy services;
- Duplicate the global improvement rate in energy efficiency;
- Doubling the share of renewable energy in the global energy mix.[17]

The basis for the program is to consider energy as a common thread between economic growth, increased social equity, and an environment that allows world prosperity. Access to power is a prerequisite for achieving many development goals. Completing the three objectives above, it will be possible to achieve sustainable development. The UN took into account the need to establish favorable conditions for private investment because the market requires a legal and security policies that encourage sustainable energy technologies.

The IRENA, founded in 2009, in Germany, is based on the principle of equality, respecting the member sovereignty and jurisdiction, and was designed based on the opportunities and positive effects renewable energy causes on energy security and price volatility. Moreover, new technologies in power generation can stimulate sustainable development, job creation and reduce GHG emissions, leading to a slow and gradual transition to a low carbon economy.[18]

The IRENA is a power-oriented organization, and can be regarded with great potential for the establishment of a global energy governance, first, by the probability of increasing share of renewable energy generation in the global energy mix in the coming years, and second, by the extent of the agreement, with 163 members, making it truly global.

From another perspective, the possibility of a specific energy agreement at the WTO deserves some analysis when it comes to international trade.

Today, the WTO system does not provide a sufficient energy treatment. WTO rules lack specificity, treating energy trade equally to general goods and services. One solution would be to discuss the topic in the Doha Round, but the consensus of all members to approve any

17 ONU. SE4All Global Action Agenda. Available at: http://sustainableenergyforall.org/images/content/SEFA-ActionAgenda.pdf. Access on 13/11/2013.

18 IRENA. Statute. Available at: http://www.irena.org/documents/uploadDocuments/Statute/IRENA_FC_Statute_signed_in_Bonn_26_01_2009_incl_declaration_on_further_authentic_versions.pdf. Access on 13/11/2013.

contract amendment is a huge obstacle and not feasible in these days.[19]

Another possibility would be to develop a plurilateral trade agreement, which could be part of the WTO treaty to be added on Annex 4 of the WTO agreement. According to article II.3 of the WTO agreement, such plurilateral agreements are part of the WTO agreement only to members who have accepted. However, the plurilateral agreements do not create either obligations or rights for not joined members.[20]

Thus, the plurilateral agreements are positive in a sense all other WTO members can adhere them at any time. And it provides a more flexible organization and a more effective forum to deal with themes such as sustainable energy, transit, intellectual property rights and energy trade-related.[21] Still, WTO members seem to have no interest in addressing issues related to energy, nor with a transition to a low carbon economy.

7. CONCLUSION

First, it must be clarified that the purpose to establish a GEG through IGOs is just one option to solve or mitigate the crisis indicators. The IGOs and their member's interests is a condition for its implementation. Second, the GEG central goal must be the transition from high to low carbon economy, considered the solution for the energy crisis indicators.

One proposal is to place the investment regime as the core of the normative framework for the energy sector. A framework similar to the ECT acting on a world scale would cause a greater flow of investments in energy infrastructure and promote electricity generation from renewable sources.

From there, the effects are multiple. The higher electricity generation share through renewable energy, the lower will be GHG emissions. It will also postpone natural energy resources depletion and will improve energy access, especially in remote regions. With new technologies, job creation increases. Still, the diversity of sources increases energy security, reducing dependence on oil and natural gas.

The world calls for urgency, which has been ignored by actors who actually have power to change, as States and investors. And if States provide favorable regulatory environments for investors? That is the idea of the UN SE4All program, which has great potential to frame

19 BACCHUS, James. A Way Forward for the WTO. Available at http://ictsd.org/downloads/2012/02/james-bacchus-a-way-forward-for-the-wto.pdf. Accesso on 10/10/2013.

20 BASSANI, Matheus Linck. Um desafio na Organização Mundial do Comércio: viabilidade de um acordo plurilateral sobre energia. **Revista de Direito Internacional**, Brasília, v. 12, n. 2, 2014 p. 168-191.

21 Ibidem.

by its ambitious approach, but it always depends on the willingness of multiple actors. The objective of IRENA is noble and deserves to be encouraged, despite being limited only to renewables. Finally, the energy trade will lack of an Agreement in the WTO, at least while members do not establish a consensus.

Therefore, it is considered possible to establish a global energy governance in many levels, not as the only existing solution, but as a mean to manage, enhance and cooperate with society. However, it will depend on the international actor's evolution in order to wish effectively promote a supportive, cooperative environment around a common goal: shift from high to low carbon energy economy.

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THE EFFICACY OF THE DECISIONS OF THE SUPREME FEDERAL COURT IN CONSTITUTIONAL REVIEW

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Abstract: In the current constitutionality control system prevailing in Brazil, decisions rendered incidentally to the verdict in a concrete case, which any court has competence to issue, coexist with a direct judgment, these being an exclusive attribution of the Supreme Federal Court. This Court, exercising its role as a guarantor of the Constitution, as defined by the very Magna Carta, represents not only a collegiate court inside the Judiciary structure, but also a true Constitutional Court. The objective of this paper is to analyze the effectiveness of the (un)constitutionality decisions rendered by the Supreme Federal Court, trying to establish, in principle, the differences between those which originate from direct constitutional control from the ones which originate from incidental control, while analyzing primarily the legislative and jurisprudential changes that indicate a tendency of convergence between both.

Keywords: Constitutionality Control - Erga Omnes Effectiveness - Binding Effect - Supreme Federal Court.

1. INTRODUCTION

This essay aims to debate the issue of the effectiveness of the decisions of the Supreme Federal Court on constitutional review,

questioning the common conception according to which only the decisions regarding direct and abstract control would be capable of exerting *erga omnes* effects, binding the rest of the Judiciary Branch and the Public Administration. Therefore, a first incursion in the topics of *erga omnes* effectiveness and the binding effects will be made, studying the significance and main characteristics of the institutes. Then, an analysis regarding legal conformations that have been responsible for an enlargement of the effectiveness of the Supreme Federal Court decisions, even on incidental constitutional review, shall be made. At last, the jurisprudential evolution of the Court and the eventual occurrence of a constitutional mutation regarding the themes herewithin will be addressed.

The difficulty in the dogmatic handling of the Supreme Federal Court decisions comes from the fact that Brazil's Supreme Court is not purely a Constitutional Court, but also a collegiate court within the Judiciary[1]. In this manner, not only is it imbued of jurisdiction to decide questions that are strictly constitutional in nature, in a direct manner, by means of a Direct Unconstitutionality Suit, a Constitutionality Declaration Suit or a Noncompliance of Fundamental Precept Argumentation, it also decides appeals, as an extraordinary instance of judgement.

Within the same system of constitutional overview, then, coexist decisions by a same Court in abstract control – primarily – and in factual situations, incidentally. The features and effects produced by the two are, at first, essentially distinct; however, as will be be demonstrated, there is a tendency to approximate both, stemming from, mainly, the institutional role of the Supreme Federal Court as the guardian of the Constitution.

2. THE EFFECTIVENESS OF THE DECISIONS OF THE SUPREME FEDERAL COURT IN DIRECT CONTROL

The binding effect and the *erga omnes* effectiveness of the rulings of the Supreme Federal Court in direct constitutional control, nowadays, are not disputed. They originate, in truth, from the Constitution itself, in the form of its Article 102, §2, and from the infra-constitutional laws, more specifically Law nº 9,868/99, which disciplines the Direct Unconstitutionality Suit.

Article 102, §2 of the Federal Constitution states, in free translation: *"the definitive merit awards rendered by the Supreme Federal Court, in Direct Unconstitutionality Suits and in Constitutionality Declaratory*

1 Cf. ZAVASCKI, Teori Albino. "It can be seen that the Supreme Federal Court is the highest collegiate court of the Judiciary and the Court of the Constitution, resolving, in original competence or in appeals, the demands in which an offense to a constitutional provision is alleged." Eficácia das Sentenças na Jurisdição Constitucional. São Paulo: Revista dos Tribunais, 2001. Pág. 16.

Suits shall have erga omnes *effectiveness and be binding to the Judiciary and the Public Administration, in federal, state and municipal spheres"*. Article 28, paragraph, of Law nº 9.868/99, in turn, states, in a slightly different manner, that *"the declaration of constitutionality or unconstitutionality, including the interpretation in accordance to the Constitution and the partial declaration of constitutionality without a text reduction have* erga omnes *effectiveness and binding effects to all the Judiciary and the Public Administration, be it federal, state, or municipal"*.

Here, two digressions can be made, one of them historical, and another dogmatic. Firstly, this situation of unanimity regarding the efficacy of the decisions of the Supreme Federal Court in direct constitutional control has nor always been the case in our midst. Very much the contrary, the question has been object of great discussion divergences in courts and doctrine. [2] Secondly, even if today there are some difficulties that stem com the very formulation found by the ordinary lawmaker, in Law 9869 and by the constitutional reformer lawmaker, in Article 102, paragraph 2, of the Federal Constitution.

Taking the historical aspect as the starting point. The current wording of Article 102, paragraph 2, of the Federal Constitution originated from the Constitutional Amendment nº 45, from December 8, 2004. Before, the Constitution had an express provision regarding the effectiveness of the merits awards of the Supreme Federal Court only for the Constitutionality Declaratory Suits, that were introduced by the Constitutional Amendment nº 3, dated March 17, 1993. The previous wording stated that "*the definitive decisions regarding the merits, rendered by the Supreme Federal Court, on the Constitutionality Declaratory Suits regarding law or federal normative act, shall produce* erga omnes *effectiveness and binding effects, in regards to the Judiciary and the Executive*".

The motive behind the inclusion of only the Constitutionality Declaratory Suit was clear. If the main objective of the Direct Unconstitutionality Suit is to declare the unconstitutionality of a law or normative act, and, with this, eject it from the legal system, the very opposite is true for the Constitutionality Declaratory Suit. The intention is not to negate validity and applicability to a norm, but, in contrary, to certify its conformity with the Magna Carta. However, this measure of attesting the constitutionality of norms does not, by itself, produce a material effect, since the law does not depend of any judicial declaration for its validity. In other words, the declaration of constitutionality does

2 At least in relation to the binding effect, as shall be demonstrated; it is important to note that the *erga omnes* efficacy of these decisions has already been recognized in previous understanding of the Supreme Federal Court itself, as is stated by MORAES, Alexandre de, *in*: Direito Constitucional. 28ª edição. São Paulo: Atlas, 2012. Pág.790.

not cause a substantial modification in the questioned norm's statute: the norm was valid before, and will continue as such.

However, if no alteration derives from the declaration of constitutionality by the Supreme Federal Court, then what would be the meaning of this measure? This is where the necessity of an express provision for these effects is made clear, since they are not exactly a logical consequence of the confirmation of constitutionality but procedural and institutional consequences desired and conferred for by the lawmaker[3]. What was essentially expected was that a law or normative act that had already passed through the Supreme Federal Court oversight could not be declares unconstitutional by lower instances judges or other tribunals. What was to be guaranteed by the *erga omnes* effectiveness and the binding effects was the observance for the decision of the Supreme Court on the Constitutionality Declaratory Suit.

Regarding the Direct Unconstitutionality Suit, the situation was less problematic, for the simple reason that a law declared unconstitutional by the Supreme Court was removed from the legal system, impeding its applicability by the lower courts. In this manner, there was no necessity for this *erga omnes* effect to be expressly mentioned, since it originates from the material modification occurred in the normative system. Being confronted with an objective procedure, in which there are no parties nor a subjacent factual dispute, the effect of the Supreme Federal Court decision was not to determine the inapplicability of a law for a specific situation, but its invalidity for the regulation of any situation or legal relationship that might come to be.

The precedents of the Supreme Federal Court itself in relation to the *erga omnes* effects of the unconstitutionality decision in a direct suit were undisputed even when the constitutional wording concerned only the Constitutionality Declaratory Suit[4]. Obviously, if the declaration of

3 "From a strictly constitutional point of view, the general efficacy or the *erga omnes* efficacy impedes the question from being submitted once more by the Supreme Federal Court. Therefore, there is no *qualitative change* of the legal status. While the declaration of nullity means the repealing of the law, the declaration of unconstitutionality has no analogous effect. (...) It is, then, certain that once a norm has been declared constitutional by the Supreme Court, the Judiciary other courts have to follow suit, since the question is already decided by the Supreme Federal Court." MENDES, Gilmar Ferreira; BRANCO, Paulo Gustavo Gonet; COELHO, Inocêncio Mártires. Curso de Direito Constitucional. 2ª edição. São Paulo: Saraiva, 2008. p. 1275-1276. Free translation.

4 Is what can be understood from the following case law, from 1993, transcript in free translation: "As we adopt a mixed judicial unconstitutionality control system, and if an unconstitutionality is recognized, in the factual case, by the Supreme Federal Court, its efficacy limits itself to the parties in the dispute, being possible for the Senate to suspend the execution of a law declared unconstitutional by decision of the Supreme Federal Court (Article 52, X, of the Constitution). Regarding the declaration of unconstitutionality by means of Direct Unconstitutionality

unconstitutionality in abstract control did not have general efficacy it would be useless, since it would not act directly upon any real situation, nor it would be mandatory for the resolution of any future cases.

On the other hand, the same cannot be said about the binding effects. The absence of an expressed constitutional prevision about its existence on the decisions given in Direct Unconstitutionality Suits made this doubt linger on for quite some time. Undeniably, these decisions possessed *erga omnes* effects, as mentioned earlier, stemming from the very exclusion of the unconstitutional norm[5]. Also undeniable that the decisions on merits in a Constitutionality Declaratory Suit had effects towards all, as well a binding effects, as per the Constitutional Amendment nº 3. Certainty regarding the binding effect in the Direct Unconstitutionality Suits came, however, only with Constitutional Amendment nº 45, putting into law the already established views of doctrine and jurisprudence.

Even before this amendment, which determined the current wording of Article 102, paragraph 2, of the Federal Constitution, Law nº 9868/99 had already extended the binding effect to the decisions given in Direct Unconstitutionality Suits, in accordance to its Article 28, paragraph. But this was not enough to cease all discussion regarding the issue, for the question of binding effects of decision rendered by infra-constitutional courts remained open. Also on the order of the day was clarifying if the binding effects, just as the *erga omnes* efficacy, was a logical consequence of the declaration of unconstitutionality model in abstract review. In positive case, the provision by law would be a mere expression of something that, in truth, would be intrinsic to the system, inexistent any irregularity. In negative, the attribution of the binding effectiveness could only be taken into force by the same means which were in the Constitutionality Declaratory Suit, in other words, by a Constitutional Amendment.

This discussion was brought to the plenary of the Supreme Federal Court by occasion of the Interlocutory Appeal Under Court Regulations (Agravo Regimental) in the Complaint (Reclamação) nº 1880, reported by Justice Marício Corrêa[6]. What was discussed was the suitability of the Complaint filed to preserve the authority of the decision of the Supreme Federal Court rendered in a Direct Unconstitutionality Suit. Admitting the Complaint as being an appropriate measure for such would be the same as accepting the existence of a binding effect of

Suit, the efficacy of such a decision is *erga omnes* and happens, observing past experience, with the decision of the Court becoming final". Justice Moreira Alves, opinion in the Direct Unconstitutionality Suit nº 221, Plenary of the Court, D.J., 22-10-1993, *RTJ* 151/331-355.

5 In this sense: FERNANDES, André Dias. Eficácia das Decisões do STF em ADIN e ADC. Salvador: Editora *Jus*podvium, 2009. Pág. 158-160.

6 D.J., 19/03/2004.

these decisions, and the constitutionality of Article 28, paragraph, of Law nº 9868/99, since the possibility of utilizing a Complaint to discuss the non-compliance to a decision of the Supreme Court is exactly the main practical consequence of the binding effect.

This conclusion had already been reached by Justice Moreira Alves in the ruling of the Constitutionality Declaratory Suit nº 1, when he analyzed the new institute in comparison with the then existing review instruments. The following excerpt deserves to be transcripted, for its lucidity and clarity:

> *It is a plus in relation to the Direct Unconstitutionality Suit, thanks to which the new instrument of constitutionality control receives the necessary efficacy to deal with the problem – as before highlighted – giving reason for its creation. If the erga omnes efficacy that the decisions on the merits by the Court also possess gives them the same efficacy as the merits awards in the Direct Unconstitutionality Suits (...), from the binding effect results:*
>
> *a) if the remainder of the Judiciary, in concrete cases under their judgment, do not respect the decision given in this suit, the damaged party can utilize the Complaint to request the Supreme Federal Court to guarantee the decision's authority; (...).*[7] *(free translation)*

Being established that the applicability of the Complaint to the Supreme Federal Court stems from the binding effect to its decision, let us see what was decided in the Interlocutory Appeal in the Complaint nº 1880. This suit was filed by the Turmalina municipality, under the premise that the Supreme Federal Court decision in the Direct Unconstitutionality Suit nº 1662[8] had been disregarded by the President of the Regional Labor Tribunal of the 15th Region, who determined the sequester of public assets for the payment of writs of government debts arisen from labor claims.

Two questions were put forward incidentally to the merits of this Complaint: if Article 28, paragraph, of Law nº 9868/99 was

7 D.J., 16/06/1995.

8 In this case, the plaintiffs argued for the unconstitutionality of the Normative Instruction. 11/97, approved by the Resolution 67 of the Special Judging Panel of the Superior Labor Tribunal, which meant to standardize the procedures of the collection suits against the federal, states and municipal Public Treasuries,in labor courts.

constitutional; and, overcome this first topic, if the Municipality of Turmalina had legitimacy to file this suit, since it was not a party to the Direct Unconstitutionality Suit nº 1662. The analysis of this second question does not concern this essay, and, as such, only the first shall be discussed.

The plenary of the Supreme Federal Court decided, by majority, for the constitutionality of the legal provision that extended to the decisions given in Direct Unconstitutionality Suits the binding effect already conferred by the Constitution to the Constitutionality Declaratory Suit. The leading vote was the rapporteur's, Justice Maurício Corrêa, who understood there to be no grounds for a differentiation between the effects of the decisions of the Supreme Court in abstract review only by means of the instrument, the procedural vehicle, used to address the Court. In the words of the rapporteur:

> *Just as the Federal Public Prosecutor's Office, I understand for the possibility of harmonic coexistence between the legal disposition in question and the current constitutional order. The finding that the decision of this Court in the Constitutionality Declaratory Suit, to which the Constitution of 1988 expressly conferred binding effects (Federal Constitution, Article 102, paragraph 2), has, in essence, the same nature of a decision given in a Direct Unconstitutionality Suit. Both produce the same practical consequence, substantially differentiating between themselves for the request, being a positive order in the first an a negative in the second. (free translation).*

The same reasoning was adopted by, amongst others, Justices Nelson Jobim and Gilmar Mendes, the latter saying he "*accepts the idea that a declaratory suit configures a Direct Unconstitutionality Suit, upside-down, both of them having double, ambivalent, characteristics, being difficult to admit that decisions rendered in Direct Unconstitutionality Suits having different effects or consequences from those recognized for the declaratory suit*". However, the understanding that both suits are practically identical was not shared by all the Justices, having been, in fact, bitterly resisted by those who voted for the unconstitutionality of Article 28, paragraph, of Law nº 9868/99, specifically Justices Moreira Alves, Ilmar Galvão and Marco Aurélio.

In few and objective words, Justice Moreira Alves made clear that, in his understanding, the impossibility of the applicability of the binding effect through infra-constitutional means originated from the

principle of separation of powers. Only the constitutional lawmaker could give this new extent to the decisions of one of the powers over the rest, as was the case with the Constitutionality Declaratory Suit. Moreover, he made sure to highlight that there was no identity between the two suits, affirming that "*the declaratory suit is different from the direct suit for its function originating from the restrictive scope of its object – federal laws and acts – and its active legitimated parties: federal authorities and agencies. Its reason to be it different, and, in this manner, an analogical interpretation being impossible to appl.*".

This debate, as already mentioned, was silenced by the passing of the Constitutional Amendment nº 45, which gave Article 102, paragraph 2, of the Federal Constitution this wording:

> *The final merits decisions given by the Supreme Federal Court in Direct Unconstitutionality Suits and in Constitutionality Declaratory Suits shall have erga omnes efficacy and binding effects to the remainder of the Judiciary and the direct and indirect, federal, state and municipal Public Administration. (free translation)*

Nowadays, there is no more discussion regarding the constitutionality of Article 28, paragraph, of Law nº 9868/99, since the binding effect of the Supreme Federal Court decisions in Direct Unconstitutionality Suits is provisioned for in the Constitution. Nevertheless, doubts in relation to the meaning of these effects persist, since the Federal Constitution or any federal law never single out what exactly the effectiveness towards all and the binding effect are. At this point, we wrap up the historical incursion, entering now into the dogmatic dissent mentioned at the start of this paper.

As for the definition of *erga omnes* efficacy, there is not much left to debate. The doctrine is unanimous in the sense that "effectiveness towards all" means that Supreme Federal Court decisions awarded in abstract constitutional review are valid for any and all present or future cases involving the same constitutional question, not only for a determined, specific case (or, as is commonly said, the effects are not merely *inter partes*). This, because, technically, the abstract constitutional control does not address a factual, concrete question, and does not have parties to it, at least not in the traditional sense, attributed by the procedural law doctrine[9].

9 According to André Dias Fernandes, "the affirmation that the objetive constitutionality control procedure is a 'procedure without parties', at least in the technical-procedural sense, since there is no request regarding *subjective* interests, is commonplace". Continues the author, arguing that he disagrees with this understanding since what is being observed is an *objective*

So, if the proceedings lack a factual conflict and parts, there would be no reason to affirm the validity of the conclusion there found in a purely concrete case situation, as normally occurs in the incidental constitutional control. The decision of the Supreme Court in a Direct Unconstitutionality Suit and in a Constitutionality Declaratory Suit shall produce effects in a general scope, which will be opposable against all who resist such decisions, private or public persons, and must be observed by all Brazil's judges, in every judicial instance.

Here, two commentaries are relevant. First, it is not only the decision for the unconstitutionality that is capable of producing *erga omnes* effects. Also in utilizing other techniques of constitutional review, such as constitutional interpretation and declaration of partial nullity without wording reduction, the Supreme Federal Court issues *erga omnes* decision. That goes to say, even when the Court limits itself to declare the constitutionality of the contested norm, *provided that* a specific interpretation is adopted, or even when it declares the unconstitutionality of a determined application of a norm, that conclusion will need to be adopted also by all judges that deal with the same *questio juris*.

If a reasonable doubt regarding this issue existed before Law nº 9868/99, its Article 28, paragraph, was sufficient to remedy it. Once more, the wording of the mentioned article: "the declarations of constitutionality or unconstitutionality, *including the interpretation according to the Constitution and the partial declaration of unconstitutionality without reduction of the wording*, have *erga omnes* effectiveness and binding effects, in relation to the Judiciary Branch and the Public Administration, be it federal, state, or municipal". This rule came to clarify that a specific interpretation given by the Supreme Federal Court to a legal provision, contested in abstract review, also has the role of obligating other instances of judgement to its observance.

Second, when discussing constitutional control by direct means, one cannot forget an instrument not yet mentioned here: the Noncompliance of Fundamental Precept Argumentation. This suit, that, just as the Direct Constitutionality Suit and the Constitutionality Declaratory Suit, directly brings to the appreciation of the Highest Court a theoretical constitutional question was regulated by Law nº 9882/99, in a very similar manner to Law nº 9868/99. Regarding what is relevant to this paper, Article 10, paragraph 3, is noteworthy. It establishes that, also for decisions given in the Noncompliance Argumentation, there

demand, and that the legitimized for action as well as the authorities who enacted the act in question can perfectly be understood as parties. Op. cit., p. 156-158. Regarding the discussion over the existence or not of parties and the contradictory in na objective procedure: DUTRA, Carlos Roberto de Alckmin. Controle Abstrato de Constitucionalidade: análise dos princípios processuais aplicáveis. São Paulo: Saraiva, 2012. p.. 198-228.

exists the *erga omnes* efficacy and the binding effect: "*The decision shall be effective against all and the binding effect relating to all other bodies of the Administration*".

With the introduction of yet another instrument in Brazilian constitutionality control system, with the expressed guarantee that decisions rendered on it shall also produce *erga omnes* effects, the Supreme Federal Court attains an even more notable institutional position. Suffice to say that, with the Noncompliance of Fundamental Precept Argumentation, no normative act escapes the possibility of review by direct means, being worthy of citation the relevant examples of the municipal law and the law passed before the coming into force of the Federal Constitution of 1988, who are not in its Article 102, I, "a".

The definition of the binding effect, however, generates more controversies. Contrary to the *erga omnes* efficacy, immediately recognized by the courts as a consequence of the *res judicata* resulting from an abstract proceeding[10], the binding effect only surfaced as an important factor with the enactment of the Constitutional Amendment n º 3, from 1993, and the creation of the Constitutionality Declaratory Suit. From this point on, only a small portion of the experts analyzed this question, noticing the difficulties of comprehension of this new institute, to which no infra-constitutional regulation was dedicated.

In general lines, it is understood that two are the main results of the binding effect of the Supreme Federal Court decisions in abstract review: (a) the mandatory observance, by the rest of the Judiciary and the Public Administration, direct and indirect, of the *ratio decidendi* of the Supreme Court decisions, and not only its provision, that would already be covered by the *res judicata*; and (b) the possibility of holding whomever refuses to comply, without just reason, with the decision, liable, by civil or administrative means.

The obligatoriness of the observance of determinant motives of the decision gives an interesting significance to the binding effect. While the *res judicata* makes the provision of the decision immutable and mandatory, the binding effect would be responsible for imposing the compliance to the grounds of the decision, the logic that lead to the specific conclusion, that is, of a sensibly larger part of the decision. The practical consequence deriving from this is that all the bodies subjectively bound to the decision of the Supreme Federal Court (in the terms of Article 102, paragraph 2, of the Federal Constitution, the rest of the Judiciary and the direct and indirect Public Administration, federal, state or municipal) would be not only prohibited from applying a law or normative act deemed unconstitutional, but also of enacting new act in the same vein. In relation to this, the lucid comments of

10 See. note 4, *supra*.

Roger Stiefelmann Leal:

> *Impossible, then, to interpret that the binding effect implicates the imposition of the decision's provision against all. The binding characteristic of the provision, being an effect extracted from the res judicata, cannot, logically, correspond to the contents of the binding efficacy. (...)*
>
> *As such, remains the necessity of comprehending the binding effect as an institute meant to make mandatory other parts of the decision than the provision to the governmental bodies mentioned in the normative wording. Then, its object transcends the decisum in strict sense, reaching its determinant arguments, the subjacent ratio decidendi. From the binding to the motives of the decision originates, as can be seen in other countries that adopt the binding effect, the prohibition of its recipients to reproduce in substance an act that was declared unconstitutional, upholding acts of similar content and of adopting understanding that is different from the one utilized by the Supreme Federal Court in direct constitutionality control.*[11] *(free translation)*

This understanding, however, is not unanimous. Elival da Silva Ramos defends that the notion of bindingness to motives substantiating a judicial decision escapes from the scope of the constitutionality control model developed in Brazil, which always based itself in the idea of the mandatory character pertaining only to the provision of the decisions. The particular contents of the binding effect clause, then, would be another: the establishment of a *functional* obligation to comply with and give effectiveness to the decisions of the Supreme Federal Court in

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LEAL, Roger Stiefelmann. O Efeito Vinculante na Jurisdição Constitucional. São Paulo: Saraiva, 2006. p. 149-150. In the same sense: MENDES, Gilmar Ferreira, et. alli. "In these terms, it is made clear that the binding effect of the decision is not restricted to the provision, but covers the very determinant arguments. As can be seen, with the *binding effect* what was wanted was to grant an additional efficacy to the decisions of the Supreme Federal Court, giving them transcendent reach. The State bodies covered by the binding effect must observe, then, not only the provision but also the abstract norms that can be extracted from the decision, that is, that a specific situation, conduct or regulation – and not only the object of the jurisdictional pronouncement – is constitutional or unconstitutional and must, for this, be preserved or eliminated." Op. cit., p. 1285. Free translation.

abstract review and, consequently, holding any who does not, liable. In the words of the author:

> *Thus, we propose another understanding, that, does not remit to the motives of the control decisions, which would misrepresent, with unpredictable consequences, our constitutional overseeing system in direct control. At the same time, this understanding does not attribute to the expression "binding effect" merely a meaning of reinforcing the erga omnes res judicata effects.*
>
> *If the addition of the binding efficacy had as a goal to oppose the unjustified resistance of the first degree judges to comply with the decision of abstract control, event when these are imbued with ample subjective efficacy, having erga omnes effects, we can conclude for the existence of a functional obligation of respect to the decision, in similar terms to the duty of the judges and administrative authorities to obey the legislator's commands. (...) In face of the bestowment of binding effects to the final merits decisions of the Supreme Federal Court in direct constitutionality control, are the remainder of the Judiciary and administrative agencies and authorities, in due performance of their attributions, bound directly to the unconstitutionality or constitutionality declarations given by the Supreme Court, under civil or criminal penalties in case of unjustified opposition to the awards.*[12]

We consider the understanding put forward by Roger Stiefelmann Leal to be correct, which would not, in truth, oppose the possibility of accountability of the noncomplying individuals, but complements it with a greater amplitude of the objective reach of the binding effects.[13] It is certain, however, that, for the complete effectuation of the understanding that the binding to the motives of the opinions, even when they reach the same conclusions, impedes a clear identification of the *ratio decidendi* of a specific judgment, since the publication of the decisions in the official press still limits itself to the provision.

12 RAMOS, Elival da Silva. Controle de Constitucionalidade no Brasil: perspectivas de evolução. São Paulo: Saraiva, 2010. p. 294.

13 According to. LEAL, Roger Stiefellman, op. cit., p. 190-191.

3. THE EFFECTIVENESS OF THE DECISIONS OF THE SUPREME FEDERAL COURT IN INCIDENTAL CONTROL

Everything that was said until now relates to the constitutionality review by direct means, in which the Supreme Federal Court, in the judgment of an abstract procedure, without parties, analyzing the compatibility of an infraconstitutional law with the Constitution. The instruments for this control, as seen, are capable of producing decisions that have *erga omnes* efficacy and binding effect, as currently expressed in law (Article 28, paragraph, of Law 9869/00, in the Direct Unconstitutionality Suit and the Constitutionality Declaratory Suit; Article 10, paragraph 3, of law 9882/99 in the Fundamental Precept Noncompliance Argumentation) and in the Constitution itself (Article 102, paragraph 2).

Of no lesser importance is the control realized by way of incidental review. Between us, this kind of review is even quite a lot older, dating back to the First Brazilian Republic. Accomplished by diffuse means, the incidental control allows magistrates in all jurisdiction instances to judge the constitutionality of norms pertinent to a concrete case, even going as far as to declare that the laws in discussion are in inadequacy to the principles of the Constitution, deciding not to apply them.

The incidental review has essentially different characteristics from the direct review. Firstly, the declaration of constitutionality or unconstitutionality, or the interpretation in conformity with the Constitution, does not represent the main request of the dispute. As its very name suggests, the constitutionality control is made only *incidentally* to the resolution of a factual dispute. Secondly, the decision regarding the constitutionality or unconstitutionality of a law rendered in incidental review does not give rise to any modification in the legal system. That is, it does not have the power to, for example, remove from the legal system a law deemed unconstitutional. The reason for this is that what is decided is merely the impossibility for that norm to regulate the particular, concrete, case in discussion, and, consequently, not its annulment with broad reach, but only the inapplicability to that determined dispute.

From these two characteristics, derive directly two other. As the analysis of a law or normative act before the Constitution can only be made to solve a specific dispute, the decision will only be applicable to this very dispute. The effectiveness of the declaration of constitutionality or unconstitutionality, then, shall have *inter partes* efficacy, and shall not, initially, obligate courts to judge in the same way in future cases that bring similar constitutional questions. The second consequence is that there is no binding effect, for the exact same reasons that indicate the non-existence of *erga omnes* efficacy in incidental control – that

is, there could be no binding of the rest of the Judiciary and Public Administration to the determinant motivation of a decision that does not even have general efficacy, being limited to a specific concrete case.

But this consideration, despite being technically correct, being applicable in its entirety to the declaration of (un)constitutionality made by the lower courts, has been relativized when the court in question is a collegiate court, and, especially, the Supreme Federal Court. As shall be seen, procedural mechanisms were put in place to guarantee the standardization of precedents, and these mechanisms end up conferring a greater efficacy to decisions rendered incidentally, which, then, escape the narrow scope of the individual dispute, serving as a paradigm to future cases. This standardization, moreover, also serves to guarantee the equality and the legal certainty, as highlighted by Teori Albino Zavascki, who mentions the peculiar characteristics of the awards involving the judgement of the validity of a law in view of the Constitution:

> *As is known, the decisions given in concrete cases have a binding force limited to the parties. (...) However, if, to reach the conclusion the judge has made a judgment – positive or negative – regarding the validity of a norm, this decision gains juridically differentiated outlines, because of the constitutional principles it may involve. This, because the normative precepts have, by nature, a characteristic of generality, that is, they do not regulate specific concrete cases, but establish an abstract command applicable to an indefinite number of situations. (...) This peculiarity is especially relevant is considered together with the principle of equality in the eyes of the law, from which can be extracted primordially the necessity of giving an equal jurisdictional treatment for equal situations. It is also important considering the principle of legal certainty, which would be fatally compromised if the same law could be ruled constitutional in one case and unconstitutional in others, depending on the judge.*[14] *(free translation)*

The relativization of the purely *inter partes* effectiveness of the decision involving a judgement regarding constitutionality passed by the Supreme Federal Court has a second reasoning, just as relevant as

14 ZAVASCKI, Teori Albino, op. cit., p. 25-26.

(or even more than) the standardization of precedents. The role of the Court goes much beyond any other collegiate court in the Judiciary structure, as to it converge all the disputes of the lower courts. The role of constitutional guardian, assigned to it by the very Constitution (Article 102, *caput*), indicated that its judgements should have a greater importance than those by the lower courts, who, even though also being guardians of the laws and the Constitution, do not have the final say in this matter.

Some of the most important changes in this particular were introduced by Law nº 9756/98, which altered the 1973 Civil Procedure Code[15]: the introduction of Article 481 (Article 494 of the New Civil Procedure Code), which deals with the unconstitutionality argumentation incident, and the changes on Article 557 (Article 932, IV of the New Civil Procedure Code), regarding the monocratic judgement of appeals in the tribunals.

The unconstitutionality argumentation incident regulates the so called plenary reserve clause, enacted by Article 97 of the Federal Constitution, according to which "*only by the vote of the absolute majority of its members or of the members of the respective special judging panel will the tribunals be able to declare the unconstitutionality of a law or normative act of the Public Power*". In truth, this is an old prudency rule adopted by Brazilian judges practice, much alike to what is done in the United States, pioneer nation in the incidental and diffuse constitutional review[16]. The necessity for the decision to be given by all the tribunal (be it the plenary or a special judging panel), and not only by its fractioned judging panels also relates to the presumption of constitutionality law enjoy, according to the lessons of Justice Moreira Alves:

> *In the diffuse constitutionality control system, the principle of constitutionality presumption of normative acts is, undoubtedly, applicable, with our Constitutions having consecrated such a precept, with the rule that de unconstitutionality declaration can only be made the courts with the votes of the absolute majority of their members by the members of their respective special jdging panel (in this sense,*

15 It is important to mention that Brazil's 1973 Civil Procedure Code has been repealed, with a new Procedure Code taking its place, in March 2016. All of the citations in the present paper remit to the previous procedural law.

16 AMARAL JÚNIOR, José Levi Mello do. Incidente de Arguição de Inconstitucionalidade: comentários ao art. 97 da Constituição e aos arts. 480 a 482 do Código de Processo Civil. São Paulo: Editora Revista dos Tribunais, 2002. p. 19-25

still now, Article 97 of the Constitution).[17]

The regulation of this clause, as said, came with Articles 480 to 482 of the Civil Procedure Code (Articles 948 to 950 of the New Civil Procedure Code). According to these articles, the fractioned judging panel of a court that encounters an argumentation of unconstitutionality that is indispensable for the resolution of the dispute must suspend the proceeding and establish an incident before the plenary of the court, or, if necessary, the special judging panel (Article 93, XI, of the Federal Constitution: "*in the tribunals with more than twenty five judges, a special judging panel can be constituted, with at least eleven members, and with the maximum number of twenty five members, to exercise administrative and jurisdictional attributions delegated from the competency of the plenary of the tribunal, half the spots being filled by seniority and the other half elected by the plenary*").

Therefore, in the tribunals, at first glance, only the plenary or the special judging panel have the competency to judge law or normative act as unconstitutional. The fractioned panels can only accept the decision rendered, and apply it to the concrete dispute. What really ends up occurring is a "split of the competency from the functional point of view"[18], once the constitutional question, put forward preliminarily, and the merits of the dispute shall be decided by distinct judgement bodies.

There are, however, two cases in which the establishment of an incident of unconstitutionality argumentation is not required – the focal point for this paper. Both are provided for in Article 481, paragraph, of the Civil Procedure Code, as follows: "*the fractioned judging panels of the tribunals shall not submit to the plenary or to the special judging panel the unconstitutionality argumentation when there is already a decision of those of from the Supreme Federal Court about the question put*". As such, (i) when the incident has already been established in the same tribunal about the question in analysis, or (ii) when the Supreme Federal Court has already decided about the issue, *even in incidental control*, the fractioned panel is not required to establish a new incident, without breaching the plenary reserve clause.

Initially, in relation to case (i), this provision can be seen as a practice towards procedural celerity and economy, since a new procedure would be unnecessary and costly, only to reach the same conclusion already attained. Another explanation, as already mentioned, is the standardization of precedents. Utilizing a decision of the plenary of the special judging panel as a paradigm, the fractioned panels do

17 Justice-rapporteur Moreira Alves' opinion, in STF – Pleno – ADI nº 97-7/RO – Questão de Ordem – Repertório IOB de Jurisprudência, nº 10/90 – p. 144-147.

18 VELOSO, Zeno. Controle Jurisdicional de Constitucionalidade. Belém: Cejup, 1999. Pág. 50

not suffer the risk of passing erratic judgements, that could represent disrespect for the equality and legal certainty, since they will be adopting an already well-established understanding in that particular tribunal.

Regarding case (ii), besides the question of equal judgement and legal certainty, one must take into consideration the special characteristics of the decisions of the Supreme Federal Court in matters of constitutional review, which come from its institutional role as guardian of the Constitution The award given by the Supreme Court is not merely the result of a judgement by the highest court in Brazil's Judiciary, but the very understanding of the Constitutional Court in a determined issue. This understanding, even expressed by means of incidental control, cannot have the same effects as the decisions given by lower courts, that is, mere *inter partes* efficacy. The reflex effects of the ruling of the Constitutional Court indicate a tendency for them to have an effect progressively closer to that of the *erga omnes* efficacy, typical of the direct review.

One of these reflexes is exactly the possibility of direct application of the understanding held the Supreme Court by the fractioned panels of the remainder of the tribunals, through Article 481, paragraph, of the Civil Procedure Code, exempt from the incident mentioned before. This had been already the usual approach, even before the introduction of this law, in 1998. The question had reached the Supreme Court by 1995, when the exemption from the incident had been considered legitimate, even without expressed provision in law. In this regard, Justice Marco Aurélio's opinion, as the rapporteur, on the Interlocutory Appeal by Court Regulations in the Interlocutory Appeal nº 168149, dated 26/06/1995:

> *It is certain that Article 97 of the Constitution provides that only with the vote by the absolute majority of its members or by the members of the respective special judging panel, can the tribunals declare the unconstitutionality of a law or normative act of the Public Power. (...) The judging panel did not transfer the judgment to the plenary of the Court, as the Supreme Federal Court has understood for the unconstitutionality of normative act in question. Where can the reason to be of the constitutional rule be found if the bureaucratic understanding of the Tax Authorities prevails: What shall ever be of the principles of celerity and procedural economy? Even more than that, what importance has the overseeing of the Supreme Court? What was decided by the lower court respects the teleological interpretation*

> *of Article 97 of the Constitution, not deserving of any change. The incident of unconstitutionality, sent to the Highest Panel of the lower court has became unnecessary, being prevalent the rationalization of juridical labor, since the Highest Guardian of the Constitution, the Supreme Court, has decided, even in diffuse control, that the normative act is unconstitutional*[19]

As very well put in the Justice's opinion, the meaning of Article 97 of the Federal Constitution is completely preserved when the fractioned panel applies the Supreme Federal Court's understanding of the question, not mattering if this judgement was in direct or incidental control.

Another reflex effect, also resulting from an alteration in the 1973 Civil Procedure Code, enacted by Law nº 9756/98, regards the cases in which the rapporteur of the appeals in the tribunals is authorized to judge them monocratically, without needing to appreciate them in a collegiate body. Article 557, *caput* and paragraph 1 of the Procedural Code states:

> *Art. 557. The rapporteur shall deny appeal that is evidently inadmissible, unfounded or in conflict with precedents and dominant case law of the judging tribunal, the Supreme Federal Court or of Superior Court.*
>
> *§ 1º-A If the appealed decision is evidently in conflict with precedents and dominant case law of the Superior Federal Court or of Superior Court, the rapporteur can provide the appeal.*

As can be seen, the rules of collegiate appreciation of the appeals in the tribunals has some important exceptions, introduces, just as Article 481, paragraph, in attention to the procedural celerity principle. However, in the same way the question of the exemption of the establishment of an incident of constitutionality argumentation, also here there is a more profound meaning regarding the permission for the rendering of a monocratic decision when it derives from the existence of undisputed precedents of the Supreme Federal Courts.

The possibility for this simplified judgement makes the decisions of the Supreme Court more relevant and effective, since they

19 RTJ 162:765.

become important precedents in constitutional affairs, having their effects expanded to beyond the narrow scope of a concrete situation. Of note is that Article 557 of the Civil Procedure Code is clear to affirm that not only the existence of binding precedents (*súmula*) justifies the monocratic ruling, but also the existence of majoritarian understanding by the Supreme Court. Then, the issues addressed in incidental control have the power to consolidate case law in such a manner that it could – and should – be adopted by the lower courts, even monocratically.

It cannot be said, either, that the reference to the dominant case law of the Supreme Federal Court concerns the rulings in abstract control. This would be the same as to admit the uselessness of Article 557 of the Civil Procedure Code, once the *erga omnes* efficacy and the binding effect of the decisions made in direct constitutional control are already originated from constitutional provisions. The innovation brought by Law nº 9756/98 consisted exactly in permitting decisions in incidental control to be utilized as precedents, concretizing the "natural expansive vocation of the decisions regarding the constitutionality of norms" [20]. That is what can be extracted from the lessons of Gilmar Ferreira Mendes:

> *The Civil Procedure Code, in turn, in ampliative manner, incorporated disposition that authorizes the rapporteur to grant the appeal if the appealed decision is in evident conflict with precedent or with the dominant case law of the respective tribunal, the Supreme Federal Court or of Superior Court (Article 557, paragraph 1-A, included by Law n. 9756 of 1998).*
>
> *With the advent of this new formula, not only the denial of extraordinary appeals, but also the granting of such appeals in cases of unconformity with the Supreme Court precedents has begun to be admitted, by monocratic decision of the rapporteur.*
>
> *It also seems evident that the lawmaker understood to be possible to extend the effects adopted by the Court, be it in case of incidental unconstitutionality declaration of specific federal, state and municipal laws – case in which it would be subject to Senate intervention – or in case of a fixed constitutional interpretation by the Court.*[21] *(free translation)*

20 ZAVASCKI, Teori Albino, op.. cit., p. 26.

21 MENDES, Gilmar Ferreira. "O Papel do Senado Federal no Controle de Constitucionalidade:

The examples analyzed up until now were dedicated to show how the conclusion of the Supreme Federal Court about constitutionality or unconstitutionality of laws and normative acts, in incidental control, have a tendency to become valid for all, acquiring *erga omnes* efficacy, especially because of some legal dispositions adopted by the civil procedural law. Nothing, until this point, has been said regarding the possible binding effect of these precedents, an issue that is sensibly more complex and controverse.

About this question, the analysis of Complaint nº4335, judged by the Supreme Court on March 2014[22], is of great interest. Before entering this matter, it is important to remember that, as already mentioned (p. 4), the possibility of utilizing the Complaint to the preservation of the authority of the decisions given by the Supreme Court is one of the main practical consequences of the attribution of binding effect to these decisions. In this sense, the precedents of the Court have been admitting, without much discussion, the applicability of Complaints when the issue put forward is a noncompliance of a constitutionality or unconstitutionality ruling in a Direct Unconstitutionality Suit, a Constitutionality Declaratory Suit or a Fundamental Precept Noncompliance Argumentation.

In Complaint nº 4335, however, the situation was quite peculiar. This suit was filed by the Union's Public Defender Office, after the ruling of Habeas Corpus nº 82959[23], in which the plenary of the Supreme Federal Court decided for the unconstitutionality of paragraph 1 of Article 2 of Law nº 8072/1990 (Heinous Crimes Act), which, in its original wording, prohibited the downgrade in incarceration conditions in the serving of the sentence of crimes considered heinous. Since this unconstitutionality was declared by diffuse means, its application would limit itself to the case in question, without any change to the law.

For the decision of the Supreme Court to be considered mandatory, the compliance with Article 52, X, of the Federal Constitution would be necessary. This article provides for the competence of the Federal Senate to "*suspend the execution of a law, in part or entirely, that was deemed unconstitutional by definitive decision of the Supreme Federal Court*". Only this action by the Senate would have the power to make the effects of the declaration of unconstitutionality in incidental control extend to all, by means of suppression of the very law in question.

Even though, in the case of the Habeas Corpus nº 82959,

um caso clássico de mutação constitucional", in: Revista de Informação Legislativa, Brasília a. 41 n. 162 abr./jun. 2004, p. 161-162.

22 Rcl 4335,Rapporteur: Justice. GILMAR MENDES, Plenary, 20/03/2014, DJe-208 DIVULG 21-10-2014 PUBLIC 22-10-2014 EMENT VOL-02752-01 PP-00001.

23 Rcl 4335, Rapporteur: Justice. GILMAR MENDES, Plenary, 20/03/2014, DJe-208 DIVULG 21-10-2014 PUBLIC 22-10-2014 EMENT VOL-02752-01 PP-00001.

there was no communication to Senate nor suspension of paragraph of Article 2 of the Heinous Crimes Act, the Public Defender's Office filed a Complaint against the Court of Criminal Enforcement of Rio Branco, Acre, since it refused to analyze the possibility of the downgrade of incarceration conditions of several inmates sentenced to prison for heinous crimes. The plaintiff alleged that the lower court was disrespecting the Supreme Federal Court authority, even the decision not being awarded in direct control. In habeas reliefs, as is known, the decisions are typically incidental, as what is request by the plaintiff is not a declaration of unconstitutionality in abstract, but the concession of a material order.

However, the rapporteur of the case, Justice Gilmar Ferreira Mendes recognized the Complaint, conferring a real binding effect to what was decided in Habeas Corpus nº 82959. To decide in this manner, the Justice had to address the questions regarding the role of the Senate in the constitutionality control of laws and normative acts, because of Article 52, X, of the Constitution. If the suspension of the law deemed unconstitutional, by resolution of the Senate, was really necessary for the attribution of *erga omnes* effectiveness and binding effects, then the inexistence of such a resolution would impede the Complaint. However, if, as put forward by Justice Mendes in his opinion, the objective of the Senate intervention was only to *give publicity* to the decision of the Supreme Court, which would already have binding efficacy, then the Complaint would be perfectly possible.

Justice Gilmar Mendes, in the judgment of Complaint nº 4335 based himself in understanding already defended by him in his writings, according to which Article 52, X, of the Constitution would have suffered a mutation, particularly perceptible from observing the uses of the Court, that have been attributing transcendent effects to the rulings in incidental review. In article published in 2004, the Justice states:

> *In truth, the application that the Supreme Federal Court has been conferring to Article 52, X, Federal Constitution, indicated that the institute has deserved a significant reinterpretation. It is possible that the configuration of the abstract control in the new Constitution, with emphasis in the abstract model, has been decisive to the observed change, since decisions with erga omnes efficacy started to generalize themselves. (...)*
>
> *Therefore, it sounds legitimate to understand that, nowadays, the formula regarding the suspension of the execution of a law by the Senate has to*

> *have simple publicity effects. In this manner, if the Supreme Federal Court, in incidental control, reaches the conclusion that, in final judgment, the law is unconstitutional, this decision will have general effects, with communication to the Senate, for it to publish the decision in the Congress Register. As such, it is not (anymore) the Senate's decision to grant erga omnes efficacy to the Supreme Court judgment. The decision itself has this normative force. .*[24]

The rapporteur Justice position was fully agreed to by Justice Eros Grau, who summarized the controversy in his opinion: "*(...) to the Federal Senate, in face of the constitutional mutation declared in his opinion – the Rapporteur's – and in this opinion reaffirmed, is attributed competence only to give publicity to the suspension of the execution of the law deemed unconstitutional, in part or on the whole, by definitive decision of the Supreme Federal Court. The decision itself has sufficient normative power to suspend the execution of the law deemed unconstitutional*". However, after the procedures were suspended for further examination of the case records, Binding Precedent nº 26 entered into force[25], making the discussion in the case irrelevant, since the Binding Precedent established a binding effect on the position of the Court regarding the possibility of the downgrade of incarceration conditions.

Therefore, in the end, the necessary majority for the granting of the award was reached not because of the incidental control decision in HC 82959[26], but because of the Binding Precedent 26. This is, nevertheless, a relevant precedent that deserve attention of all who are concerned in following the developments of the Supreme Federal Court precedents, since it signals a possible evolution towards attribution of greater efficacy to the precedents of the Highest Court in incidental constitutional review.

4. CONCLUSION

24 MENDES, Gilmar Ferreira, op. cit., p. 165.

25 "For downgrading of incarceration conditions in the serving of sentence for a heinous or equal crime, the decision for serving shall observe the unconstitutionality of Article 2 of Law n. 8072, of July 25, 1990, without prejudice to evaluating if the convicted has the subjective and objective requisites for the benefit, with the possibility of determining, with motive, the realization of criminological exams."

26 In this sense, Justices Teori Zavascki, Luis Roberto Barroso, Rosa Weber e Celso de Mello. Dissenting, with opinions for thenon-granting of the Complaint, but granting Habeas Corpus, Justices Sepúlveda Pertence, Ricardo Lewandowski, Joaquim Barbosa e Marco Aurélio.

The way the oversight of the constitutionality of laws and normative acts has been executed in our system is a consequence of a long evolutionary road that stretches back, from the creation of the Republic, with the institutionalization of incidental review, inspired by the diffuse control model inaugurated by the United States. Since the beginning, despite all judges and courts having competence to decide over the constitutionality of norms created by the ordinary lawmaker or the constitutional reformer, the Supreme Federal Court has always had a distinguished role, given its institutional position as the highest collegiate court in the Brazilian Judiciary and having the last say in any and all constitutional matters.

With the creation and development of several direct constitutional control instruments, especially after the 1988 Constitution, which enlarged the list of legitimated parties to file a Direct Unconstitutionality Suit, and the Constitutional Amendment nº 3/93, which created the Constitutionality Declaratory Suit and the Fundamental Precept Noncompliance Argumentation, the abstract review gained heightened importance, in such a way that nowadays the most relevant constitutional issues to reach the Highest Court are, normally, brought by means of one of the direct constitutional suits. The Supreme Court, then, performing its role as guard of the Constitution also (and, maybe, principally) through this competence delegated by the very Magna Carta, turns into a true Constitutional Court, much alike the European ones.

The result arising from the coexistence system between incidental and direct control, despite well-functioning, in a general view, reveals some incongruences, especially in regards to the effects of the decisions given by the Supreme Court. In fact, while judgements in abstract review have *erga omnes* efficacy and binding effects, as per Article 102, paragraph 2 of the Federal Constitution, Artcile 28, paragraph, of Law nº 9868/99 and Article 10, paragraph 3, of Law nº 9882/99, those given in concrete control have, in principle, only an *inter partes* efficacy, without any binding effects toward the Judiciary and the Public Administration. As such, the same Court, with the same eleven Justices, could, in the same day, grant an award on unconstitutionality that had effects only to the parties involved and another with general efficacy.

A relatively recent trend, however, is observable, in which the decisions granted in incidental control can have a transcendental efficacy to the concrete case, and, even, binding to other judicial and administrative instances and courts. This happens through some procedural mechanisms created by the ordinary legislation, such as Article 481, paragraph, of the Civil Procedure Code of 1973 (Article 949 in the New Procedural Code) that permits the exemption of the mandatory establishment of an unconstitutionality incident in courts

when there is already precedent of the Supreme Federal Court addressing the matter, and Article 558, *caput*, of the same statute (Article 1012, paragraph 4, of the New Code), which makes possible the monocratic ruling of appeals when there are uncontested precedents in the Court.

The evolution that can be witnessed in this matter indicates that the next steps probably will not be taken by the lawmaker, but by the case law of the Supreme Federal Court. In Complaint nº 4335, the Supreme Court came to a result quite near the attribution of binding effect to the decisions of (un)constitutionality made incidentally, with relevant opinions in favor of the adequacy of a Complaint to preserve the authority of these decision. This ended up not materializing because of the Binding Precedent nº 26, which made possible a simpler resolution to the controversy. Even so, it is necessary to remain alert to the case law of the Supreme Federal Court, since the issue certainly will return to discussion, with the very real possibility of opinion by Justices who did not participate in the judgement of the mentioned Complaint. And, regardless of that, there is an irreversible tendency of approximation between the efficacy of decisions in concrete review and in abstract review given by the Supreme Court, representing no more than the recognition of the fair share of importance of this Court, the greatest responsible for the defense of the Magna Carta.

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DERECHO DEL MAR EN BRASIL: NUEVOS DESARROLLOS

LAW OF THE SEA IN BRAZIL: NEW DEVELOPMENTS

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Resumen: El artículo hace un análisis de las nuevas acciones emprendidas por Brasil en lo referente al Derecho del Mar, especialmente sobre los cuatro programas desarrollados actualmente por el Estado brasileño. Primeramente, el trabajo presenta dos acontecimientos importantes relacionados al Derecho del Mar en Brasil: el episodio de la "Guerra de la Langosta" y la expansión del mar territorial para doscientas millas marinas. En seguida, el trabajo examina, en términos históricos, políticos y jurídicos, los cuatro programas mencionados: el proyecto "Amazonia Azul", el Programa Archipiélago de São Pedro y São Paulo; el Programa de Investigaciones Científicas en la Isla de Trindade y el Programa de Prospección y Exploración de los Recursos Minerales de la Zona Internacional del Atlántico Sur y Ecuatorial. En la parte final, el estudio presenta algunas conclusiones.

Palabras clave: Derecho del Mar – Brasil – Programas – Desarrollos

Abstract: The article analyses the new actions undertaken by Brazil on the Law of the Sea issues, especially the four programs that Brazil has been developing in the last years. Firstly, the paper presents two important events involving Law of the Sea in Brazil: the "Lobster War" episode and the 200-nautical mile territorial sea extension. Afterwards

1 El autor desea expresar su gratitud al China Institute of Boundary and Ocean Studies de la Wuhan University por la acogida como visiting fellow (2016-2018).

the paper looks the historical, political and legal questions of the four mentioned programs: the "Blue Amazon" Project, the São Pedro and São Paulo Archipelago Program; the Scientific Program on the Island of Trindade and the Program for Prospecting and Exploration of Mineral Resources in the Equatorial and South Atlantic International Area. In the end, the study presents some concluding remarks.

Keywords: Law of the Sea – Brazil – Programs – Developments

1. INTRODUCCIÓN

Brasil es un país de dimensiones continentales, con un territorio de 8.514.877 km² y una costa extensa direccionada para el Atlántico. La franja de tierra del litoral brasileño tiene una anchura variable, extendiéndose por aproximadamente 10.800 kilómetros a lo largo de la costa[2], si se contabiliza sus concavidades naturales, y posee un área de aproximadamente 514.000 km², a lo largo de diecisiete estados costeros. Ese extenso litoral, junto a su localización geográfica, da al país una importante posición estratégica y política. Sin embargo, esa prominente posición en el Atlántico Sur no transformó Brasil en un Estado con una clara orientación marítima. En pocos momentos de su historia jurídica y política el asunto estuvo como tema principal, excepto por dos momentos en especial: en el episodio de la "guerra de la langosta", con Francia (1962-1964), y en la ampliación del mar territorial para doscientas millas marinas (1970).

Actualmente, entre las principales actividades económicas desarrolladas a lo largo de la costa brasileña están la pesca, el turismo y la explotación de gas y petróleo en la plataforma continental, siendo esta, en términos económicos, la más importantes. De las reservas probadas de petróleo de Brasil, alrededor de 96% están localizadas en el mar, principalmente en la costa del estado de Rio de Janeiro, que detiene 84,2% de las reservas probadas *offshore* y 81,2% del total. A lo largo de los últimos años, el país viene ocupando la 15ª posición en el *ranking*

2 La extensión de la franja costera varía enormemente en la literatura sobre el tema, de 7 mil a más de 11 mil kilómetros. Tal diferencia es debido a las distintas metodologías empleadas en el cálculo de la línea costera. El dato aquí adoptado, de 10.800 kilómetros, fue obtenido en el ámbito de los estudios sobre la representatividad de los ecosistemas costeros en el Sistema Nacional de Unidades de Conservación (SNUC), y considera los recortes y concavidades naturales de la costa brasileña. Ministério do Meio Ambiente (Gerência de Biodiversidade Aquática e Recursos Pesqueiros), Panorama da conservação dos ecossistemas costeiros e marinhos no Brasil, Brasília, MMA/SBF/GBA, 2010.

mundial de países con las mayores reservas probadas de petróleo.[3]

Si en el pasado Brasil tuvo un interés limitado por el Derecho del Mar, en los últimos años él viene demostrando una nueva inflexión para el Atlántico. Algunas acciones son reflejos del renovado interés por el Derecho del Mar: la extensión de la plataforma continental más allá del límite inicial de las 200 millas marinas (Proyecto "Amazonia Azul"), el Programa Archipiélago de São Pedro y São Paulo (PROARQUIPELAGO), el Programa de Investigaciones Científicas en la Isla de Trindade (PROTRINDADE) y el Programa de Prospección y Exploración de Recursos Minerales de la Zona Internacional del Atlántico Sur y Ecuatorial (PROAREA).

De esa manera, el objetivo principal de este artículo es, en un primer momento, describir los principales hechos históricos que unen Brasil al Derecho del Mar, para, en un segundo momento, analizar los desdoblamientos actuales de la política oceánica brasileña. Conocido por ser un gigante continental, los últimos quince años vienen mostrando una nueva cara brasileña: la atlántica.

2. BRASIL Y EL DERECHO DEL MAR

De la independencia en 1822 a los días actuales, las reglas jurídicas sobre la delimitación de los espacios marítimos adyacente a la costa brasileña pasaron por varios cambios. A lo largo del tiempo es posible percibir una serie de avanzos y retrocesos, algunas actitudes caracterizadas por una cierta timidez, mientras otras marcadas por cierta osadía. En lo que se refiere al Derecho del Mar, la mayor parte de la historia jurídica brasileña fue dedicada a la anchura del mar territorial, en especial el tema de las 200 millas marinas durante los años 1970. Sin embargo, antes de examinar este episodio, vale la pena destacar un episodio anterior a este – que, como el primero, tuvo una grande repercusión en los medios de comunicación, traspasando los límites jurídicos y políticos, y reverberando en la sociedad –, la llamada "guerra de la langosta".

2.1 El episodio de la "guerra de la langosta" con Francia (1962-1964)

Entre los años 1962 y 1964 ocurrió un serio litigio involucrando Brasil y Francia en torno a la pesca de langosta en la costa del Nordeste brasileño. Los primeros hechos de lo que se conoció como "guerra de

3 AGÊNCIA NACIONAL DO PETRÓLEO, GÁS NATURAL E BIOCOMBUSTÍVEIS. *Anuário estatístico brasileiro do petróleo, gás natural e biocombustíveis 2016*. Rio de Janeiro: ANP, 2016, p. 71-74.

la langosta" ocurrieron cuando un barco langostero francés, llamado *Cassiopés*, fue detenido en el litoral del Nordeste, en enero de 1962. La controversia surgió porque el Gobierno de Brasil negó la permisión de la pesca o captura del crustáceo en el litoral brasileño – un espacio que comenzaría en la ciudad de Recife y se extendería hacia Fortaleza – por langosteros franceses.

Desde 1961, los franceses ya mostraban un interés en el potencial de explotación de langosta en la costa brasileña, cuando, en este año, solicitó la autorización para que dos barcos franceses hicieran investigaciones sobre los recursos langosteros del Nordeste. El pedido francés fue aceptado por las autoridades brasileñas, que autorizaron la pesca por barcos franceses con la condición de que hubiera a bordo controladores de pesca de la Marina de Brasil, que verificarían los métodos de pesca y serían informados sobre los resultados de las investigaciones – tal condición fue acepta sin restricciones por la embajada francesa en Brasil.[4]

Con el fin de las investigaciones, el Departamento Político del Ministerio de Relaciones Exteriores (Itamaraty) advirtió al embajador de Francia que, siendo la langosta recurso de grande importancia para el Nordeste, y cuya existencia estaría amenazada por la explotación intensiva con métodos predatorios, el Gobierno brasileño no estaría dispuesto a permitir esa actividad a pescadores extranjeros. La preocupación del Gobierno de Brasil era más que razonable, una vez que durante toda la década de 1950, la pesca predatoria fue realizada en la región del Atlántico norte del continente africano, sobre todo en las costas de Senegal, Guinea y Mauritania, dónde actuaba grande parte de la frota especializada de Francia, conduciendo al agotamiento de los bancos langosteros de la región y, por lo tanto, buscando nuevas áreas de explotación, como en el caso concreto, en la costa brasileña.[5]

Los franceses decidieron desconsiderar las manifestaciones de las autoridades brasileñas, conduciendo sus barcos de pesca para la costa brasileña, cuando entonces fueron apresados por la Marina brasileña y luego liberados. Mientras tanto, hubo intentos de resolver el conflicto por medio de negociaciones bilaterales. Francia propuso que el asunto fuera sometido a una instancia arbitral, la Corte Permanente de Arbitraje, mientras el Itamaraty rechazó tal propuesta, pero aceptó la idea de llegar a una fórmula de *modus vivendi*, a la cual, sin comprender las posiciones jurídicas antagónicas de los dos países, se disciplinara el asunto creando un entendimiento entre particulares brasileños y franceses.[6]

4 LESSA, Antonio Carlos. A Guerra da Lagosta e outras guerras: conflito e cooperação nas relações França-Brasil (1960-1964). *Cena Internacional*, n. 1, 1999, p. 111-112.

5 *Ibidem*, p. 112.

6 *Ibidem*, p. 113.

En medio a las tratativas para solucionar la controversia, en enero de 1963, las autoridades francesas comunicaron, de modo sorprendente, que dos langosteros franceses habían partido rumbo al Nordeste brasileño y que fueron nuevamente detenidos por la Marina de Guerra. Debido a la apelación del Gobierno francés, Brasil aceptó nuevamente liberarlos como un gesto de última concesión. El mes siguiente, Francia una vez más solicitó la permisión para la operación de seis langosteros en la región cuando ya estaban en las proximidades de la costa brasileña. Brasil comunicó oficialmente el impedimento de la presencia de la pesca de langostas por embarcaciones extranjeras.[7]

En este momento, la tensión alrededor de la "guerra de la langosta" alcanzó su punto máximo cuando el Gobierno francés decidió reaccionar de manera enérgica al comunicado brasileño, enviando el destructor *Tartu* para proteger las actividades de sus langosteros en el Nordeste brasileño. La prensa brasileña ha llamado a esta acción de "belicosa". En los meses siguientes, la tensión entre los gobiernos de Francia y Brasil dio lugar a la retirada de los embajadores y a la cancelación de viajes oficiales[8]. No obstante, no fueron registradas actitudes de animosidad entre los navíos de guerra brasileños y el destructor francés, y el asunto fue enfriando gradualmente.[9]

Para Raymundo de Castro, el grande mérito de la posición sostenida por Brasil en el desarrollo de este litigio consistió en la transferencia de la cuestión del campo político para el biológico. Desde el principio, el Gobierno brasileño fundamentó su posición de que la langosta es un recurso vivo del lecho de la plataforma continental, de modo que su pesca solo puede ser hecha por extranjeros con la autorización o consentimiento expreso del Estado costero.[10]

Los franceses se opusieron a la tesis brasileña, argumentando que la langosta es una especie nadadora y no sedentaria o bentónica. Las autoridades brasileñas respondieron, alegando que la langosta vive en contacto físico constante con el lecho del mar y que el hecho de ella dar pequeños saltos en su marcha sobre el lecho de la plataforma no era razón suficiente para que fuera considerada una especie pelágica o nadadora.

7 *Ibidem*, p. 114.

8 AZZAM, Issam. The dispute between France and Brazil over Lobster Fishing in the Atlantic. *International Comparative Law Quarterly*, vol. 13, n. 4, 1964, p. 1454.

9 MUNIZ, Tulio de Souza. *O ouro do mar: o surgimento da indústria da pesca da lagosta no Brasil à condição do pescador artesanal na História do tempo presente (1955-2000). Uma narrativa sócio-histórico marítima*. Fortaleza: Universidade Federal do Ceará, Dissertação (Mestrado em História), 2005, p. 52.

10 CASTRO, Raymundo Nonnato Loyola de. Aspectos fundamentais da doutrina brasileira sobre plataforma continental. *Revista Brasileira de Política Internacional*, n. 47/48, 1969, p. 36.

Por fin, recuerda Raymundo de Castro: "echamos mano de un argumento que fue decisivo: se la langosta fuera considerada especie nadadora solo porque da saltos en el lecho del mar, entonces también deberíamos incluir el canguro que da saltos en tierra firme entre las especies que vuelan".[11]

La "guerra de la langosta" tuvo como contribución más importante llevar para la opinión pública brasileña el debate que trata de los aspectos esenciales sobre la utilización de los recursos del mar, en especial de la plataforma continental. La repercusión del asunto en la opinión pública nacional fue expresiva, un momento raro en el que el Derecho del Mar llegó a los titulares de los periódicos.

2.2. El mar territorial brasileño: la regla del cañón a las 200 millas marinas

El segundo hecho jurídico y político relacionado con el Derecho del Mar que transcendió la esfera más restricta de los expertos en el tema y se tornó un interés de la opinión pública en general fue cuando Brasil, por medio del Decreto-ley n. 1.096, de 25 de marzo de 1970, expandió su mar territorial para 200 millas marinas. Antes de ser analizado el contexto en el cual ocurrió la adopción de esta acción, es importante exponer como fue la evolución del mar territorial brasileño hasta aquel momento.

Como parte del legado portugués, Brasil mantuvo la regla del cañonazo, que fue mencionada en la Circular n. 92, de 1 de julio de 1850, firmada por el Ministro de la Marina y enderezada a los presidentes de las provincias[12]. Como recuerda Marotta Rangel, Brasil "adhirió a la independencia con una regla distinta de aquella practicada por los otros países americanos que obtuvieron su independencia de España o Inglaterra y para quien la regla de las seis o tres millas marinas prevaleció hasta por lo menos desde la independencia".[13]

La regla solamente fue modificada al comienzo de la Primera

11 *Ibidem*, pp. 35-36. Traducción del original: *"[...] lançamos, a seguir, mão de um argumento que foi decisivo: se a lagosta fosse considerada espécie nadadora só porque dá saltos no leito do mar, então deveríamos também incluir o canguru que dá saltos em terra firme entre as espécies voadoras!"*.

12 BEVILÁQUA, Clovis. *Direito Público Internacional: a synthese dos princípios e contribuição do Brazil*. Rio de Janeiro: Francisco Alves, 1910, p. 321-322.

13 RANGEL, Vicente Marotta. Brazil. In: ZACKLIN, Ralph (ed.). *The changing law of the sea: Western hemisphere perspectives*. Leiden: Sijthoff, 1974, p. 136. Traducción del original: *"[...] acceded to independence with a rule different from that in force in other American countries which had gained independence from Spain or England and for whom the rule of six or three nautical miles prevailed, at least since independence"*.

Guerra Mundial, con fines de basar la posición de neutralidad brasileña, cuando el Ministerio de Relaciones Exteriores adoptó la regla de las tres millas marinas por las Circulares n. 42 y 43, de 25 de agosto de 1914, respectivamente encaminadas a las Legaciones extranjeras y a los gobernadores y presidentes de los Estados que componían la Unión, bien como a los Ministerios de Guerra y de la Marina.

Para la Conferencia de La Haya de 1930 sobre la Codificación del Derecho Internacional, las instrucciones dadas a la delegación brasileña eran para advocar el alargamiento del mar territorial. La delegación brasileña era favorable a un mar territorial de seis millas y contraria a la institución de una zona contigua. Sin embargo, la Conferencia de La Haya de 1930 no consiguió lograr un consenso sobre la anchura del mar territorial, marcando, de esa forma, el fracaso de la Conferencia y del Proyecto Schücking[14]. Internamente, las instrucciones a la delegación brasileña no tuvieron impacto legislativo y el país mantuvo la anchura del mar territorial en apenas tres millas marinas.[15]

A pesar de la posición contraria a una zona contigua al mar territorial, pocos años después el gobierno creó una "zona de pesca costera". Según el artículo 3º, parágrafo 2º, del Decreto n. 23. 672, de 2 de enero de 1934, que aprobó el Código de Caza y Pesca: "la pesca costera es la realizada de la costa a una distancia de 12 millas, contando para fuera".

Durante la Segunda Guerra Mundial – antes de la relación directa con el conflicto –, Brasil apoyó iniciativas regionales para la constitución de una zona de seguridad de 12 millas marinas. Con todo, el mar territorial seguía con la anchura de tres millas según lo estipulado desde el comienzo del siglo XX.

Para Marotta Rangel, la regla de las tres millas para el mar territorial fue siendo gradualmente despreciada por aquello que el cuerpo diplomático apoyaba en los encuentros internacionales[16]. Los "Principios de México sobre el régimen jurídico del mar", aprobado por el Consejo Interamericano de Juristas de 1956, no solo declaraba que la regla de las tres millas era insuficiente como límite del mar territorial y, por lo tanto, no era más acepta como regla general de Derecho Internacional, como también apoyaba el derecho de cada Estado establecer la anchura de su mar territorial dentro de los límites razonables.

En 1965, después que las dos primeras conferencias de las Naciones Unidas sobre el Derecho del Mar, realizadas en Ginebra

14 O'CONNELL, D. P. *The International Law of the Sea*. Oxford: Oxford University Press, 1982, p. 3.

15 PEREIRA DA SILVA, Alexandre. *O Brasil e o Direito Internacional do Mar Contemporâneo: novas oportunidades e desafios*. São Paulo: Almedina, 2015, p. 227.

16 RANGEL, *op. cit.*, p. 137.

en 1958 y 1960, no lograron un acuerdo sobre la anchura del mar territorial, el Comité Jurídico Interamericano recomendó, con el apoyo de su presidente, el jurista brasileño Raul Fernandes, que todo Estado americano "tiene el derecho de establecer la anchura de su mar territorial hasta el límite de doce millas contadas desde la línea de base".[17]

Brasil solamente aumentó el mar territorial para seis millas por medio del Decreto-ley n. 44, de 18 de noviembre de 1966. Además de eso, el decreto estableció también una franja adicional, hasta la distancia de doce millas del litoral, en lo que se refiere a la prevención y a la represión de las infracciones con relación a la policía fiscal, aduanera, sanitaria o de inmigración.

Ese período, sin embargo, no iba a durar mucho. Ya en 25 de abril de 1969, el gobierno brasileño editó el Decreto-ley n. 553, alterando de nuevo los límites del mar territorial brasileño, que pasó a ser de doce millas marinas. El período en cual el mar territorial brasileño tuvo el límite de doce millas marinas sería aún más breve que el anterior. Menos de un año después, en 25 de marzo de 1970, por el Decreto-ley n. 1.098, el gobierno brasileño determinó que el límite del mar territorial pasaría a ser de 200 millas marinas.[18]

Las razones que llevaron Brasil a expandir su mar territorial de 12 para 200 millas marinas, en un espacio de menos de un año, son varias, de naturaleza externa e interna. En aquel particular momento histórico, había la percepción de la viabilidad de la idea por parte de las autoridades brasileñas, que recomendaban y justificaban la acción de reivindicación unilateral sobre una extensa área del mar adyacente a las costas del país. Para Araújo Castro, el impacto positivo interno de la expansión del mar territorial para 200 millas marinas, en un momento particularmente sensible para el Gobierno, fue considerado para la adopción de la medida.[19]

En América Latina – donde la mayoría de los países ya habían adoptado el mar territorial de 200 millas marinas – la aceptación del acto brasileño fue la mejor posible. A fin de cuentas, la posición sería reforzada con la adhesión de un miembro importante como Brasil. Entre los demás Estado en desarrollo, la medida también fue bien recibida, aunque no

17 *Apud* RANGEL, *op. cit.*, p. 138.

18 PEREIRA DA SILVA, Alexandre. O novo pleito brasileiro no mar: a plataforma continental estendida e o Projeto Amazônia Azul. *Revista Brasileira de Política Internacional*, vol. 56, n. 1, 2013, p. 106-107.

19 ARAÚJO CASTRO, Luiz Augusto de. O Brasil e o novo Direito do Mar: mar territorial e zona econômica exclusiva. Brasília: Funag, 1989, p. 17. Además de eso, Araújo Castro aún indica que el asunto se tornó, incluso, tema de samba de João Nogueira "Esse mar é meu": "Ese mar es mío/lleve su barco para lejos de ese mar/ vaya a lanzar su red/de las doscientas para allá/ pescador de ojos verdes/vaya a pescar en otro lugar".

efusivamente como entre los latinoamericanos.[20]

En este momento histórico, la discusión acerca de un mar territorial de 200 millas marinas era un tema polémico y rechazado por los Estados desarrollados. Durante los trabajos de la III Conferencia de las Naciones Unidas sobre el Derecho del Mar (1973-1982), fue adoptada la solución conciliatoria: el mar territorial con anchura máxima de 12 millas marinas contadas desde las líneas de base, y se creó el concepto de zona económica exclusiva (ZEE), con un máximo de 200 millas marinas de las líneas de base, o sea, 188 millas marinas contadas desde el límite exterior del mar territorial para los Estados costeros que establecieran un mar territorial de 12 millas.

La posibilidad de una disminución en el mar territorial de 200 millas para 12 millas marinas, ya esbozada al comienzo de la III Conferencia, inicialmente fue vista con resistencia por el Gobierno de Brasil que, sin embargo, prometía no hacer oposición al consenso que se formaba sobre el tema. La probabilidad, casi una certeza, de que Brasil iba a reducir el mar territorial de 200 millas para 12 millas, en razón del proceso de negocio en curso en la III Conferencia, fue expuesta por el Ministro de Relaciones Exteriores Ramiro Saraiva Guerreiro en una entrevista para el periódico *Gazeta Mercantil*, en 1980. Inicialmente, la manifestación de Saraiva Guerreiro fue vista con resistencia en el Congreso Nacional.

La aprobación del texto final de la Convención de las Naciones Unidas sobre el Derecho del Mar (CONVEMAR) ocurrió el 10 de diciembre de 1982, pero el comienzo de su vigencia internacional solo iba a ocurrir doce años después, el 16 de noviembre de 1994. Con todo, Brasil ya estaba se adecuando a los nuevos parámetros establecidos en la CONVEMAR, con la aprobación de la Ley n. 8.617, de 4 de enero de 1993, anulando el Decreto-ley n. 1.098/70. Bajo esta ley, el mar territorial brasileño comprende una franja de doce millas marinas medidas desde la línea de bajamar.

La Ley n. 8.617/93 está en vigor hasta hoy en Brasil, sin alteraciones, bien como la CONVEMAR que Brasil firmó en 10 de diciembre de 1982, al fin de la III Conferencia, depositando su instrumento de ratificación el 22 de diciembre de 1988.

Sin embargo, la entrada en vigor interna de la CONVEMAR fue poco usual. Para efectos internos y siguiendo una costumbre de larga fecha consagrada, la CONVEMAR fue promulgada por medio del Decreto n. 99.165, de 12 de marzo de 1990, que dio poder de ejecución para efectos internos de la convención. Lo que ocurre es que la CONVEMAR todavía no había entrado en vigor en el plan internacional. De esta manera, el Decreto n. 99.165 fue anulado integralmente por el Decreto n. 99.263, de 24 de mayo de 1990. En el preámbulo de este Decreto, con fines de

20 RODRIGUES, Carlos Calero. O problema do mar territorial. *Revista Brasileira de Política Internacional*, n. 49/50, 1970, p. 124-125.

justificar la anulación del decreto poco más de un mes después de su expedición, consta que eso se sucedió "considerando que el Decreto n. 99.165, de 12 de marzo de 1990, abre una brecha legislativa con relación a los espacios marítimos brasileños".[21]

Por lo tanto, se esperó que la CONVEMAR entrara en vigor, lo que ocurrió el 16 de noviembre de 1994, para que fuera expedido un nuevo decreto de ejecutoriedad, el Decreto n. 1.530, de 22 de junio de 1995, dando efectos internos a CONVEMAR a partir de la fecha en vigor internacional.

3. BRASIL Y UNA NUEVA MIRADA PARA EL ATLÁNTICO

Después de la polémica acerca del mar territorial de 200 millas marinas, pacificada con la adopción de la CONVEMAR, el Derecho del Mar se retiró de los noticiarios cotidianos y volvió al debate solamente entre los expertos en Brasil. Sin embargo, el tema viene resurgiendo en los últimos años estimulado por el plan de creación de una "Amazonia Azul" y de una mayor presencia en el Atlántico Sur.

3.1 La expansión de la plataforma continental y el proyecto "Amazonia Azul"

Una de las principales novedades de la CONVEMAR fue la nueva definición jurídica de la plataforma continental. En los términos de la Convención sobre la Plataforma Continental de 1958, esta era definida como "el lecho del mar y el subsuelo de las zonas submarinas [...] hasta una profundidad de 200 metros o, más allá de este límite, hasta donde la profundidad de las aguas suprayacentes permita la explotación de los recursos naturales de dichas zonas" (artículo 1º).

La definición de la plataforma continental consagrada en esta Convención no fue exclusivamente basada en características geológicas o geomorfológicas. Además de eso, se trataba claramente de un sistema sin precisión, complicado y virtualmente impracticable, una vez que implicaba, de un lado, una profundidad específica de las aguas (200 metros) y, del otro, un criterio indefinido de aprovechamiento.

Ya la definición de plataforma continental consagrada en el artículo 76 de la CONVEMAR tampoco es basada de modo exclusivo en las características geológicas o geomorfológicas, pero se utiliza de otros dos criterios para definir plataforma continental. En los términos del artículo 76.1: "la plataforma continental de un Estado ribereño comprende el lecho y el subsuelo de las áreas submarinas [...] a todo lo

21 Traducción del original: *"[...] considerando que o Decreto nº 99.165, de 12 de março de 1990, abre lacuna legislativa com relação aos espaços marítimos brasileiros"*.

largo de la prolongación natural de su territorio hasta el borde exterior del margen continental, o bien hasta una distancia de 200 millas marinas". Esto es, en este artículo 76.1, la CONVEMAR utilizó dos criterios para fijar los límites de la plataforma continental, el criterio geomorfológico (margen continental) y el criterio de distancia (200 millas marinas). Como resume muy bien Robert Smith y George Taft, el artículo 76.1 "define la plataforma continental de un modo que es científicamente basada, legalmente defensable y políticamente aceptable".[22]

De esta manera, el Estado costero tiene dos opciones: i) hincar su plataforma continental hasta una distancia máxima de 200 millas marinas, contadas desde las líneas de base a partir de las cuales se mide la anchura del mar territorial, independientemente de los factores geológicos o geomorfológicos de la misma; ii) podrá extender su plataforma continental hasta el borde exterior del margen continental, hasta una distancia que no exceda 350 millas marinas o de 100 millas marinas contadas desde la isobata de 2.500 metros, que es una línea que une profundidades de 2.500 metros.

En la hipótesis del Estado costero utilizar el segundo criterio, o sea, expandir su plataforma continental más allá del límite inicial de las 200 millas marinas, el Estado no hará por la adopción de un simple acto unilateral, pero deberá encaminar una propuesta de expansión a la Comisión de Límites de la Plataforma Continental (de ahora en delante CLPC o Comisión), un órgano técnico creado por la CONVEMAR para analizar los pleitos estatales.

Brasil fue el segundo Estado a presentar una propuesta a CLPC, el mayo de 2004 (CLCS/42)[23]. El pleito encaminado por el Estado brasileños es resultado del Plan de Levantamiento de la Plataforma Continental Brasileña (LEPLAC) y fue desarrollado a lo largo de dieciocho años (1986-2004), por la Junta de Hidrografía y Navegación de la Marina y contó con el apoyo técnico y científico de la Petrobras, empresa estatal petrolera.[24]

La propuesta brasileña de extensión de su plataforma continental para más allá de las 200 millas marinas previó una expansión de 911.847 km². En seguida, el febrero de 2006, Brasil también hizo una adición, haciendo con que el área total se quedara con 953.525 km². Esa área se distribuye principalmente en las regiones Norte (región del

22 Robert Smith; George Taft, "Legal Aspects of the continental shelf", in Peter J. Cook; Chris Carleton, Continental Shelf Limits: the scientific and legal interface, Oxford, Oxford University Press, 2000, p. 17. Traducción del original: "*defines the continental shelf in a manner which is scientifically based, legally defensible, and politically acceptable"*.

23 CLCS/42, 14 September 2004. *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission*.

24 VIDIGAL, Armando Amorim. *Amazônia Azul: o mar que nos pertence*. Rio de Janeiro: Record, 2006, p. 51.

Cono del Amazonas y la Cadena Norte Brasileña), Sudeste (región de la Cadena Vitória-Trindade y la Meseta de São Paulo) y Sur (región de la Meseta de Santa Catarina y Cono do Rio Grande). En esos términos, el área oceánica brasileña totalizaría 4.400.000 km², correspondiendo, aproximadamente, a la mitad del área terrestre, lo que le equivaldría el nombre de "Amazonia Azul".[25]

Tras analizar los documentos de la propuesta encaminada por Brasil, la Comisión – por medio del documento CLCS/54, de 27 de abril de 2007 – no aprobó integralmente el pleito brasileño. Del total de la zona reivindicada por Brasil, la CLPC no concordó con cerca de 190.000 km², o sea, 20% del área extendida allá de las 200 millas marinas.[26]

Con todo, el Anexo II de la CONVEMAR – que trata de la Comisión de Límites de la Plataforma Continental – permite que el Estado costero, al discordar de las recomendaciones de la CLPC, presente "dentro de un plazo razonable una propuesta revista o una nueva propuesta" (artículo 8º, Anexo II).

Esa es la situación actual del pleito brasileño a una plataforma continental extendida, que, luego recibidas las recomendaciones iniciales de la CLPC, reinició los estudios con fines de encaminar una propuesta revista a la Comisión. Sin embargo, distinto de lo que ocurrió en 2004, el Gobierno brasileño envió a la Comisión, el 10 de abril de 2015, una sumisión *parcial* revista, solamente acerca del "Área Sur". Las demás regiones de la sumisión brasileña que no fueron íntegramente aceptadas por la CLPC, en especial la cadena Vitória-Trindade y meseta de São Paulo, serán sometidas a pleitos posteriores.[27]

Con todo, en medio a eso, la Comisión Interministerial para los Recursos del Mar (CIRM), por medio de la Resolución nº 3, de 26 de agosto de 2010, admitió la propuesta de la Subcomisión para el LEPLAC, que deliberó sobre el derecho del Estado brasileño de evaluar de manera previa los pedidos de autorización para la realización de investigaciones en la plataforma continental brasileña más allá de las 200 millas marinas, determinando así que

> *[...] independientemente del límite exterior de la Plataforma Continental (PC) más allá de las*

25 PEREIRA DA SILVA, *op. cit.*, p. 115.

26 CLCS/54, 27 April 2007. *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission*.

27 Commission on the Limits of the Continental Shelf (CLCS), Outer limits of the continental shelf beyond 200 nautical miles from the baselines: submissions to the Commission: Partial revised Submission by Brazil, Disponible en: <http://www.un.org/depts/los/clcs_new/submissions_files/submission_bra_rev.htm>. Acceso en: 16 de junio de 2017.

> *200 millas marinas no haber sido definitivamente establecido, Brasil tiene el derecho de evaluar previamente los pedidos de autorización para la realización de investigación en suya PC más allá de las 200 millas marinas, teniendo como base la propuesta de límite exterior, encaminada a la Comisión de Límites de la Plataforma Continental (CLPC), en 2004.*[28]

De ese modo, el Gobierno brasileño, por acto unilateral, mientras aguarda la posición final de la CLPC, decidió que el propio Brasil es aquel que tiene el derecho de evaluar previamente los pedidos de autorización para la realización de investigaciones en la plataforma continental brasileña extendida. La actitud brasileña es perfectamente defensable, protegiendo sus derechos mientras aguarda una nueva manifestación de la Comisión.[29]

El reflejo de la importancia y del interés que el tema de la "Amazonia Azul" viene despertando en la sociedad pude ser ejemplificado por la iniciativa del Senado Federal de establecer el "Día de la Amazonia Azul" (PLS 30/2014). En junio de 2015, el Proyecto de Ley 7903/14 del Senado fue aprobado por la Comisión de Constitución y Justicia (CCJ) de la Cámara de los Diputados en carácter conclusivo. El proyecto original establecía el día 10 de diciembre para recordar la fecha; sin embargo, por enmienda propuesta en la Comisión de Cultura y aprobado por la CCJ de la Cámara de los Diputados, fue instituido – por la Ley n. 13.187, de 11 de noviembre de 2015 –, el "Día de la Amazonia Azul" el 16 de noviembre, fecha de la entrada en vigor de la CONVEMAR en 1994, y no el 10 de diciembre, fecha de la firma de la Convención, tal como previsto en el proyecto original del Senado.[30]

3.2 El Programa Archipiélago de São Pedro y São Paulo

28 Disponible en: <https://www.mar.mil.br/secirm/documentos/atas/resolucao-3-2010.pdf>. Acceso en: 16 de junio de 2017. Traducción del original: *"[...] independentemente de o limite exterior da Plataforma Continental (PC) além das 200 MN não ter sido definitivamente estabelecido, o Brasil tem o direito de avaliar previamente os pedidos de autorização para a realização de pesquisa na sua PC além das 200 MN, tendo como base a proposta de limite exterior encaminhada à Comissão de Limites da Plataforma Continental (CLPC), em 2004"*.

29 PEREIRA DA SILVA, *op. cit.*, p. 116-117.

30 Câmara dos Deputados, Aprovada comemoração do Dia Nacional da Amazônia Azul em 16 de novembro, Disponible en: <http://www2.camara.leg.br/camaranoticias/noticias/MEIO-AMBIENTE/490640-APROVADA-COMEMORACAO-DO-DIA-NACIONAL-DA-AMAZONIA-AZUL-EM-16-DE-NOVEMBRO.html>. Acceso em: 16 de junio de 2017.

(PROARQUIPELAGO)

Rumbo al camino para aumentar su presencia en el Atlántico Sur, Brasil lanzó un segundo plan importante, el Programa Archipiélago de São Pedro y São Paulo (PROARQUIPELAGO), creado por la Resolución n. 1 de la CIRM, de 11 de junio de 1996, que estableció también el Grupo de Trabajo Permanente para Ocupación e Investigación en el Archipiélago de São Pedro y São Paulo.

El archipiélago de São Pedro y São Paulo – anteriormente conocidos como Rocas de São Pedro y São Paulo – es compuesto por seis islas mayores, cuatro menores y otras varias puntas de rocas, presentando un área total de 17.000 m²; la distancia entre los puntos extremos es de cerca de 420 metros. Se trata de uno de los puntos más inhóspito del país, una vez que el conjunto de islas no tiene playas, vegetación y agua potable. El archipiélago se queda muy próximo de la línea del Ecuador, distante cerca de 1.110 km de la ciudad de Natal y 520 km del archipiélago de Fernando de Noronha.[31]

Cuando se creó el PROARQUIPELAGO, el objetivo principal del programa era la implementación de una Estación Científica permanente en aquella zona, para a partir de entonces desarrollar, de forma sistemática, investigaciones científicas en el local, ocupándole de forma definitiva.

El renovado interés por São Pedro y São Paulo se dio a partir de la ratificación por Brasil de la CONVEMAR, en diciembre de 1988, en especial, en razón de lo que dispone el artículo 121:

> *1. Una isla es una extensión natural de tierra, rodeada de agua, que se encuentra sobre el nivel de ésta en pleamar. 2. Salvo lo dispuesto en el párrafo 3, el mar territorial, la zona contigua, la zona económica exclusiva y la plataforma continental de una isla serán determinados de conformidad con las disposiciones de esta Convención aplicables a otras extensiones terrestres. 3. Las rocas no aptas para mantener habitación humana o vida económica propia no tendrán zona económica exclusiva ni plataforma continental*

Debido a ese dispositivo, una isla es una formación natural de tierra, rodeada de agua, que posee, consecuentemente, mar territorial, zona contigua, zona económica exclusiva y plataforma continental, esto es, sus límites pueden ser extendidos hasta 200 millas marinas a

31 VIANA, Danielle de Lima. *O Arquipélago de São Pedro e São Paulo: 10 anos de Estação Científica*. Brasília: SECIRM, 2009, p. 15-16.

partir de las líneas de base. Sin embargo, el párrafo 3º de ese mismo artículo 121 dispone que: "las rocas que, por si propias, no sirven para la habitación humana o para la vida económica no deben tener zona económica exclusiva ni tampoco plataforma continental", esto es, las rocas tendrían apenas mar territorial (12 millas marinas) y zona contigua (otras 12 millas marinas).

Es interesante recordar que las rocas (o islas) de São Pedro y São Paulo siempre fueron llamadas de "rocas". La propia Resolución n. 1/96 de la CIRM indicó la importancia de la alteración de tal denominación cuando propuso "que sean tomadas las medidas legales necesarias para la alteración de la toponimia de las Rocas de São Pedro y São Paulo para Archipiélago de São Pedro y São Paulo".

Después de algunos estudios sobre la ocupación del archipiélago, fue presentado un nuevo cuadro toponímico para la región. Oficialmente, de acuerdo con la Carta Náutica n. 11 (1998) trazada pela *Diretoria de Hidrografia e Navegação*, el archipiélago de São Pedro y São Paulo es formado por un conjunto de cinco islotes (Barão de Tefé, Belmonte, São Pedro, São Paulo y Sirius) y cinco rocas (Atobá, Viuvinha, Graça Aranha, Coutinho y Sacadura Cabral).

La consecuencia más importante es que el hecho de transformarse en un archipiélago, esto es, un conjunto de islas, permite que Brasil añada 450.000 km² de plataforma continental y zona económica exclusiva alrededor del archipiélago, área que equivale aproximadamente a 15% de toda área marítima brasileña o 6% del territorio brasileño.[32]

Sin embargo, la medida no pudo simplemente limitarse a la toponimia, pues el país tuvo que ocupar efectivamente el conjunto de islotes. En 1998, ocurrió la inauguración de la Estación Científica en São Pedro y São Paulo, "a partir del cual el local permanece permanentemente habitado", según el entendimiento oficial de la CIRM. La Estación Científica, que pasó por un proceso de remodelación acabado en 2008, posee un alojamiento para cuatro personas, sala de estar, laboratorio, cocina, cuarto de baño, terraza, área para almacenamiento de agua potable y una edificación de apoyo para el generador de emergencia.[33]

Por lo tanto, el PROARQUIPELAGO está inserido en este contexto, que es lo de ocupar y justificar una zona económica exclusiva y una plataforma continental de 200 millas marinas en la región. Entre las competencias del programa está la de conducir un programa continuo de investigaciones científicas en la región, en las áreas de geología, geofísica, biología, recursos de pesca, oceanografía, meteorología y sismología.[34]

32 *Ibidem*, p. 11.

33 PROARQUIPELAGO, Disponible en: <https://www.mar.mil.br/secirm/portugues/arquipelago.html>. Acceso en: 16 de junio de 2017.

34 ARRAIS, Raimundo Pereira Alencar. O nascimento de um arquipélago: São Pedro e São

3.3 El Programa de Investigaciones Científicas en la Isla de la Trindade (PROTRINDADE)

La isla de Trindade se encuentra a poco más de 1.160 km de Vitória, capital del estado de Espírito Santo. Posee una extensión de 10,2 km² y es fuertemente accidentada, con elevaciones que atingen hasta 600 metros (Pico Deseado). Ya la isla de Martin Vaz – un conjunto menor de islas – se encuentra a unos 48 km a leste de Trindade. El archipiélago constituye el extremo leste de una cadena de montañas submarinas que tiene inicio cerca de la ciudad de Vitoria y emerge del fondo oceánico a más de 5.000 metros de profundidad donde existieron volcanes que formaron las dos islas principales, además de islas menores y rocas. Debido a su origen volcánica, hay considerable presencia de lavas, cenizas y arenas volcánicas. La última erupción volcánica ocurrió hace casi 50.000 años.[35]

La posesión pacífica de la isla de Trindade que nunca fue objeto de contestación y entendida como parte integrante del territorio brasileño desde la independencia fue, en enero de 1895, ocupada por la Gran Bretaña, bajo la excusa de que la isla fue abandonada. La presencia británica causó indignación popular y provocó grande reacción diplomática. La reacción del Legislativo también fue de indignación y apoyo al Ejecutivo.[36]

La anexión británica se había llevado a cabo de manera confidencial con el fin de preservar los intereses comerciales de las compañías de telégrafos dispuestos a poner un cable entre Gran Bretaña y el río de la Plata, pero teniendo en cuenta la larga distancia entre la Isla Ascensión y Buenos Aires ese sería demasiado largo para el éxito comercial, una alternativa podría ser dividir en cable en dos secciones, utilizando la isla de Trindade en su ruta.[37]

Brasil rechazó todas las iniciativas de que la cuestión fuera solucionada por arbitramento. El argumento utilizado era el de que la isla, mismo deshabitada, no estaba abandonada. El litigio fue solucionado por la mediación del rey de Portugal D. Carlos I, de manera favorable y justa para Brasil. En agosto de 1896, el encargado británico de negocios comunicó al Ministerio de Relaciones Exteriores el reconocimiento británico de la soberanía brasileña sobre la isla. Pocos días después, la

Paulo e a presença do Estado brasileiro no Oceano Atlântico. *Revista Porto*, n. 2, 2012, p. 66-67.

35 PROTRINDADE, Disponible en: <https://www.mar.mil.br/secirm/portugues/trindade.html>. Acceso em: 16 de junio de 2017.

36 BUENO, Clodoaldo Bueno. *A República e sua política exterior (1889-1902)*. Brasília: Funag, 1995, p. 333.

37 MARSTON, Geoffrey. The Anglo-Brazilian Dispute over the Island of Trindade, 1985-6. *British Yearbook of International Law*, vol. 54, n. 1, 1984, p. 226.

legación inglesa en Rio de Janeiro confirmó el reconocimiento y anunció que iba a retirar las señales de la ocupación. Tras ser desocupada, fue enviado el cruzador *Benjamin Constant,* en enero de 1897, para hacer nuevos señales de la presencia brasileña en la isla.[38]

En virtud de la Primera Guerra Mundial, en 1916, Trindade fue ocupada con fines de impedir su utilización por navíos adversarios. En 1941 fue nuevamente ocupada militarmente para impedir que los submarinos enemigos la utilizasen como base de apoyo. En 1950, una expedición científica fue enviada para planear la ocupación permanente de la isla. En 1957, fue creado el Puesto Oceanográfico de la Isla de Trindade.[39]

El PROTRINDADE, siguiendo la línea de los programas anteriores, fue aprobado por la Resolución n. 3 de la CIRM, de mayo de 2007, con la finalidad principal de promover y administrar el desarrollo de investigaciones científicas en las islas de Trindade y Martin Vaz y en el área marítima adyacente.

Además de eso, el PROTRINDADE cumple con las directrices de la Política Nacional para los Recursos del Mar (PNRM), de la Política de Defensa Nacional (PDN) y de la Política de Medio Ambiente (PNMA), y tiene otros objetivos como: construir y mantener, con el consentimiento de la Marina de Brasil instalaciones para la acomodación de investigadores y realización de investigaciones científicas, juntamente a las instalaciones que ya existen en la isla de Trindade y Martin Vaz y en la zona marítima adyacente. Uno de los principales resultados del PROTRINDADE fue la construcción de la Estación Científica de la Isla de Trindade (ECIT), en diciembre de 2011, con capacidad para hospedar hasta ocho investigadores.

3.4 El Programa de Prospección y Exploración de Recursos Minerales de la Zona Internacional del Atlántico Sur y Ecuatorial (PROAREA)

En septiembre de 2009, por medio de la Resolución n. 3 de la CIRM, fue creado el Programa de Prospección y Exploración de Recursos Minerales de la Zona Internacional del Atlántico Sur y Ecuatorial (PROAREA), es un nuevo y relevante avanzo brasileño en su renovado interés oceánico.

El PROAREA es especialmente interesante porque,

38 KÄMPF, Martin Normann. *Ilha da Trindade: a ocupação britânica e o reconhecimento da soberania brasileira (1895-1896)*. Brasília: Funag, 2016, p. 175-189.

39 PROTRINDADE, Disponible en: <https://www.mar.mil.br/secirm/portugues/trindade.html>. Acceso en: 16 de junio de 2017.

diferentemente de lo que ocurre en los programas analizados anteriormente, su actuación no ocurre dentro de los límites nacionales, pero en la "Zona". En los términos del artículo 1º de la CONVEMAR, "por 'Zona' se entiende los fondos marinos y oceánicos y su subsuelo fuera de los límites de la jurisdicción nacional", esto es, en cierto sentido, se trata de un concepto jurídico residual, una vez que comprende los espacios marinos que no están bajo el dominio de ningún Estado. La Zona y sus recursos son patrimonio común de la humanidad (artículo 136 de la CONVEMAR).

Para cuidar de la Zona y de los recursos, la CONVEMAR creó una institución con enfoque exclusivo para esta finalidad: la Autoridad Internacional de los Fondos Marinos (de ahora en delante Autoridad). La Autoridad es la organización por medio de la cual los Estados Partes administran los recursos de la Zona. Tiene sede en Kingston, capital de Jamaica.

El hecho de que la Zona sea considerada patrimonio común de la humanidad, con todo, no quiere decir que ningún tipo de actividad pueda ser ejercida dentro de su perímetro. Esto solo impide que los Estados puedan actuar de modo aislado y unilateral en esta parte de los fondos marinos. De esa forma, la internacionalización de la Zona y sus recursos implica la administración por la Autoridad.

La idea inicial de los Estados durante el proceso de negociación de la CONVEMAR era de que la propia Autoridad pudiera realizar directamente las actividades en la Zona, por medio de la Empresa, como está prescrito en el artículo 170.1 de la CONVEMAR: "La Empresa será el órgano de la Autoridad que realizará actividades en la Zona directamente en cumplimiento del apartado a) del párrafo 2 del artículo 153, así como actividades de transporte, tratamiento y comercialización de minerales extraídos de la Zona".

La Empresa sería, entonces, una especie de órgano operacional de la Autoridad. Sin embargo, más de veinte años después de la CONVEMAR entrar en vigor, la Empresa todavía no fue creada. Eso sucedió porque el Acuerdo Relativo a la Aplicación de la Parte XI de la CONVEMAR (1994) prácticamente inviabilizó su establecimiento. El modelo vigente actualmente privilegia la exploración de la Zona vía empresas privadas que presentan planes de trabajo que deben ser patrocinados por Estados Partes de la CONVEMAR.

Hasta el mes de junio de 2017, la Autoridad había firmado 27 contratos de exploración, que cubren más de un millón de kilómetros cuadrados del fondo del mar. Diecisiete de esos contratos se refieren a la explotación de nódulos polimetálicos, seis de sulfuros polimetálicos y cuatro de cortezas de ferromanganeso de cobalto.[40]

40 ISA. *Deep Seabed Minerals Contractors*. Disponible en: <https://www.isa.org.jm/deep-seabed-minerals-contractors>. Acceso en: 16 de junio de 2017.

Según el sitio electrónico del PROAREA, los objetivos del programa, entre otros son: i) la ampliación de la presencia brasileña en el Atlántico Sur y Ecuatorial; ii) la recolección de datos para dar soporte a futuras requisiciones de áreas de prospección y exploración mineral junto a la Autoridad Internacional de los Fondos Marinos; e, iii) la obtención de informaciones técnicas, económicas y ambientales necesarias para que empresas, públicas y privadas, y órganos gubernamentales puedan desarrollar actividades de explotación mineral y gestión ambiental en el área allá de la jurisdicción brasileña. Y entre las principales actividades de trabajo del PROAREA están: i) integración y sistematización de informaciones; ii) evaluación de la potencialidad mineral; iii) estudios de viabilidad económica, técnica, ambiental y legal; e, iv) prospección y exploración de recursos minerales (contrato con la Autoridad).[41]

Sobre ese último punto, vale la pena señalar que Brasil ya presentó su plan de trabajo en la Zona para la Autoridad. La propuesta brasileña fue encaminada en diciembre de 2013 para la exploración de cortezas de ferromanganeso de cobalto (*cobalt-rich ferromanganese crusts*) en la Zona, por medio de la Companhia de Pesquisa de Recursos Minerales (CPRM), que es una compañía estatal.

La zona que figura en el plan de trabajo de la CPRM es en la región del Elevado do Rio Grande (*Rio Grande Rise*), cerca de 1.500 km de la ciudad de Rio de Janeiro. El plan de trabajo fue aprobado inicialmente en la Comisión Jurídica y Técnica, y posteriormente por el Consejo de Autoridad. La zona de exploración comprende 150 bloques, cada uno con un área de 20 km². Los bloques, de forma rectangular, están agrupados en ocho grupos, cada uno con 5 a 56 bloques contiguos. Todos los bloques se encuentran completamente dentro de una zona geográfica de un tamaño que no excede a 550 km².[42]

El contrato entre la Autoridad Internacional y la CPRM fue firmado el 9 de noviembre de 2015 y tiene duración inicial de quince años. De acuerdo con el plan de trabajo presentado por la CPRM, la ejecución será realizada en tres fases, con duración de cinco años cada una. En la primera etapa serán hechos estudios de sondeos exploratorios marinos. En la segunda etapa, será realizada una evaluación de las características mineralógicas, estructurales y geomorfológicas de la región. Y, en la tercera etapa, el plan de trabajo prevé una selección de las zonas para estudio de viabilidad económica, ambiental y técnica de

41 PROAREA, Disponible en: <https://www.mar.mil.br/secirm/portugues/proarea.html>. Acceso en: 16 de junio de 2017.

42 INTERNATIONAL SEABED AREA (ISA). ISBA/20/C/30, 9 July 2014. *Report and recommendations of the Legal and Technical Commission to the Council of the International Seabed Authority relating to an application for the approval of a plan of work for exploration for cobalt-rich ferromanganese crusts by Companhia de Pesquisa de Recursos Minerais*.

los depósitos minerales identificados.[43]

4. CONCLUSIÓN

El creciente interés por el Atlántico por parte del Estado brasileño es significativo y variado. Significativo en el sentido de que pleitea vastas áreas de actuación, sea en el caso del proyecto "Amazonia Azul", por medio de expansión de su plataforma continental, sea en el caso del PROAREA, que pretende explorar una región que se encuentra más allá de su jurisdicción nacional. Y es una presencia variada de modo que otras iniciativas, como el PROTRINDADE y el PROARQUIPELAGO, buscan consolidar y profundizar su presencia en archipiélagos que son incontestablemente brasileños.

Por lo tanto, el Derecho del Mar, tradicionalmente relegado a una posición de poca importancia en el contexto histórico, jurídico y político nacional – excepto por los episodios de la "guerra de la langosta" y de la expansión del mar territorial para 200 millas marinas – deberá ser visto con una nueva visión estratégica nacional, marcando una mayor presencia del país en el Atlántico Sur.

La costa brasileña es utilizada de diversas formas: fuente de alimentos, escenario de actividades recreativas y deportivas, turismo, de actividades relacionadas con la explotación de petróleo y gas, entre muchas otras. El momento ahora es de fortalecimiento del Derecho del Mar en Brasil, que satisfaga ese escenario de creciente interés y presencia atlántica.

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EL SISTEMA INTERAMERICANO Y LA PRO-TEC-CIÓN DE LOS DERECHO HUMANOS DE LAS MUJERES: MONITOREO DE LAS PETICIONES CONTRA BRASIL (2006-15)

THE INTER-AMERICAN SYSTEM AND THE PROTECTION OF WOMEN'S HUMAN RIGHTS: MONITORING PETITIONS AGAINST BRAZIL (2006-15)

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Resumen: Este artículo contextualiza el desarrollo de los derechos humanos de las mujeres en la contemporaneidad, haciendo hincapié del sistema regional de protección y de la Convención Americana de Derechos Humanos/1969. En este contexto, son identificados los derechos específicos relativos a la protección de las mujeres y de los órganos de control administrativo y judicial con competencia para procesar y decidir sobre las demandas propuestas. Este estudio pretende investigar la hipótesis de que el sistema de peticiones individuales o quejas (individual complaints) propuestas junto a la Comisión Interamericana de Derechos Humanos es mecanismo de

control y mecanismo capaz de reflejar la situación de violación de los derechos contra la mujer en el país y puede funcionar como instrumento alternativo para garantizar los derechos humanos.

Palabras clave: Derechos humanos - Mujeres - Sistema Interamericano - Convención Americana.

Abstract: This article contextualizes the development of human rights of women in contemporary society, with emphasis on regional human rights system and the American Convention on Human Rights/1969. In this context, the specific rights relating to the protection of women and the administrative and judicial bodies with powers to process and act on the demands proposals are identified. This work aims to investigate the hypothesis that the system of individual petitions or complaints (individual complaints) proposed by the Inter-American Commission on Human Rights it is control and monitoring mechanisms able to mirror the situation of rights violations against women in the country and can act as alternative instruments to guarantee human rights.

Keywords: Human rights - Women - Inter-American System - American Convention.

1.INTRODUCCIÓN

En las últimas cinco décadas, los derechos humanos se han convertido en un asunto de interés internacional, afirmándose como una rama del derecho dotada de su propia especificidad, incluso como problema de estudio e investigación. Sin embargo, aunque los derechos humanos hayan tenido este impresionante desarrollo a través de tratados y convenciones internacionales, siguen produciendo una eficacia limitada desde el punto de vista del cumplimiento de sus obligaciones y garantías (TRINDADE.1991).

En su proceso de "juridicización", los Pactos Internacionales de Derechos Humanos (1969)[1], también conocidos como *International Bill*

1 De hecho, la Declaración Universal de Derechos Humanos (1948), aprobados por la Asamblea General de las Naciones Unidas, desempeñó un papel clave en la definición y fijación de este elenco mínimo de derechos y libertades fundamentales garantizados.

[3] Hasta el primer semestre de 2012, fueron hechos 47.555 registros de atención en la Central de Atención a la Mujer. A lo largo de 2011, fueron 74.984 registros. muy por debajo de los 108.491 de 2010. El tipo de registro que aparece en mayor número es sobre la violencia física contra las mujeres que puede ir desde corporales leves, graves o muy graves, intento de asesinato y asesinato. Hubo 46.838 en 2010, 45.953 63 n 2011 y 26.939 hasta julio de 2012. Casos de violencia sexual como violación, explotación sexual y acoso en el trabajo aparecen en 5º lugar

of Rights, inauguraron el sistema global de protección de los derechos civiles, políticos, sociales, económicos y culturales, simultáneamente con la creación de los sistemas de protección a nivel regional, como el interamericano (PIOVESAN, 2000).

Se ampliaría el sistema global de derechos humanos, en su conjunto, con la introducción de otros tratados multilaterales que garantizaron, en especie, la protección contra las violaciones de los derechos, como la eliminación de la discriminación contra la mujer. La Convención sobre la Eliminación de la Discriminación contra la Mujer (1979), a la cual Brasil se adhirió en 1984, no sólo dirigido a erradicar la discriminación contra la mujer y sus causas, así como para estimular estrategias de promoción de la igualdad de género.

Sin embargo, aunque ha evolucionado en relación con el escenario de protección de derechos específicos, no ha enfrentado con claridad el tema de la violencia contra la mujer, que sólo se produjo con la Convención Interamericana para Prevenir, Punir y Erradicar la Violencia contra la Mujer (1994).

En este contexto, se destaca que ninguno de ellos tiene el poder de sancionar a un Estado parte que viole la convención. De esta manera, en la que además de los mecanismos originales de monitoreo y control definidos por las convenciones internacionales, la Convención Americana sobre Derechos Humanos (1969) prevé mecanismos adicionales a los que se refieren a la presentación de informes periódicos, posibilitando las denuncias de violaciones de derechos en forma de peticiones individuales o quejas presentadas por individuos, grupos de individuos u organizaciones no gubernamentales.

De hecho, basado en los datos estadísticos del UNA-SE y de la UNFPA sobre la violencia contra las mujeres, incluyendo los índices del PNAD[2] nacional, este artículo tiene como objetivo principal investigar la hipótesis de que el sistema de peticiones individuales o quejas (*individual complaints*), establecido en la Convención Americana y propuestas ante la Comisión Interamericana, sea mecanismo de control y monitoreo capaz de reflejar la situación de violación de los derechos contra la mujer en el país, pudiendo funcionar como instrumentos alternativos de solución y garantía de los derechos humanos.

Para ello, se presentará un panorama de las principales convenciones internacionales sobre la protección de los derechos humanos de la mujer, seguido de la descripción del sistema regional americano, desde la identificación de los derechos y las garantías protegidos hasta la previsión y monitoreo de competencias de los órganos interamericanos. Finalmente, se realizará una recolección de los informes de la Comisión Interamericana contra el Estado brasileño,

con 2.318 casos en 2010, 1.298 en 2011 y 915 este año.

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en materia de violación al derecho de la mujer, presentadas en el período de 2006 a 2015.

2 PANORAMA DE LA PROTECCIÓN INTERNACIONAL DE LOS DERECHOS HUMANOS DE LA MUJER

Al final de cinco décadas de una extraordinaria evolución, el derecho internacional de los derechos humanos se afirma como una rama autónoma del derecho siendo beneficiada con su propia especificidad. Se trata esencialmente de un derecho a la protección de los seres humanos, formado por el conjunto de normas y una serie de mecanismos de supervisión y control específicos (COMPARATO, 2003).

De este modo, a diferencia de los tratados en general, en los tratados de derechos humanos la llamada autonomía de la voluntad estatal cede espacio para el fiel cumplimiento de los objetivos y propósitos por sus valores éticos y morales, tratando de ampliar la protección de los derechos de la víctima (PIOVESAN, 2000). Así, es que los tratados internacionales en materia de derechos humanos establecen al menos dos esferas de protección distintas y complementarias a la nacional, una a nivel mundial y la otra en escala regional, respectivamente sometidos a los sistemas de las Organizaciones de las Naciones Unidas y de los Estados Americanos.

En este sentido, el criterio de selección de la norma aplicable deberá utilizar el criterio de la primacía de la norma más benéfica a las personas protegidas (TRINDADE, 1991). Aunque ambas las normativas internacionales son sistemas complementarios al nacional, es posible identificar una clara inflexión no judicial de solución de controversias en el sistema onusiano, diferente del sistema interamericano que prevé una solución predominantemente judicial. (PIOVESAN, 2000)

En 1979, impulsada por la proclamación en 1975, declarado el Año Internacional de la Mujer, y por la Conferencia Internacional de la Mujer en el mismo año, las Naciones Unidas aprobaron la Convención sobre la eliminación de todas las formas de discriminación contra la mujer. Aunque ampliamente aceptada por la comunidad internacional, en la época, más de 100 ratificaciones, ante la paradoja de ser el instrumento internacional de protección que más recibió número de reservas sustanciales[3].

3 De los 100 Estados que inicialmente ratificaron el Tratado, 23 realizaron reservas, de las cuales 88 fueron sustanciales al texto. La mayoría de las reservas sobre la presentación de conflictos relativos a la interpretación del tratado a la jurisdicción de la Corte Internacional de Justicia (art. 29); otros se refieren a la adopción de acciones afirmativas sobre la eliminación de prejuicios y estereotipos (art. 5) y la eliminación de la discriminación política y vida pública (art. 7). Dichas reservas incompatibles con el objeto y propósito de la Convención contradicen

En estos términos, se debe señalar que materia de protección de la mujer, el Estado brasileño ha incorporado a esta Convención Internacional en 1984, con reservas iniciales de algunos dispositivos[4], más tarde superadas por el contenido constitucional actual. Según el art. 1 de la Convención Internacional sobre la discriminación contra la mujer: "cualquier distinción, exclusión o restricción basada en el sexo que tiene por objeto o resultado perjudicar, anular el reconocimiento, la base de la igualdad de hombres y mujeres, de los derechos humanos y de las libertades fundamentales en las esferas políticas, económicas, sociales, culturales y civiles". Cabe señalar que la Convención Internacional, no enfrenta la temática de la violencia contra la mujer de manera explícita (AMARAL, 2006).

Dado este hecho, en 1993, las Naciones Unidas adoptaron la Declaración sobre la Eliminación de la Violencia contra la Mujer, que la define como "cualquier acto de violencia de género que resulte o pueda resultar en daño físico, sexual, psicológico o sufrimiento de la mujer, incluyendo amenazas y actos, coerción o privación arbitraria de la libertad, pudiendo producirse en la esfera pública o en la esfera privada", no adoptada por Brasil.

En el contexto de las normas regionales de protección de los derechos humanos, el país se comprometió con la Convención Americana sobre Derechos Humanos/1969 o "Pacto de San José de Costa Rica", al que se unió en 1992. Esta Convención no trata específicamente sobre el derecho de la mujer, sino remite a las protecciones y garantías de las libertades individuales en general, incluyendo el derecho a la integridad personal (art. 5) y la libertad personal (art. 7).

Unos años más tarde, el país se unió en 1995[5], a la Convención Interamericana para Prevenir, Punir y Erradicar la Violencia contra la Mujer/1994, también llamada "Convención Belén do Pará". La Convención Interamericana reconoce que la violencia contra la mujer constituye una violación de los derechos humanos y las libertades fundamentales de forma que limitar total o parcialmente el reconocimiento, goce y ejercicio de tales derechos y libertades, incorporando muchos conceptos de la Declaración de Viena de 1993 de las Naciones Unidas. Fue "[...] el tratado con el mayor número de ratificaciones dentro de los sistemas regionales de protección de los derechos humanos "(NEGREIROS, 2010).

Así, basado en el contenido de este derecho internacional, en materia de derechos humanos de la mujer, especialmente en materia

por lo menos la Convención de Viena sobre Derechos de los Tratados de 1969, en su art. 19.

4 El Decreto Legislativo n. 93 de 14 de noviembre de 1983 hizo reservas a los arts. 15 § 4 sobre la libertad en la elección de domicilio y al art. 16 § 1 letras *a*, *c*, *g* y *h.*, sobre la igualdad de derechos en el matrimonio y en las relaciones familiares.

5 Decreto n ° 1.973 de 1996.

de prevención, cohibición y punición de prácticas que causen la violencia contra la mujer, se observa la predicción de un conjunto de mecanismos de control y monitoreo de los tratados que van más allá de los tradicionales informes periódicos elaborados por los Estados partes, que son peticiones individuales o quejas (*individual complaints*).

En efecto, en función de resultados preliminares, las peticiones han sido herramientas de gran alcance en la denuncia de desobediencias por parte del Estado brasileño al "Pacto de San José", como queda claro en el contenido de la Recomendación 54/2001 de la Comisión Interamericana sobre el caso de Maria da Penha. Para confirmar esta hipótesis, se realizó un sondeo de las acciones perpetradas contra el Estado Brasileño en el periodo 2002-2012 y el análisis de los criterios de admisibilidad de las peticiones de los informes de la Comisión Interamericana.

3 CONVENCIÓN AMERICANA SOBRE DERECHOS HUMANOS (PACTO DE SAN JOSÉ DE COSTA RICA) Y SUS DISPOSITIVOS DE MONITOREO Y CONTROL

La Convención Americana sobre Derechos Humanos, negociada en San José de Costa Rica el 22/11/1969, entró en vigor internacionalmente el 18/07/1978, tras el 11º (undécimo) depósito de un instrumento de ratificación o de adhesión en la Secretaría General de la Organización de los Estados Americanos, en los términos de su art. 74-2, entrando en vigor, para los demás Estados, en la fecha del depósito de su instrumento de ratificación o de adhesión. En este sentido, la Convención Americana sobre Derechos humanos cuenta con 19 signatarios[6] y 25 instrumentos de ratificación/adhesión depositados, de entre el total de 35 (treinta y cinco) países americanos[7]. Brasil recibió el Pacto de San José en su ordenamiento el 26.05.1992, a través

6 [7] Entre los signatarios, sólo los Estados Unidos nunca depositaron instrumento de ratificación o de adhesión a la Convención. (OEA. CIDH, 2017).

7 [8] Antigua y Barbuda, Bahamas, Belice, Canadá, Cuba, Guyana, San Cristóbal y Nieves, Santa Lucía, San Vicente y las Granadinas son los Estados que no han firmado o adherido al Pacto, en el caso del Estado cubano, en 2009, durante la 39ª Asamblea General de OEA se ha convertido en sin efecto la Resolución que excluía a Cuba de la Organización en 1962, dando lugar a su reintegración. Antes de eso, la Comisión Interamericana de Derechos Humanos abogó por la colocación de la exclusión de ese país, efectuada por medio de la Resolución VI de la Octava Reunión de Consulta de Ministros de las Relaciones Exteriores, compuesto por sólo el Gobierno cubano y no el Estado miembro, haciendo hincapié en la diferencia entre los conceptos jurídicos del Estado y Gobierno, manteniendo el Estado cubano como miembro participante del sistema interamericano y ,por lo tanto, responsable por los compromisos asumidos con la Declaración Americana de los Derechos y Deberes del Hombre y con la Carta de la Organización de Estados Americanos. (OEA. CIDH, 2017).

del Decreto Legislativo nº. 27, de 26.05.1992 y Decreto nº. 678, de 25.09.1992.

Aparte de ratificar el Pacto, los Estados pudieron reconocer o no la competencia de la Corte Interamericana de Derechos Humanos para todos los casos relativos a la interpretación o aplicación de la Convención (art. 62 - 1) y la competencia de la Comisión Interamericana para los casos de peticiones específicas presentadas por los Estados Partes contra Estados Partes (art. 45-1). De entre los 25 países que ratificaron/se adhirieron al Pacto, tres no aceptaron la competencia de la Corte[8] y quince no aceptaron la competencia de la Comisión[9], en los términos anteriormente expuesto. Cabe subrayar que la competencia de la Comisión para apreciar los casos de violaciones de Estados contra sus nacionales no depende de declaración expresa, siendo inherente a la ratificación del Pacto.

La interpretación del texto de la Convención no puede implicar en supresión, limitación o exclusión del goce o ejercicio de los derechos previstos, excepto en los casos de guerra, peligro público u otra emergencia afín (art. 29), en este último caso, las garantías previstas en el Pacto pueden suspenderse por tiempo limitado, siempre y cuando no pongan fin a la discriminación y no alcancen los derechos determinados en los artículos 3 (personalidad jurídica) , 4 (vida), 5 (integridad personal), 6 (prohibición de esclavitud y servidumbre), 9 (legalidad y retroactividad), 12 (libertad de conciencia y de religión), 17 (protección de la familia), 18 (derecho al nombre), 19 (derechos del niño), 20 (nacionalidad) y 23 (derechos políticos) o su protección de garantías esenciales, en virtud del art. 27.

Además, el texto de la Convención trata de la posibilidad de realización de reservas[10](art. 75), sobre la posibilidad de proposiciones de enmiendas al texto, con sumisión de propuestas por los Estados partes, Comisión o Corte a la Asamblea General (art. 76) o protocolos facultativos, con propuesta por los Estados partes o por la Comisión[11]

8 Dominica, Grenada y Jamaica. El Perú reconoció la competencia de la Corte en 1981, este reconocimiento fue retirado en 1999 y volvió a reconocer el 29.01.2001, con vigencia ininterrumpida a partir del depósito de su instrumento de ratificación el 21.01.1981. (OEA. CIDH, 2017).

9 Barbados, Bolivia, Brasil, Dominica, El Salvador, Grenada, Guatemala, Haití, Honduras, México, Panamá, Paraguay, República Dominicana, Suriname y Trinidad y Tobago. (OEA. CIDH, 2017).

10 De los 25 países que se unieron a la Convención, sólo Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Grenada, Guatemala, Haití, Honduras, Jamaica, Nicaragua, Panamá, Paraguay, Surinam no hicieron ninguna reserva o declaración interpretativa. La Declaración tuvo lugar solo Brasil: "El gobierno de Brasil considera que los artículos 43 y 48, d, no incluyen el derecho automático de visitas e investigaciones in loco de la Comisión Interamericana de Derechos Humanos, que dependerán de la ausencia expresa del estado". (OEA. CIDH, 2017).

11 La Convención tiene solamente un protocolo facultativo, el protocolo adicional a la

(art. 77), para incluir otros derechos y libertades, y sobre la denuncia a la Convención que puede ocurrir tras cinco años de su entrada en vigor (art. 78-1 y 78-2)[12].

La Convención Americana trae en su seno el compromiso hecho entre los Estados partes para respetar los derechos y libertades reconocidos en ella y garantizar su pleno y libre ejercicio a toda persona, sin discriminación alguna, por motivos de raza, color, sexo, idioma, religión, opiniones políticas o cualquier otra índole, origen nacional o social, posición económica, nacimiento o cualquier otra condición social.

En total, el Pacto de San José de Costa Rica lista 23 (veintitrés) derechos y garantías, distribuidos en 02 (dos) capítulos (II. De los Derechos Civiles y Políticos y III. De los Derechos Económicos, Sociales y Culturales)[13]: Derecho al Reconocimiento de la Personalidad Jurídica (art. 3), Derecho a la Vida (art. 4)[14], Derecho a la Integridad Personal (art. 5)[15], Prohibición de la Esclavitud y Servidumbre (art. 6), Derecho a la Libertad Personal (art. 7), Garantías Judiciales (art. 8)[16], Principio de Legalidad y de la Retroactividad (art. 9), Derecho a la Indemnización (art. 10)[17] , Protección del Honor y de la Dignidad (art. 11), Libertad de

Convención Americana sobre Derechos Humanos en materia de Derechos Económicos, Sociales y Culturales – Protocolo de San Salvador (firmado el 17.11.1988), con dieciséis y quince firmas y quince ratificaciones/Adhesiones. Chile, Haití, Nicaragua, República Dominicana y Venezuela lo firmaron, pero no lo ratificaron, mientras que Brasil, Colombia, Honduras y Suriname no lo firmaron, pero sí lo ratificaron a posteriori. (OEA. CIDH, 2017).

12 En esos términos, Trinidad y Tobago denunció la Convención el 26.05.1998, con vigencia a partir de 26.05.1999. (OEA. CIDH, 2017).

13 Además, el Convenio establece, en su capítulo V, art. 32, los Deberes de las Personas, en el marco de la correlación entre Derechos y Obligaciones, que son: "1. Toda persona tiene deberes para con la familia, la comunidad y la humanidad; 2. Los Derechos de cada persona están limitados por los derechos de los demás, por la seguridad de todos y por las justas demandas del bien común, en una sociedad democrática ". (OEA. CIDH, 2017).

14 Barbados, Guatemala, Trinidad y Tobago formularon reserva a este artigo este artículo, teniendo en cuenta que sus ordenamientos jurídicos internos preveían la posibilidad de la pena de muerte, siendo posteriormente retirada la reserva sólo por Guatemala. México hizo una declaración interpretativa en el sentido de que no entiende que no existe obligación de adoptar o mantener en vigor legislación que proteja la vida desde la concepción, puesto que el asunto sería de dominio exclusivo de los Estados. (OEA. CIDH, 2017).

15 Dominica hizo una declaración interpretativa al artículo interpretativo, de modo que no se interprete como prohibición a castigos corporales, ya que el país tiene una Ley de Castigo Corporal y la ley de Castigo de Menores Delincuentes. (OEA. CIDH, 2017).

16 Dominica y Barbados hicieron recientemente reserva al derecho irrenunciable a la asistencia de defensor proporcionado por el Estado, en casos donde el acusado no se defienda solo o nombre defensor en el plazo legal. (OEA. CIDH, 2017).

17 La Argentina ha presentado una declaración interpretativa de ese artículo para que el error judicial que implique la obligación de indemnizar sea establecido por un tribunal nacional. (OEA. CIDH, 2017).

Conciencia y de Religión (art. 12), Libertad de Pensamiento y Expresión (art. 13), Derecho de Rectificación o Respuesta (art. 14), Derecho de Asamblea (art. 15), Libertad de Asociación (art. 16), Protección de la Familia (art. 17), Derecho a un Nombre (art. 18), Derechos del Niño (art. 19), Derecho a la Nacionalidad (art. 20) , Derecho a la Propiedad Privada (artículo 21)[18], Derecho de Circulación y de Residencia (art. 22), Derechos Políticos (art. 23)[19], Igualdad Ante la Ley (art. 24), Protección Judicial (artículo 25) y Desarrollo Progresivo (art. 26).

Sobre el control externo ejercido por la comunidad internacional cuando un Estado se enlaza a una Convención y asume los deberes y obligaciones derivados, Piovesan hace los siguientes apuntes:

> *Al acoger el aparato internacional de protección, así como obligaciones internacionales que se derive de él, el Estado pasa a aceptar el monitoreo internacional, con respecto a la forma por el cual los derechos fundamentales son respetados en su territorio. El estado pasa, así, a permitir el control y seguimiento de la comunidad internacional, cuando, en casos de violación de derechos fundamentales, la respuesta de las instituciones nacionales se muestra insuficiente y falla, o, a veces inexistente. Se enfatiza, sin embargo, que la acción internacional es siempre una acción suplementaria, constituyendo una garantía adicional de protección de los derechos humanos (PIOVESAN, 2003, p. 61).*

En este sentido, al comprometerse con la Convención, el Estado tiene el deber de someterse a los mecanismos de control establecidos por ella.

Para el cumplimiento de tales derechos, el acto crea dos

18 Aunque reconoce el Derecho a la propiedad privada y a la indemnización justa en caso de expropiación por razones de utilidad pública o interés social, el Chile, se reserva el derecho de que la Comisión y la Corte, al abordar la cuestión, no pueden comentar sobre las razones de utilidad pública o interés social que hayan sido utilizadas por el Estado como fundamento para privar a la persona de su propiedad. La Argentina hizo reserva indicando que no serán sometidas a revisión cuestiones relativas a la política económica del gobierno, las causas de utilidad pública e interés social, o lo que se entienda por una indemnización justa. (OEA. CIDH, 2017).

19 El Uruguay formuló reservas en relación con este artículo, puesto que la Constitución prevé la posibilidad de suspender la ciudadanía de las personas condenadas a pena de prisión. El México también formuló reserva al artículo, considerando que su Carta Magna dispone que los ministros de los cultos no tendrán derecho a voto, activo o pasivo, ni el derecho de asociación con fines políticos. (OEA. CIDH, 2017).

mecanismos de control: peticiones e informes. Las peticiones son instrumentos de control que contienen denuncias o quejas de violación de la Convención por un Estado parte, se presentarán a la Comisión o a la Corte y puede presentarse en dos formas que se difieren sólo por sujetos que pueden interponerlas junto a la Comisión. Las peticiones generales (art. 44) son las que pueden ser presentadas por cualquier persona o grupo de personas o entidad no gubernamental legalmente reconocida. Por otra parte, las Peticiones Específicas son las que contienen comunicaciones hechas por un Estado parte con la alegación de violación de los derechos reconocidos en la Convención por otro Estado parte (art. 45), se considera sólo cuando ambos Estados reconocen la competencia de la Comisión para recibir este tipo de comunicación.

Los informes se presentan en diferentes momentos de la Convención: a) como función de la Comisión Interamericana de Derechos Humanos, que deberá presentar un informe anual a la Asamblea General de la Organización de Estados Americanos (art. 41, g); b) como obligación de los Estados Partes, que deberán presentar a la Comisión una copia de los mismos que deberán ser enviados a las Comisiones Ejecutivas del Consejo Interamericano Económico y Social y del Consejo Interamericano para la Educación, Ciencia y Cultura (art. 42); y c) como parecer final de la Comisión, en los casos que alcance o no una solución a las peticiones o comunicaciones a ella presentadas (arts. 48, 49, 50 y 51).

Además de estos mecanismos de control, el Pacto dispone para la competencia de dos órganos encargados de conocer las cuestiones relacionadas con la Convención, siendo uno de control administrativo (Comisión Interamericana de Derechos Humanos) y uno de control jurisdiccional (Corte Interamericana de Derechos Humanos).

La Comisión es tratada en 18 artículos en el texto de la Convención, los cuales disponen sobre su Organización (arts. 34 a 40), Funciones (arts. 41 a 43), Competencia (arts. 44 a 47) y Procedimientos en la Comisión (arts. 48 a 51).

La Comisión estará compuesta de siete miembros elegidos por la Asamblea General de la lista de candidatos propuestos por los gobiernos de los Estados miembros y no puede estar compuesta de más de un nacional del mismo Estado, con mandatos de cuatro años, con posibilidad de reelección. La Comisión representará todos los miembros de la OEA y contará con estatuto y reglamento propios.

Su función principal es promover la observancia y defensa de los derechos humanos y, por eso, sus responsabilidades son: estimular la conciencia de los derechos humanos en los pueblos de América, formular recomendaciones a los gobiernos de los Estados miembros en materia de derechos humanos, preparar estudios o informes que considere convenientes para el desempeño de sus funciones, solicitar

información a los Estados miembros en materia de derechos humanos , cumplir con las consultas y prestar asesoramiento sobre los derechos humanos a los Estados que lo soliciten, actuar con respecto a las peticiones y otras comunicaciones de su competencia, presente informe anual a la Asamblea General de la OEA.

Posee Jurisdicción para examinar las peticiones generales presentadas por personas, grupos de personas o entidades no gubernamentales contra los Estados partes y, reconocida la competencia por los Estados miembros, también para apreciar peticiones específicas de Estado parte contra Estado parte.

El procedimiento ante la Comisión será mejor analizado cuando sean presentados los resultados del análisis de peticiones impetradas como mecanismo de control previsto en la Convención.

La Corte Interamericana de Derechos Humanos aparece en 18 (dieciocho) artículos, de modo que el texto del Pacto dispone sobre su organización (arts. 52 a 60), Competencias y Funciones (arts. 61 a 65) y como es el procedimiento ante la Corte (arts. 66 a 69).

La Corte estará compuesta de siete jueces, nacionales de los Estados miembros y no puede haber dos jueces de la misma nacionalidad, que son elegidos por seis años, con posibilidad de reelección. El *quorum* para las deliberaciones en la Corte es de cinco jueces y la Comisión comparecerá a todos los casos ante la Corte. La Corte elaborará su propio estatuto, que será sometido a la aprobación de la Asamblea General y contará con su propio regimiento.

Su función principal es conocer los casos relativos a la interpretación y aplicación de las disposiciones de la Convención.

Solamente los Estados partes y la Comisión pueden someter casos a la decisión de la Corte, y para eso es necesario que haya sido agotado el procedimiento de análisis ante la Comisión. La Corte funcionará sólo en casos donde los Estados partes hayan reconocido su competencia, sea incondicionalmente o bajo condición de reciprocidad.

Sus decisiones implican determinar que sea asegurado al perjudicado el disfrute del derecho o libertad violados, que sean reparadas las consecuencias de la medida o situación de la violación y/o el pago de indemnización, pudiendo tomar decisiones de carácter permanente y, algunos casos de ex5trema gravedad y urgencia y cuando sea necesario para evitar daños irreparables, pueden adoptar medidas provisionales que se aplican.

Además, la Corte podrá ser consultada por los Estados miembros de la interpretación de la Convención y podrá emitir pareceres sobre la compatibilidad de leyes internas con el texto del Pacto y, aún, con la Carta de la OEA, a solicitud de un Estado miembro.

La sentencia de la Corte deberá basarse y tendrá carácter definitivo e indiscutible y puede haber solicitud de interpretación, en un

plazo de 90 días, sobre el sentido o alcance de la sentencia. Los Estados partes en la Convención, que acepten la jurisdicción de la Corte, se comprometen a cumplir con sus decisiones, en los casos en que sean partes.

4 EL SISTEMA DE MONITOREO DE LA CONVENCIÓN AMERICANA SOBRE DERECHOS HUMANOS/1969 Y LAS PETICIONES INDIVIDUALES EN MATERIA DE DERECHOS HUMANOS DE LA MUJER – ANÁLISIS DE LOS INFORMES (2006-2015)

Para el análisis del sistema de monitoreo de la Convención Americana sobre Derechos Humanos fueron recolectados y seleccionados datos extraídos de informes anuales de la Comisión Interamericana sobre Derechos Humanos en su página oficial[20], según la clasificación proporcionada por la Comisión, los informes se clasifican en: a) informes presentados a la Asamblea General de la OEA (art. 41, g del Pacto), b) informes de solución amistosa de la demanda (art. 49) c) informes en que no se ha llegado a una solución amistosa de la demanda (art. 50), d) informes de archivos (arte. 48.1. b) y e) informes de admisibilidad de peticiones presentadas a la Comisión (arts. 46, 47 y 48).[21]

Además de presentar la clasificación mencionada, los informes dispuestos por la Comisión permiten el acceso a toda la información publicada de casos contra los Estados partes presentados a la competencia de la Comisión, con fundamento en cualquiera de las Convenciones a las que sea órgano de control.

De ese modo, fue posible seleccionar sólo peticiones individuales o quejas contra el estado brasileño, por motivos de violaciones de los derechos reconocidos en el Pacto de San José, entre los años de 2006 a 2015, en relación con las peticiones en que las mujeres aparecen en condición de peticionarias o víctimas, con el fin de verificar si el Sistema Regional de Protección de los Derechos Humanos funciona como un mecanismo para la protección más rápida y eficaz que el sistema de protección nacional.

20 OEA. CIDH. Publicaciones. **Informes anuales**. Disponible en: < http://cidh.oas.org/Publicacoes.htm >.
Acceso el: 20 ene. 2017.

21 La Comisión no publica informes intermediarios sobre el progreso de las demandas desde su protocolización hasta la publicación de los informes mencionados, o hace imposible realizar un análisis detallado de los elementos relativos a plazos y duración de los procedimientos dentro de la Comisión.

TABLA 1 – Panorama General de las peticiones contra Brasil (2006-2015)

AÑO / SITUACIÓN	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Peticiones recibidas	1325	1456	1323	1431	1598	1658	1936	2061	1758	2164
Peticiones pendientes de análisis inicial	-	-	-	-	-	6134	7208	8548	9039	9673
Peticiones con la decisión de no iniciar el trámite	562	880	880	1395	712	789	674	613	1039	876
Peticiones con la decisión de iniciar el trámite	147	118	118	120	276	262	137	123	284	208
Total de decisiones sobre apertura	709	998	998	1515	988	1051	811	736	1323	1084
Informes de Inadmisibilidad	14	14	10	15	10	11	17	9	4	2
Informes de Admisibilidad	56	51	49	62	73	66	42	44	47	42
Peticiones sobre Admisibilidad	-	-	-	-	-	-	-	-	1379	1392
Casos de Mérito	-	-	-	-	-	-	-	-	**576**	**511**
Informes de Mérito Publicados	**8**	**4**	**7**	**13**	**4**	**5**	**1**	**3**	**3**	**5**
Informes de Solución Amistosa	10	5	4	4	11	8	8	6	6	5
Peticiones y casos en trámite	1237	1251	1376	1450	1584	1645	1704	1753	1955	1903
Decisiones de Archivo	27	10	0	20	55	54	42	38	29	107
Casos enviados a la Corte IDH	14	14	9	11	16	23	12	11	19	14
Solicitudes de Medidas Cautelares	-	-	301	-	375	422	448	400	504	674
Medidas Cautelares Otorgadas	37	40	28	34	68	57	35	26	33	45

Fuente: Elaborada por las autoras, basado en datos estadísticos facilitados por la Comisión IDH en: http://www.oas.org/es/cidh/multimedia/estadisticas/estadisticas.html >.

En este sentido, de las informaciones contenidas en la tabla 1, es posible extraer que hay un gran déficit de publicaciones de la Comisión IDH. Véase, por ejemplo, que en el año 2006 fueron 147 (ciento cuarenta y siete) decisiones favorables a las peticiones para el inicio del proceso, mientras que sólo 56 (cincuenta y seis) informes de admisibilidad. Del mismo modo, hubo 562 (quinientas sesenta y dos) decisiones de inadmisibilidad, con la publicación de solamente 14 (catorce) informes de inadmisibilidad. Incluso más evidente es la diferencia entre el total de casos de mérito para el período analizado (1087) y las publicaciones de informes de análisis de mérito (53).

Todavía con respecto a la tabla 1, en el período 2006-2015, solamente en relación a Brasil, fueron recibidas por la Comisión IDH, el total de 16.710 (dieciséis mil setecientos diez peticiones), con 1.379 y 1.392 en proceso de admisibilidad en los años de 2014 y 2015, respectivamente. El indicador "Total de decisiones sobre apertura" (Tabla 1, línea 6), presenta el número total de peticiones que han sido analizadas por la Secretaría de Comisión IDH, así, restando este valor

del número de peticiones recibidas, hay un vacío de 6.491 (seis mil cuatrocientos noventa y una) peticiones que no han pasado todavía por la etapa inicial de análisis de la Comisión.

Los números dejan claro, en primer lugar, que la búsqueda de la protección internacional de los derechos humanos en la Comisión no es baja, por el contrario, más de 1.200 (mil doscientas) peticiones al año, sin embargo, la respuesta que ha sido dada por la Comisión no ha atendido satisfactoriamente a las demandas presentadas.

Aunque la propia Comisión, en la tabla 1, hace referencia a 532 (quinientos treinta y dos) informes de admisibilidad, 106 (ciento seis) de inadmisibilidad, 53 (cincuenta y tres) informes de mérito y 382 (trescientos ochenta y dos) decisiones de archivo, en los informes anuales publicados se identificaron, en total solamente 99 (noventa y nueve), informes sobre las peticiones presentadas contra Brasil (tabla 2 abajo) , siendo 54 (cincuenta y cuatro) de admisibilidad, 11 (once) de inadmisibilidad, 01 (una) de solución amistosa, 05 (cinco) de análisis de mérito y 28 (veintiocho) de archivo. Esto significa que aproximadamente el 91% (noventa y un por ciento) de los informes no han sido publicados, o 974 (novecientos setenta y cuatro) informes no han sido localizados en las publicaciones oficiales de la Comisión y, una vez más, sólo con relación a Brasil.

AÑO	SITUACIÓN					
	ADMISIÓN	INADMISIÓN	SOLUCIÓN AMISTOSA	MÉRITO	ARCHIVO	TOTAL POR AÑO
2006	06	00	01	01	00	08
2007	07	01	00	00	00	08
2008	06	00	00	01	00	07
2009	07	06	00	02	00	15
2010	10	00	00	01	06	17
2011	06	00	00	00	03	09
2012	08	03	00	00	06	17
2013	01	01	00	00	02	04
2014	02	00	00	00	00	02
2015	01	00	00	00	11	12
TOTAL POR SITUACIÓN	54	11	01	05	28	**99**

Fuente: Elaborada por las autoras.

Es importante aclarar que, no necesariamente cada informe se refiere a un caso diferente, porque los casos de solución amistosa, de mérito y de archivo pueden referirse a casos ingresados en el mismo período, lo que daría lugar a dos informes distintos para el mismo caso. Dicho esto, si consideramos que, hipotéticamente, los informes de solución amistosa y de mérito publicados se refieren a admitidas en el mismo período, se llega a la conclusión que aproximadamente el 11% (once por ciento) de los casos admitidos por la Comisión alcanzaron

una respuesta definitiva.

De esos 99 (noventa y nueve) informes, los que versaron sobre la violación de los derechos humanos, teniendo a mujeres como peticionarias o víctimas, fueron 18 (dieciocho), es decir, un 18% (dieciocho por ciento) del total, con fundamento en el Pacto de San José, como se detalla a continuación:

TABLA 3 – Peticiones específicas contra Brasil – peticionarias mujeres (2006-2015)

AÑO	SITUACIÓN					
	ADMISIÓN	INADMISIÓN	SOLUCIÓN AMISTOSA	MÉRITO	ARCHIVO	TOTAL POR AÑO
2006	01	00	00	01	00	02
2007	01	00	00	00	00	01
2008	01	00	00	00	00	01
2009	01	00	00	00	00	01
2010	03	00	00	00	00	03
2011	01	00	00	00	00	01
2012	02	02	00	00	01	05
2013	01	00	00	00	01	02
2014	00	00	00	00	00	00
2015	00	00	00	00	02	02
TOTAL POR SITUACIÓN	11	02	00	01	04	**18**

Fuente: Elaborada por las autoras.

La Tabla 3, en ese caso, se muestra aún más preocupante que la anterior, lo que representa aproximadamente un 0.10% (un centésimo) del número total de solicitudes sometidas a la apreciación de la Comisión en el período (véase tabla 1). Además, que, entre los 18 (dieciocho) informes, apenas 01 (uno) presenta respuesta definitiva a la demanda, que representa algo más del 8% (ocho por ciento) del número total de peticiones admitidas en las condiciones descritas en este período, de no haber logrado éxito, hasta ahora, en la resolución de los casos mediante el procedimiento de solución amistosa.

Con respecto a los informes de admisibilidad publicados por la Comisión es importante tener en cuenta que su fundamento se encuentra en los arts. 46.1 del Pacto de San José de 31 a 34 del reglamento interno de la Comisión, que cuentan con cuatro requisitos para que una petición sea considerada admisible:

> a) agotamiento de recursos internos – toma en consideración si fueron interpuestos y agotados los recursos de jurisdicción interna en el Estado parte, basado en la idea de que tal requisito actúa como una garantía para que el Estado parte tenga la oportunidad de resolver los casos internamente y evitar la interferencia arbitraria de la competencia internacional al no

ordenamiento patrio. Este requisito prevé algunas excepciones que se tratarán a continuación;
b) fecha límite de presentación de la petición – generalmente el período es de seis meses después de la notificación de la decisión definitiva de la jurisdicción interna, sin embargo, si se aplica cualquiera de las excepciones previstas, la petición debe presentarse en un plazo razonable, a criterio de la Comisión;
c) ausencia de duplicidad del procedimiento y cosa juzgada - en la jurisdicción internacional;
d) caracterización de posible violación de las disposiciones de la Convención - en este primer momento (informe de admisibilidad), la Comisión no analiza el mérito del caso, decidiendo si en realidad configura la efectiva violación de los derechos protegidos por la Convención, pero sólo compara los hechos descritos por las partes a las disposiciones del Pacto para verificar aquellos hechos, si se confirman, podrían conducir a una posible violación de tales dispositivos y por lo tanto, la petición es admitida en este punto;

Los requisitos a y b contienen algunas excepciones: a) ausencia, en la legislación interna del Estado parte, del debido proceso legal para la protección del derecho que se alegue que haya sido violado; b) imposibilidad de acceso o agotamiento, por el perjudicado, a los recursos de jurisdicción interna; y c) demora en la decisión sobre los mencionados recursos. Cabe destacar todavía que en los casos donde el peticionario no cumple con el requisito de agotamiento de recursos internos, el plazo de presentación de la petición se considerará "razonable", a través de análisis discrecional de la Comisión que tendrá en cuenta la fecha de violación de los derechos y las circunstancias específicas del caso en concreto.

En cuanto a los casos con publicación del informe de admisibilidad, estos se examinarán en detalle, ya que ofrece informaciones detalladas sobre la atención a los requisitos de admisibilidad establecidos en la Convención y en el Reglamento Interno de la Comisión IDH, los derechos reconocidamente violados y el lapso temporal transcurrido entre los hechos apuntados y la publicación de los informes por la Comisión, resumidos en tabla 4.

TABLA 4 – Peticiones admitidas en la Comisión IDH contra Brasil inherentes a violaciones de derechos humanos de las mujeres – los requisitos de admisibilidad (2006-2015)

Caso	Requisitos de Admisibilidad				Observaciones
	Agotamiento de los Recursos Internos	Plazo para Presentación de la Petición	Inexistencia de Duplicación de Procedimientos y Cosa Juzgada	Caracterización de Posible Violación de Dispositivos de la Convención	
Neuza y Gisele[22]	**No**	**Razonable**	Sí	Sí	Excepción del art. 46.2.c
Marcia Souza[23]	**No**	**Razonable**	Sí	Sí	Excepción del art. 46.2.c
Margarida Alves[24]	Sí	Sí	Sí	Sí	-
Samantha Nunes[25]	Sí	Sí	Sí	Sí	-
Fátima y Maura[26]	Sí	Sí	Sí	Sí	-
Thalita, Ana y otros[27]	**No**	**Razonable**	Sí	Sí	Excepción del art. 46.2.a
Rosa y José Luiz[28]	Sí	Sí	Sí	Sí	-
Clelia y Rita[29]	**No**	**Razonable**	Sí	Sí	Excepción del art. 46.2.a
Nancy y Marcio[30]	**No**	**Razonable**	Sí	Sí	Excepción del art. 46.2.a
Ivete y otros[31]	**No**	**Razonable**	Sí	Sí	Excepción del art. 46.2.c
M.V.M. y P.S.R.[32]	Sí	Sí	Sí	Sí	-

De la lectura de los datos disponibles en la tabla anterior, es posible extraer que, más de la mitad de las peticiones aceptadas por la Comisión lo fueron en razón de la aplicación de de algunas de las excepciones previstas en el art. 46.2 de la Convención Americana. Garantizando la admisibilidad de las demandas cuando no se compruebe, en la jurisdicción interna, el ejercicio del debido proceso legal para proteger el derecho violado (a), o en casos donde el perjudicado no puede acceder o agotar los recursos de jurisdicción interna (b), o cuando haya demora sin fundamento en la decisión sobre los mencionados recursos (c). En los casos mencionados arriba, la aplicaron las excepciones previstas en las letras "a" y "c" en igual proporción (50%).

El reconocimiento de la aplicación de una de las mencionadas excepciones a subsanar la falta del requisito de agotamiento de los recursos internos atrae, como se explica en la exposición sobre el procedimiento en la Comisión, una mensuración en cuanto a la razonabilidad del plazo para la presentación de la petición a la Comisión, caso en el que considerará la fecha del hecho y circunstancias del caso en concreto.

En todos los casos analizados en la tabla 4, la Comisión reconoció la razonabilidad para los propósitos de la admisión de la petición.

Para esos casos en que han sido reconocidas algunas de las excepciones mencionadas, teniendo en cuenta las fechas de los hechos, la fecha de las últimas acciones en las jurisdicciones y las fechas de recepción de la petición por la Comisión, el tiempo promedio que se considera razonable es de 05 (cinco) años y 06 (seis) meses (de la fecha del hecho a la fecha de la última acción practicada en la jurisdicción interna). Cabe señalar que fue de 05 (cinco) años la media de tiempo transcurrido entre las fechas de los eventos y la recepción de las peticiones por la Comisión.

Interesante observar que, para las peticiones admitidas por la

Comisión, el tiempo promedio transcurrido entre la fecha de recepción de la petición y la publicación del informe de admisibilidad fue de 06 (seis) años y 06 (seis) meses, con menor tiempo observado en el caso de Neusa y Gisele, en que transcurrieron 02 (dos) años y 10 (diez) meses.

Dicha información puede ser comparada con el tiempo previsto por la Convención Americana y por el Reglamento de la Comisión, cuyo plazo máximo previsto para la duración del procedimiento de apreciación inicial y publicación del informe de admisibilidad es 10 (diez) meses, ya considerados los plazos máximos previstos para la prorrogación. Es decir, la media real de la Comisión es aproximadamente 8 x (ocho veces) más alto que la prevista en el el texto de la Convención y en el Reglamento de la Comisión.

Otro punto a destacar en relación con el incumplimiento de los plazos establecidos para las decisiones de la Comisión es el análisis del decurso temporal en el caso de Simone Andre Diniz (único con informe de mérito), cuyos hechos ocurrieron el 02.03.1997, con petición recibida el 10.10.1997, informe de admisibilidad publicado el 09.10.2002 e informe de mérito el 21.10.2006.

Es importante recordar que los plazos establecidos por el Pacto de San José y por el Reglamento Interno de la Comisión, para finalizar el procedimiento de análisis de mérito, con la publicación del informe correspondiente es de 3 (tres) años y 5 (cinco) meses entre la publicación del informe de admisibilidad y el informe de mérito. Sin embargo, en este caso transcurrieron 04 (cuatro) años, aparte de la predicción normativa, que se hace más grave cuando observado que, en este caso, no fueron realizados procedimientos facultativos (audiencia, investigación in loco o colecta de prueba testimonial), que reduce el tiempo máximo previsto de 2 (dos años) y 5 (cinco) meses.

Para el mismo caso de la recepción de la petición hasta la publicación del informe de mérito, 09 (nueve) años transcurridos, cuando lo ideal es 04 (años) y 03 (tres) meses.

Para el mismo caso, de la recepción de la solicitud hasta la publicación del informe de mérito, transcurrieron 09 (nueve) años, cuando lo ideal es 04 (años) y 03 (tres) meses.

Finalmente, en relación con los derechos presuntamente violados, tanto los mencionados por los peticionarios como los reconocidos por la Comisión cuando publicados los informes de admisibilidad, es buena idea señalar que pueden ocurrir tres situaciones: a) la Comisión reconoce la posible violación de todos los dispositivos alegados; b) la Comisión reconoce la posible infracción de los dispositivos alegados; y c) la Comisión agrega dispositivos no alegados por el peticionario.

La tabla a continuación presenta, en forma simplificada, comparación entre los dispositivos alegados por los peticionarios y los efectivamente reconocidos por la Comisión.

TABLA 5 – Peticiones admitidas en la Comisión IDH contra Brasil – comparación entre los dispositivos mencionados por el peticionario y reconocidos por la Comisión (2006-2015)

Caso	Dispositivos Alegados por el Peticionario	Dispositivos Añadidos por la Comisión
Neuza y Gisele	Arts. **1** y **24**	Arts. **8** y **25**
Marcia Souza	Arts. **1.1**, 2, **4, 24** y **25**	Arts. **8.1**
Margarida Alves	Arts. **1.1, 8** y **25**	-
Samantha Nunes	Arts. **1.1,** 5.1, 7, 11.1, **19, 24** y **25**	Arts. **8.1**
Fatima e Maura	Arts. **1.1,** 8, **17, 19** y **24**	Arts. **8.1** y **25**
Thalita, Ana e outros	Arts. **4, 5,** 11 y **25**	Arts. **1, 5.1** y **8**
Rosa e José Luiz	Arts. **1.1, 4** y **25**	Arts. **8** y **16**
Clelia e Rita	Arts. **1.1, 2, 8, 25** y 28	Arts. **21**
Nancy e Marcio	No hizo referencia a dispositivos específicos	Arts. **1.1, 2, 8, 21** y **25**
Ivete e outros	Arts. 4, 5, 11 y **8.1, 25.1**	Arts. **1** y **5.1**
M.V.M. e P.S.R	Arts. 1.1, **5**, 7, **11, 24** y **25**	Arts. **8.1** y **19**

Fuente: Elaborada por las autoras.

En relación con el caso de Nancy y Marcio, en que los peticionarios no hicieron referencia expresa a los dispositivos que entendían haber sido violados por el estado, la Comisión explicó que

> *Ni la Convención Americana ni el Reglamento de la CIDH requiere que el peticionario identifique los derechos específicos que alega haber sido violados por el Estado sobre el tema presentado a la CIDH, aunque los peticionarios puedan hacerlo. Es de competencia de la Comisión Interamericana, basándose en la jurisprudencia del Sistema, determinar en sus informes de admisibilidad los artículos de los instrumentos interamericanos relevantes que son aplicables y, en el final, para establecer si se violó esa disposición y si los hechos alegados fueron comprobados con pruebas suficientes.*

Para los otros casos, como puede verse, por unanimidad fueron reconocidas las posibilidades de violación del art. 25 de la Convención, que prevé sobre la Protección Judicial, es decir, reconoce la posibilidad de violación de la ley "[...] a un recurso simple y rápido o a cualquier otro recurso efectivo ante los jueces o tribunales competentes [...] ", asegurando una decisión sobre los derechos ante el Estado brasileño.

Tales violaciones, en los casos concretos analizados, fueron representados por el retraso de las autoridades brasileñas en iniciar o dar seguimiento a las investigaciones para la verificación de las violaciones de derechos perpetradas contra las víctimas, así como por el retraso en la ejecución de las sanciones aplicadas en los casos donde hubo adecuado análisis y juicio del mérito.

5. CONSIDERACIONES FINALES

Desde el final de la segunda guerra mundial, los derechos humanos vienen demostrando una impresionante capacidad para establecer, entre los Estados, parámetros comunes de comportamiento y de conducta por medio de declaraciones y tratados internacionales.

Entre los derechos humanos en general, se destaca la evolución de los derechos humanos de las mujeres, que desde 1975, Año Internacional de la Mujer, se ha incorporado a las normas del derecho internacional público en el marco de los sistemas de protección internacional global y regional, de las cuales son ejemplos: la Convención sobre la eliminación de todas las formas de discriminación contra la mujer/1979 y la Convención Interamericana para Prevenir , Punir y Erradicar la Violencia Contra la Mujer/1994. .

A pesar de la existencia de este fenómeno, la capacidad para implementar esas reglas y principios contra los Estados que las incumplen no ha sido suficiente, y una respuesta eficaz todavía depende prioritariamente de la voluntad política y del ordenamiento interno de cada país. Esto significa que: a las violaciones ocurridas dentro de los Estados, se recurre en primer lugar a sus competencias en la solución de los conflictos.

Por otro lado, la estructura de los sistemas convencionales de monitoreo, basados casi exclusivamente en la figura de los Comités Internacionales, casi no posee poderes judiciales que les permitan sancionar los Estados Partes, responsables por las violaciones de las convenciones. Aunque la Comisión Interamericana de Derechos Humanos puede ofrecer recomendaciones, publicar informes y relatar la situación política y legislativa de cada Estado, el medio más eficaz para hacer cumplir las obligaciones de los tratados, todavía se ciñe a la revisión política, positiva o negativa, expuesta en un foro internacional.

Debido a esto y a los altos niveles de violaciones contra las mujeres por los/en los Estados en general, el Sistema Americano de Derechos Humanos, específicamente la Comisión Interamericana, ha intentado avanzar en la ponderación de los requisitos de admisibilidad de las demandas, adoptando el "criterio de razonabilidad" del plazo como una regla, en relación con la excepción del requisito de "agotamiento de los recursos internos".

En este sentido, la mayor aceptación de las peticiones y de las quejas individuales por la Comisión va a reflejar un compromiso más amplio de los Estados, con referencia a recepciones/adaptaciones legislativas, como en el caso brasileño de reconocimiento de la naturaleza "violencia sexual contra la mujer" en el ámbito doméstico y la adopción de un tipo penal específico: el feminicidio. No de otro modo, las políticas públicas fueron también ampliadas y profundizadas,

como el aumento en el número de comisarías de policía y juzgados especializados en recibir y decidir sobre las denuncias de violencia contra la mujer.

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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.

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