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

ARTICLES

ESSAYS, LECTURES AND CONFERENCES

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TABLE OF CONTENTS

ARTICLES

ESSAYS, LECTURES AND CONFERENCES

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

A “second final foreword” or “a new farewell”: these are other possible titles for this editorial note.

The first number of the new Panorama of Brazilian Law was issued in 2013 as an independent project to rescue the goals and ideas of the 1992 original journal released by 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).

The new Panorama had no official support until 2017, when it was endorsed by Universidade do Estado Rio de Janeiro and incorporated into its Electronic Publications Portal.

The editors of Panorama of Brazilian Law were very pleased with the positive repercussions of the project abroad and know that the journal is an important tool to provide foreign researchers an ultimate way to access Brazilian law.

It is time to leave the project in new hands.

Brazil, September 2019.

Raphael Carvalho de Vasconcelos
Eraldo Silva Júnior

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COSTITUZIONE PER CHI? TRENT'ANNI D'INVISIBILITÀ COSTITUZIONALE DEI DIRITTI LGBTI IN BRASILE[1]

CONSTITUTION FOR WHOM? THIRTY YEARS OF CONSTITUTIONAL INVISIBILITY OF LGBTI RIGHTS IN BRAZIL

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Riassunto: il lavoro ricerca la protezione costituzionale dei diritti della comunità LGBTI in Brasile dal punto di vista dei movimenti sociali. Sulla base del quadro teorico della *subaltern cosmopolitan legality* (legalità cosmopolita subalterna) proposta da Santos e Rodríguez-Garavito (2005), viene messo in discussione se la Costituzione brasiliana del 1988 protegge sufficientemente le persone LGBTI. La prima ipotesi è negativa una volta che il riconoscimento dei diritti fondamentali dipende dall'approccio giudiziario: è un processo di costruzione dei

1 Tradotto da Giovanna Cruz Burlamaqui

diritti verticalizzato e veramente instabile. La ricerca realizza uno studio empirico, avviando un'analisi qualitativa mediante l'utilizzazione di tecniche di rassegna bibliografica e l'applicazione e valutazione di questionari. Di quella forma è stata tracciata una ricostruzione storica dell'operato del movimento LGBTI brasiliano a partire dalla rassegna bibliografica. D'altra parte, il questionario è stato utilizzato per raccogliere dati riguardo il posizionamento di ogni organizzazione collegata alla protezione costituzionale dei diritti delle persone LGBTI in Brasile. Alla fine, è stato possibile concludere sull'insufficienza dell'attuale paradigma normativo, così come la necessità di affrontare la questione a partire di altri settori come sanità e istruzione.

Parole chiavi: Diritto costituzionale. Diritti LGBTI. Movimento LGBTI.

INTRODUZIONE

La Costituzione brasiliana del 1988 è stata compresa come parte del movimento del Nuovo Costituzionalismo Latinoamericano (NCLA). Leonardo Avritzer (2017, p. 28) indica che il NCLA disporrebbe di tre caratteristiche principali: 1) l'intenso ampliamento di diritti, insomma, costituzioni con richieste sostanziali prolungate; 2) l'espansione delle forme di partecipazione, anzitutto per meccanismi democratici di partecipazione popolare diretta e indiretta; 3) lo svolgimento di un nuovo ruolo per il Potere Giudiziario. In questo senso, l'autore indica che quella nuova forma di costituzionalismo si distingue grazie al grande ampliamento del riconoscimento dei diritti a classi oppresse durante la storia. Ad esempio, andando avanti nella protezione delle comunità tradizionali e delle donne (AVRITZER, 2017, p. 28-29).

Però, anche se si possa verificare un passo avanti nella protezione degli enti oppressi, il nuovo movimento costituzionale sembra aver ignorato le richieste di lesbiche, gay, bisessuali, transessuali e intrasessuali (LGBTI). La Magna Carta del Brasile non solo smette di elencare l'orientamento sessuale e l'identità di genere nel ruolo che vieta pratiche discriminatorie, ma anche costruisce un documento di natura fortemente eteronormativa nelle sezioni relative alle possibilità di famiglia, le quali indicano espressamente l'unione stabile fra "uomo e donna".

Rileva che l'assenza di previsioni specifiche non è successa inconsciamente. Proprio com'è successo in tanti altri paesi latinoamericani, il movimento LGBTI brasiliano ha lavorato energicamente insieme alla costituente perché fosse inclusa il divieto di discriminazione per "opzione sessuale", e in seguito per "orientamento

sessuale" (SIMÕES; FACCHINI, p. 122). Il tema fu parte di varie proposte di emendamenti per l'inclusione del termine "orientamento sessuale" oppure "rapporti sessuali" all'articolo tre della Costituzione brasiliana. In tal senso, una ricerca del termine "orientamento sessuale" negli annali della costituente indica la sua apparizione 121 volte, in quattro commissioni diverse; fatto che di per sé dimostra che la questione non fu soltanto ignorata dai legislatori[2].

Invece, diversi brani dei verbali delle riunioni di quelle commissioni segnalano con molta attenzione, scomodità e controversia intorno al termine "orientamento sessuale", cui è risultato essere escluso del documento costituzionale. Intorno a molte proteste di "*LGBTI fobia*" dai e dalle costituenti, quella ragione di esclusione del termine che sembra aver attirato più convergenza è quella che riterrebbe superflua una protezione costituzionale più specifica riguardo alla diversità di orientamento sessuale, essendo sufficiente la previsione generica di divieto di discriminazione fondata sul sesso. A tale proposito, è illustrativo il seguente intervento fatto dallo Costituente Costa Ferreira: "abbiamo già la parola "sesso". Nessuno viene discriminato a causa del sesso – capite come vi pare qual'è il sesso. Non c'è più bisogno della espressione 'orientamento sessuale' nel nostro documento" (BRASIL, 1987, p. 34).

Basato sul quadro teorico della *subaltern cosmopolitan legality* (legalità cosmopolita subalterna) proposto da Santos e Rodríguez-Garavito (2005), questo lavoro mette in discussione giustamente se la Costituzione brasiliana del 1988, partendo dalle sue previsioni astratte e generiche, protegge sufficientemente le persone LGBTI. L'ipotesi iniziale indica di non una volta che il riconoscimento dei diritti fondamentali dipende dall'approccio giudiziario, un processo verticalizzato e abbastanza instabile di costruzione dei diritti.

Per sviluppare la ricerca di carattere empirico e qualitativo, è stato utilizzato un metodo induttivo di ricerca mediante l'utillizzazione di tecniche di rassegna bibliografica e applicazione e analisi di questionari. La rassegna bibliografica è stata usata per migliorare la comprensione del quadro teorico, anche per una ricostruzione storica del ruolo fatto dal movimento LGBTI brasiliano. D'altro canto, i questionari sono stati

2 La ricerca è stata fatta nella versione online degli annali fornita dal Senato. Disponibile a: <http://www6g.senado.gov.br/apem/search?keyword=orienta%C3%A7%C3%A3o+sexual>. Accesso il: 31 mar. 2018. Le commissioni in cui la questione è stata discussa furono: Commissione della Sovranità e dei Diritti dell'Uomo e della Donna, Commissione dell'Ordine Sociale, Commissione della Famiglia, dell'Istruzione, Cultura e Sport, delle Scienze e Tecnologie e Comunicazioni; e Commissione di Sistematizzazione (ed è stato in quest'ultima che si è decisa di maneira definitiva l'esclusione del termine "orientamento sessuale" dell'articolo terzo.

applicati per catturare la percezione del movimento LGBTI riguardo lo *status* della protezione costituzionale dei suoi diritti, privilegiando la costruzione di un diritto dal basso verso l'alto. Così, il lavoro ha come obiettivo generale constatare la sufficienza o scarsità della tutela costituzionale dei diritti LGBTI a partire dall'ottica dei movimenti sociali.

1 LA LEGALITÀ COSMOPOLITA SUBALTERNA

Sarebbe troppo pretenzioso e arbitrario qualificare determinato ordinamento giuridico come protettore o no basato appena sulla visione di un ricercatore o soltanto sulla letteratura orientata verso quella tematica; che potrebbe compromettere, compreso, la legittimità della ricerca. Dentro della proposta di questo lavoro è essenziale che sia sostenuta la costruzione di un costituzionalismo di trasformazione (*dal basso*), che agisca contro l'egemonia e in base alla visione e protagonismo delle e dei propri LGBTI. Alla fine, chi meglio delle stesse vittime della violenza per dire se si sentono o no protette? Ovvero, che dovrebbe o non essere vietato dal documento costituzionale al fine di tutelare i suoi principali interessi?

Pertanto, è importante che sia priorizzata un'impostazione di costruzione e interpretazione del diritto "dal basso verso l'alto", e anche una *subaltern cosmopolitan legality* (legalità cosmopolita subalterna), secondo le parole di Santos e Rodríguez-Garavito (2005, p. 5). Per potenziare quella discussione, Boaventura de Sousa Santos (2010, p. 59) sostiene che per raggiungere la trasformazione del nostro attuale modello di Stato e di società, sarebbe necessaria l'appropriazione degli strumenti politici egemonici per quelle classi e gruppi emarginati. Dunque, classifica l'uso contro l'egemonia come contro l'ideologia dominante e che per sostenersi "*ha bisogno [...] della mobilitazione politica costante che, per essere efficace, deve funzionare da dentro delle istituzioni e da fuori"* (SANTOS, 2010, p. 60). Nell'ambito costituzionale, l'autore caratterizza che tale mobilitazione si sarebbe a partire da un costituzionalismo di trasformazione *dal basso*, opponendosi al costituzionalismo moderno eurocentrico e liberale (SANTOS, 2010, p. 72).

Così, la prospettiva di legalità cosmopolita subalterna cerca mettere in evidenza le vittime, che sono escluse del paradigma egemonico ("*top-down")*, e permettendole ristrutturare le istituzioni in modo da includerle e riconoscerle, stabilendo uno standard non sarà più egemonico ma contro l'egemonia. Insomma: "la subalternità cosmopolita grida per un concepimento del campo legale che sia adeguato per mettere in contatto il diritto e la politica e ripensare le istituzioni legali da zero" (SANTOS; RODRÍGUEZ-GARAVITO,

2005, p. 15).

Inoltre, un'ottica come quella anche tenta superare il paradigma liberale dell'autonomia individuale in base all'incorporazione di forme alternative di conoscenza giuridica. In altre parole, interpretazioni legali che estrapolano gli interpreti del diritto di solito autorizzati e che allora capiscano l'ambito giuridico mentre constituiti dal "elementi di lotta che hanno bisogno di essere politicizzati prima di essere stabiliti" (SANTOS; RODRÍGUEZ-GARAVITO, 2005, p. 16).

In larga misura questi fattori furono coniugati e sono stati presenti nella maggioranza dei processi costituenti latinoamericani[3]. Questo è diventato in documenti veramente di trasformazione, soprattutto in quello che tratta riguardo ai diritti delle popolazioni indigene e tradizionali, delle donne e dell'ambiente. Comunque, lo stesso non è successo per la comunità LGBTI, cosa che deve cambiare al più presto attraverso il protagonismo delle persone colpite, il quale viene illustrato nella costruzione di un costituzionalismo LGBTI opposto allo standard egemonico che favorisce la eteronormatività.

È importante notare che questa azioni contro l'egemonia non deve succedere solo nel momento di creazione legislativa del diritto, ma anche nella sua interpretazione. Quindi, viene proposto un ingrandimento dell'idea d'interpretazione pluralista progettata da Häberle (2002, p. 11-18). L'autore tedesco propugna il superamento di quello che ha definito come una società chiusa d'interpreti (marcata dal monopolio statale di questa funzione attraverso le azioni giurisdizionale) per una società aperta, che coprirebbe una molteplicità di attori interpretativi, oltre a quelli tradizionalmente autorizzati e legittimati. Secondo lui "tutto quel che vive nel contesto regolato da una norma (...) è, indiretta o, incluso direttamente, un interprete di quella norma" (HÄBERLE, 2002, p. 15). Quindi, tutti i cittadini che esperimentano o, in molti casi, sentono la sua mancanza, sarebbero pre interpreti oppure cointerpreti del precetto costituzionale.

La costruzione di un'ermeneutica costituzionale pluralista è essenziale per la diversificazione dell'interpretazione e per l'espansione

3 Ochy Curiel (2013, p. 100-108), in lavoro che esamina la formazione della Costituzione colombiana, risalgono due punti importanti: 1) il fatto che grande parte delle regole incluse nel documento costituzionale riguardo le donne, indigene, ecc; configurano una semplice uguaglianza formale che non trova corrispondenza concreta nello materiale; e d'altro canto: 2) il fatto di com'è stata l'identità ampiamente maschile, eterosessuale e biancha del processo costituente perché quelle erano le caratteristiche dei legislatori costituenti colombiani (c'erano appena quattro donne all'assemblea costituente). Così, anche se ci fosse una pressione esterna dei movimenti sociali, i gruppi oppressi non hanno trovato rappresentanza efficace tra gli autori del documento costituzionale, il che non si limita solo alla realtà colombiana, anche a quella dell'Amercia-latina come un insieme.

della legittimità interpretativa. Intanto non sembra essere sufficiente perché sia caratterizzata come un'impostazione "Dal basso verso l'alto". Per quello, sempre che si tratti di violazione dei diritti umani e di diritti fondamentali, si difende che quello che esperimenta la norma (oppure la sua assenza) non deve attuare solo come cointerpreti, sì come interprete principale e il più legittimato per l'interpretazione. Pertanto, la funzione statale sarebbe trasmettere l'interpretazione degli individui colpiti. E quello non solo sull'ambito formalmente legittimato per esercitare la giurisdizione (ad esempio, attraverso degli istituti del *amicus curiae* e dell'udienza pubblica o anche dello svolgimento di azioni legali estrategiche), ma anche sull'interpretazione fatta da quei individui in altri ambiti come lavori scientifici, teorici e in dibattiti politici. Ossia, sentire la voce di quei che veramente devono essere sentiti, dato che sono giuridica e materialmente colpiti dall'ordinamento.

Con quell'intenzione, questo articolo si dedica alla costruzione dell'interpretazione del movimento LGBTI brasiliano riguardo la protezione o no dei suoi diritti per il testo costituzionale. Pertanto, al realizzare l'applicazione del questionario per essere riempito da uno stesso, si è tentato non solo definire uno standard di protezione ideale, ma anche capire la percezione di quel movimento sullo scenario dei diritti LGBTI dopo i trent'anni della nostra Costituzione, le sue cause e possibili alternative per la sua modifica.

2 LA TRAIETTORIA DEL MOVIMENTO LGBTI BRASILIANO

Prima di partire per l'analisi fatto dai movimenti sociali riguardo l'attuale stato di protezione costituzionale dei suoi diritti, è essenziale risalire la sua importanza storica. Insomma, capire come la sua esistenza e attuazione furono fondamentali per arrivare al livello attuale, oltre a capire le specificità e contraddizioni della sua propria formazione. In tal senso, questo modulo si dedica a una piccola esposizione della traiettoria del movimento LGBTI in Brasile, ricostruita dalla rassegna bibliografica.

Una riserva iniziale è importante: dato il modo de costruzione del movimento che oggigiorno chiamiamo dei LGBTI e anche alla invisibilità prodotta dal protagonismo eccessivo e non inclusivo degli uomini bianchi gay all'inizio della politicizzazione delle identità sessuali, grande parte della storia del movimento LGBTI a cui abbiamo accesso è marcata da una segnalazione altamente omosessuale maschile che solo molto di recente è cominciato a diversificarsi.

James Green in un lavoro sulla storia dell'omosessualità in Brasile (2000, p. 454) sottolinea che l'avvento di un movimento omosessuale politicizzato e rivendicativo dei diritti è avvenuto in ritardo nel paese, quando se si comparava con la realtà latinoamericana

in paesi come Argentina, Messico e Porto Rico. Secondo l'autore: il motivo di quello sarebbe stato lo scoppio della dittatura militare nel 1964, dato che le condizioni del Brasile sarebbero già matture per la nascita di un movimento di gay e lesbiche anteriormente.

Per capire meglio la forma come'è successo quello sviluppo, Regina Facchini (2005) divide l'ascesa del movimento LGBTI brasiliano in tre ondate: la prima ondata è la stessa nascita del movimento avvenuta alla fine degli anni settanta. Secondo l'autrice fu in quell'epoca che gay e lesbiche cominciarono a riunirsi con scopi più politicizzati al contrario ai modelli di "ghetti omosessuali" da prima esistenti (FACCHINI, 2005, p. 88). Quel riferimento ai "ghetti" rimanda ai gruppi omosessuali già esistenti dall'anno 1950 se si occupavano appena "alla sociabilità, al divertimento e alla parodia, raccogliendo soprattutto uomini, che promuovevano eventi come concorsi di Miss, show di travestiti e sfilate di fantasie" (SIMÕES; FACCHINI, 2009, p. 63).

Quindi, attivisti brasiliani veramente influenzati dalla *gay liberation* americano cominciarono a riunirsi per dopo fondare nell'anno 1978 a São Paulo, quello che viene segnalato il primo gruppo brasiliano in ricerca della politicizzazione dell'omosessualità: il *Somos* (*Siamo*). Il gruppo affrontò dalla sua nascita "una polarizzazione tra la 'sinistra' e 'l'autonomia delle lotte delle minoranze'", un dibattito che è arrivato a tutti gli integranti del movimento della prima ondata e che oggigiorno lascia tracce (FACCHINI, 2005, p. 93-94).

Dato lo scoppio in piena dittatura, la prima ondata del movimento si caratterizzava dall'opposizione all'autoritarismo, quindi rifiutavano composizioni gerarchiche dentro la stessa organizzazione ed esercitando un importante ruolo nella lotta contro la repressione militare. Un esempio singolare di quel ruolo è stata la creazione del giornale *Lampião* in aprile del 1978, con il giornalista e scrittore Aguinaldo Silva come direttore. La proposta della pubblicazione si applicava al formato di "stampa alternativa" fortemente presente in quell'epoca, però possedeva un'ottica esclusiva nella tematica dell'omosessualità (SIMÕES; FACCHINI, 2009, p. 82-83). Si può dire che il

Lampião si distingue anche nella forma come affrontava l'omosessualità. Il giornale tentava di offrire un trattamento che lottasse contro l'immagine degli omosessuali come criature distrutte grazie al loro desiderio, incapaci di arrivare all'autorealizzazione e con tendenze a rifiutare la propria sessualità. Però non lo faceva in modo esclusivo en centrato verso gli omosessuali, ma gli presentava come una tra diverse minoranze oppresse che avevano il diritto di esprimersi (SIMÕES; FACCHINI, 2009, p. 85-86).

Inoltre, questo momento anche fu davvero marcato da un

tentativo di sovversione della normalizzazione imposta al genere e alla sessualità. Si tentava di ritirare il contenuto peggiorativo di termini come "bicha" (*froccio*) e «lésbica» (*lesbica*) attraverso la valorizzazione del loro uso quotidiano. Peraltro, la lotta contro le asimmetrie tra uomini e donne ebbe grande rilevanza, tanto quanto gli stereotipi fra attivo/passivo e effeminati/mascolinizzate (FACCHINI, 2005, p. 96).

Quella prima ondata avrebbe la sua fine a metà degli anni 80 coincidente con il momento dell'apparizione dell'epidemia di AIDS (*Acquired Immunodeficiency Syndrome*). Quell'epoca è stata marcata dalla grande diminuzione del numero di gruppi LGBTI organizzati grazie alla diffusione di AIDS, ma anche all'inizio del processo di ritorno alla democrazia il che ritirò il "nemico comune" della maggioranza dei gruppi che concentrano il loro ruolo nella lotta contro l'autoritarismo (SIMÕES; FACCHINI, 2009, p. 61-117). Benché molti indicano il cosiddetto periodo come il declino del movimento omosessuale, Facchini (2005, p. 102-119) rileva che fu appena di una diminuzione quantitativa di gruppi senza coinvolgere perdite qualitative dentro la militanza che alterasse la loro forma di operare.

La seconda ondata è stata caratterizzata dalla ricerca di collegamento con il movimento LGBTI internazionale, soprattutto attraverso dell'*International Lesbian and Gay Association* (ILGA); e dalla valorizzazione di formalizzare le organizzazioni, portando gli interessi al registro legale e all'acquisto di personalità giuridiche per i gruppi. I militanti di questo periodo non consideravano la condotta di quei della prima ondata come politica, però sì come una maniera di autoaiuto al considerare che i primi gruppi c'erano per scambiare esperienze della vita personale (FACCHINI, 2005, p. 102-119).

Unitamente a ciò, il movimento dell'epoca ebbe un'altra grande sfida: combattere i discorsi di patologizzare l'omosessualità que stavano rafforzandosi nell'ambito scientifico dalla diffusione di AIDS. Pertanto gli sforzi si legarono al disinvestimento fra omosessualità e malattia, e alla lotta contro quella caratterizzazione di forma illegittima di esperienza sessuale. Grazie all'intenso lavoro dei gruppi LGBTI in quell'ambito c'è stata un'importante conquista in quel periodo: in ritiro dell'omosessualità del Código de Doenças do Instituto Nacional da Previdência Social (*Codice di Malattie dell'Istituto Nazionale della Previdenza Sociale*) (FACCHINI, 2005, p. 53- 61). In riassunto,

Quella nuova generazione di attivisti aveva un coinvolgimento scarso o nullo com posizioni ideologiche di sinistra oppure anarchiche, e si mostrava molto meno refrattaria alle azioni nell'ambito istituzionale. Quelle caratteristiche, da prima presenti nello scorso periodo, diventarono, anche se meno influenti, predominanti dentro la nuova configurazione del movimento, più orientato a stabilire organizzazioni di natura più formale e più concentrata in assicurare il diritto alle

diversità (SIMÕES; FACCHINI, 2009, p. 117).

Anche fu in quel momento che i gruppi intensificarono il loro intervento insieme al potere legislativo al lavorare direttamente nella costituente del 1998, tentando includere in rapporto all'orientamento sessuale il divieto alla discriminazione nella nuova Costituzione. I due gruppi più rilevanti di quel periodo ed elementi fondamentali dell'andata avanti della militanza LGBTI furono il *Triângulo Rosa (Triângulo Rosato)* (comandato da João Antônio Mascarenhas) e il *Grupo Gay da Bahia (Gruppo Gay di Bahia)* (guidato da Luiz Mott). Entrambi rappresentavano caratteristiche tipiche del movimento di quell'epoca, meno concentrati in trasformazioni sociali, ricercando un agire pragmatico nelle garanzia dei diritti civili e la lotta contro la discriminazione de la violenza (SIMÕES; FACCHINI, 2009, p. 120).

Più tardi, dall'inizio del decennio dei 90, c'è stato un cambiamento nell'aria del movimento omosessuale con l'origine della terza ondata, allora veramente più plurale e con più protagonismo dei rappresentati dalle altre lettere dell'insime della "zuppa di sigle". Di quel periodo, di cui ancora oggigiorno ce ne sono alcuni aspetti prevalenti, si è sottolineata per la professionalizzazione dell'attivismo politico mediante la strutturazione nel formato di organizzazioni non governative (ONG) e la crescente ricerca di finanziamento. Anche da quel periodo si estese la competitività tra le entità LGBTI al coinvolgere dispute per finanziamento e visibilità politica.

Quel período anche si è distinto da un'intensificazione delle relazioni con lo Stato provocando la nascita dei programmi *AIDS I* (1994-1998)*, AIDS II* (1998-2002)*, AIDS III* (2002-2006)[4] e *Brasil Sem Homofobia (Brasile senza omofobia)* (2004)[5]. E anche dalla più stretta relazione, marcata da diverse tensioni, con il mercato econômico che segnò la comunità LGBTI come un potenziale grande gruppo di clienti (SIMÕES; FACCHINI, 2009, p. 137-152), poi iniziando un *modus operandi* aziendale continuo oggigiorno dal quale le azioni a favore della comunità LGBTI mira all'acquisto di profitti nella maggioranza dei casi.

Oggigiorno, anche se non si tratti precisamente di una quarta ondata, una volta che il modello di ONG rimanga consolidato, si possono indicare nuove particolarità legate alla forma di operare.

4 Si tratta di accordi firmati tra Brasile e la Banca Mondiale per finanziare progetti nell'ambito della salute che integrano al Programa Nacional de DST e AIDS *(Programma Nazionale di MTS e AIDS)* (SIMÕES; FACCHINI, 2009, p. 140).

5 Il programma si è centrato nell'incentivazione di molteplici azioni per combattere l'omofobia nel paese, dalla formazione di funzionari d'istruzione sulle tematiche d'identità di genere e orientamento sessuale fino al lanciamento di editti per finanziare ricerche legate alle tematiche (SIMÕES; FACCHINI, 2009, p. 145-146).

Quelle sarebbero un'ottica scientifica più grande dei e delle militanti sulla tematica, cercando la validità della loro lotta da un punto di vista accademico. E come lo indichiamo di forma più specifica, un ruolo più grande insieme al Potere Giudiziario di tutela giudiziaria per l'espansione delle garanzie dei diritti dall'ordinamento.

3 METODOLOGIA E ANALISI DEI QUESTIONARI

Epstein e King (2013, p. 47-56) risaltano la "riproducibilità" come una regola essenziale per l'investigatore nella ricerca empirica. Quindi, è essenziale la dettagliata esposizione della raccolta di dati usati nella ricerca. Pertanto, gli autori indicano che "il buon lavoro empirico aderisce allo schema della replicazione: un altro investigatore deve capire, valutare, basarsi su, e riprodurre la ricerca senza che l'autore gli fornisca qualche informazione addizionale". Per quello, questa sezione occupa la precisazione della forma di applicazione e l'analisi dei questionari.

Uno degli obiettivi già nominati di questa ricerca è permettere la costruzione di una interpretazione costituzionale dal basso verso l'alto, con protagonismo di persone della comunità LGBTI. A tal fine, mettendo in considerazione la difficoltà di delimitazione della popolazione (in virtù di vari fattori come la stessa condizione di anonimato rispetto all'orientamento non eterosessuale oppure alla condizione non cisgender), si è considerato che la migliore forma di raggiungere sarebbe da organizzazioni che lavorano direttamente con la tematica. Inoltre, ricorrere alle organizzazioni si mostra ancora più favorevole in base al profilo dei suoi integranti, in genere più costumati al "linguaggio dei diritti" dovuto alla esperienza di militanza, e anche per consentire una percezione più collettiva e meno soggettiva riguardo a quali sarebbero le priorità nell'agenda LGBTI, estendendo senza garanzie la possibilità di ottenere risultati più inclusivi, attenti alla pluralità di esperienze LGBTI.

In relazione allo strumento usato per la produzione di dati, anche se il questionario stia legato di solito all'applicazone di ricerche quantitative, la scelta è avvenuta in seguito alle limitazioni fisiche e finanziarie di questa ricerca. Dato che la ricerca copre ampliamente diversi stati del Brasile non sarebbe possibile intervistare a tutti i rappresentanti di ogni organizzazione in ogni sede. E poi realizzare interviste mediante videochiamate potrebbe non essere accettato da tutte le organizzazioni, oppure incluso pregiudicare la percezione delle informazioni in base a errori della connessione. Per quello lo strumento mostrato come migliore scelta metodologica è stato il questionario.

Il questionário è stato diviso in quattro sezioni per la sua

strutturazione, prevalendo domande di tipo aperto per possibilitare il massimo di captazione d'informazione e anche un grado minore d'influenza sulle risposte. La prima sezione intendeva appena l'attenzione d'informazioni generali sull'organizzazione come nome, paese[6], città della sede e anche l'indirizzo elettronico di contatto. Nella seconda sezione si è domandato su quali sono i diritti che l'organizzazione considera que hanno bisogno di essere espressamente previsti nella Costituzione, senza dipendere della realtà del suo proprio paese. Uno spazio è stato fornito per includere addirittura cinque diritti e una giustificazione per ognuno, essendo obbligatoria soltanto l'inclusione di almeno un diritto. Nella seguente sezione l'unica che contava con una domanda di risposta chiusa (le opzioni offerte erano solo "sì e "no"), si domandava: "la protezione costituzionale dei diritti LGBTI nel suo paese è sufficiente?". Infine, la quarta sezione variava d'accordo con la risposta data nella terza domandando: perché l'organizzazione considerava la protezione sufficiente o no, quali credevano che fossero i motivi di quello *status* di protezione e, nei casi in cui c'era stata indicata una protezione insufficiente, si domandava quali potrebbero essere le vie di soluzione del problema.

Per ottenere un sondaggio ampio di organizzazioni brasiliane si è optato per usare una lista di organizzazioni che lavorano con la causa LGBTI nel paese fornita da "TODXS *App*", un'applicazione di cellulare creata dalla ONG TODXS e pensata di forma esclusiva per la comunità LGBTI[7]. L'applicazione oltre a fornire la lista di organizzazioni offre accesso a tutta la legislazione brasiliana legata alla tematica e anche per realizzare denunce di casi di "omotransfobia" che si trasferiscono direttamente alla Controladoria Geral da União (CGU) *(Corte dei conti dell'Unione)* per la ricerca.

Alla luce di quanto esposto, è stato inviato il questionario per un totale di 72 organizzazioni, tra le quali sono ritornate 10 risposte. Tutti i questionari furono inviati a gennaio del 2018 con un termine per la risposta fino alla metà di febbraio, più tardi sono stati inoltrati a febbraio e estendendosi il termine di risposte fino all'inizio di marzo.

Rispetto al metodo, si è guidato dall'analisi qualitativa tripartita di documentazione empirica proposta da Mario Cardano (2017). Il metodo d'analisi proposto dall'autore copre queste fasi: segmentazione, qualificazione e individualizzazione dei rapporti. La segmentazione fa riferimento allo stabilimento di marcatori " la cui funzione è identificare i segmenti relativamente omogenei per sottoporre la comparazione

6 Tale elemento è stato sollecitato, dato che il questionário è stato applicato a organizzazioni di diversi paesi per realizzare uno studio comparato di Latinoamerica, anche se in questo lavoro si sfrutti soltanto l'ottica brasiliana.

7 Per più informazioni dell'applicazione e l'organizzazione: <https://www.todxs.org/>.

dentro i materiali empirici" (CARDANO, 2017, p. 273). In tal senso, la segmentazione ha continuato con la divisione di domande costanti dentro il questionario al dividere l'esame in quattro categorie: i diritti e le giustificazioni, la sufficienza o no della protezione nel paese e il perché di quella caratterizzazione, le cause della protezione sufficiente oppure insufficiente, e i suggerimenti di superamento dell'insufficienza di protezione nei casi che si potessero applicare.

Più avanti Cardano offre un concetto per la fase della qualificazione (2017, p. 293): "assegnazione di una o più proprietà a uno specifico segmento della documentazione empirica, utili per la caratterizzazione". Così, la tecnica permette che si approfondì la dimensione d'analisi del documento mediante la sua specificazione più grande. Dunque, per la qualificazione dei segmenti è stata utilizzata il cosiddetto *template analysis* proposto da Nigel King (2012, p. 426-450). Il metodo consiste nella composizione di un grade analitica che parte dalla caratterizzazione di ogni proprietà identificata per possibilitare la sua comparazione. L'uso del *template analysis* può darsi da due ottiche principal: induttiva (*data-drive*), che compone la rete attraverso quello che si osserva nell'analisi del materiale; oppure deduttiva (*theory-drive*), mediante il quale viene inserito quello trovato nel documento analizzato a categorie prima determinate. L'analisi dei questionari è stata appena fatta di forma induttiva, essendo la classifica stabilita dalle risposte fornite.

Finalmente, l'individualizzazione dei rapporti consiste nell'analisi sulla base delle comparazioni delle qualificazioni, o anche mediante la separazione di una determinata qualificazione per analisi. Quindi, in quell'ultima etapa si è fatta l'analisi attraverso la verifica incrociata delle qualificazioni, scomponendo le principali conclusioni esposte dai dati prodotti.

3.1 Diritti e giustificazioni

Come indicato in precedenza, il questionario possedeva spazio per indicare fino a cinque diritti LGBTI che l'organizzazione ritenesse essenziali e che dovevano essere esposti espressamente interpello nei documenti costituzionali, ognuno accompagnato da uno spazio per giustificare la ragione di quel diritto. L'intenzione era creare un parametro ideale di protezione che potesse compararsi con il documento costituzionale. Un'altro anche indicato in precedenza è l'appena obbligatoria indicazione di un diritto, rimanendo opzionali gli altri quattro.

In base all'analisi delle risposte si è potuto constatare la compilazione di 44 diritti diversi. Ognuno dei diritti fu inserito di

forma induttiva in 14 diversi categorie, in alcuni casi con un'esistente divisione di una stessa compilazione in due categorie diverse.

La Tabella 01 espone le diverse forme di apparizione di ognuno dei diritti dentro dei questionari.

Tabella 01 – Forme di Apparizione dei Diritti Indicati nei Questionari

Diritto	**Forme di Apparizione**
Diritto alla non discriminazione	non discriminazione, diritto alla non discriminazione, diritto alla non discriminazione; diritto alla non discriminazione in base all'orientamento sessuale e identità di genere; lotta contro la discriminazione
Diritto al lavoro	**istruzione e lavoro**
Diritto a una vita degna/sicurezza	diritto alla cittadinanza; protezione dello Stato alla comunità LGBT; diritto alla sicurezza della vita; sicurezza; [protezione dei] LGBT in prigione
Uguaglianza di diritti e opportunità	Garantire il trattamento paritario più che altro dei servizi pubblici, diritti all'uguaglianza e cittadinanza; diritti civili; **politiche affermative ai transessuali**; diritto a completa isonomia come quella dei cittadini eterosessuali
Diritto all'identità di genere	Legge sull'Identità di Genere nota come João Nery; **diritto all'adempimento della pena privativa di libertà concordando con l'identità di genere e in ambiente libero dalla discriminazione**; **nome sociale**; diritto alla modifica di registro (nome e sesso); legge d'identità di genere; carta d'identità; diritto alla libera espressione sociale dell'identità di genere e orientamento sessuale
Diritto al matrimonio e unione civile	diritto all'uguaglianza matrimoniale; uguaglianza matrimoniale **diritto al matrimonio civile e all'adozione da coppie non eterosessuali**

Diritto alla salute	totale accesso alla salute; la salute di qualità; diritto alla salute; **prevenzione di infezioni di trasmissione sessuale**; garanzie sulla salute piena LGBT
Criminalizzazione dell'omofobia	criminalizzazione della LGBTIfobia; criminalizzazione della lgbtfobia; criminalizzazione della LGBTIfobia
Diritto all'alloggio	Alloggio
Diritto a un'istruzione plurale	accesso all'istruzione; istruzione per la diversità; **istruzione e lavoro**
Diritto alla maternità/ paternità/adozione	adozione da coppie dello stesso sesso; adozione; **diritto al matrimonio civile e all'adozione da coppie non eterosessuali**
Depatologizzazione della transessualità	transessualità non è malattia
Diritto alla riassegnazione chirurgica del sesso e alla terapia ormonale	diritto alla riassegnazione del sesso e terapia ormonale; il trattamento ormonale e chirurgico in tutte le città con più di 300.000 abitanti.
Diritto all'informazione riguardo la sessualità	diritto all'informazione giusta riguardo l'omosessualità

Fonte: lavoro personale

Le apparizioni colorate in rosso sono quelle in cui due diritti furono collocati assieme e che, perciò, sono stati divisi per classificarli meglio. D'altro canto, quelle colorate in arancione si riferiscono alle apparizioni che, anche se vengano inserite in diritti più grandi, sono così specifiche che potrebbero aver ricevuto una categoria autonoma; cosa non fatta nel tentativo di possibilitare una comparazione e l'individualizzazione migliori delle relazioni. Nella Tabella 02 è possibile osservare la frequenza di apparizione di ogni categoria nei questionari.

Tabella 02 – Frequenza di Apparizione dei Diritti

Diritto	Brasile
Diritto alla non discriminazione	5

Diritto al lavoro	1
Diritto a una vita degna/sicurezza	5
Uguaglianza di diritti e opportunità	**5**
Diritto all'identità di genere	**7**
Diritto al matrimonio e unione civile	**4**
Diritto alla salute	5
Criminalizzazione dell'omofobia	3
Diritto all'alloggio	1
Diritto a un'istruzione plurale	3
Diritto alla maternità/paternità/adozione	**3**
Depatologizzazione della transessualità	1
Diritto alla riassegnazione chirurgica del sesso e alla terapia ormonale	2
Diritto all'informazione riguardo la sessualità	1

Fonte: lavoro personale

Un analisi veloce delle tabelle precedenti ci permette affermare che la protezione presenta nella Costituzione brasiliana è infinitamente al di sotto dello scenario ideale che i LGBTI indicano e sperano. Limitandosi soltanto ai quattro diritti più frequenti (la non discriminazione, l'uguaglianza di diritti e opportunità, il matrimonio e l'identità di genere) è possibile notare che il magno documento della

patria non presenta nessuna previsione specifica riguardo le persone LGBTI in concordanza con essi diritti. Quello evidenzia quanto il documento costituzionale manca ancora di progresso per una piena protezione dei e delle LGBTI e il loro riconoscimento come esseri e soggetti di diritto. Così, quei dati aiutano a capire il problema accennato prima, aspettando la conformazione dell'ipotesi formulata.

Per capire meglio i motivi per cui le organizzazioni considerano quei diritti così essenziali, è stata effettuata l'analisi incrociata delle giustificative presentate per quei diritti con frequenza uguale o maggiore a quattro (colorati in verde). Inoltre, si è optato per esaminare anche le giustificazioni del diritto alla maternità/paternità/adozione (colorate in giallo) in virtù della loro prossimità (perfino confusione in certi momenti) con la tematica del matrimonio e dell'unione civile.

In materia del diritto alla non discriminazione spiccano due gruppi di giustificazioni. Il primo si basa sullo storico e sull'intensità della discriminazione, anche sul numero di morti LGBTI. Il secondo gruppo di giustificazioni fa riferimento alla sua rilevanza simbolica e alla visibilità causate da quella inclusione, anche si riferisce al substrato giuridico che fornirebbe. Pertanto, merita sottolineare la successiva risposta di una delle organizzazioni:

La Costituzione Federale prevede come obiettivo fondamentale della Repubblica promuovere il bene di tutti, senza pregiudizi di origine, razza, sesso, sul colore, età e qualsiasi altra forma di discriminazione (art. 3º, IV). L'inclusione in quel ruolo del divieto della discriminazione rispetto alla sessualità e l'identità di genere non costruirebbe strumenti legali per l'eliminazione di quelle pratiche discriminatorie, ma offrirebbe espresso sostegno costituzionale per il tema, oltre alla sua deduzione dei principi costituzionali.

Tornando all'analisi della categoria "diritto a una vita degna/sicurezza" anche si potrebbero sottolineare due gruppi di giustificazioni. La prima e più ricorrente cercava di segnalare i numeri di violenza e omicidi contro persone LGBTI in Brasile in funzione del suo orientamento sessuale e identità di genere. Oltre, anche furono sottolineate le crudeli caratteristiche con cui si ricoprono i crimini omofobici. Da un'altra parte, si è notato che l'avvenuta persecuzione contro i LGBTI gli impedisce di esprimere la loro dignità e godere di diritti basici consacrati dal documento costituzionale per tutti i cittadini e le cittadine.

La categoria successiva le cui giustificazioni sono state analizzati ("uguaglianza di diritti e opportunità") è strettamente legata al diritto alla non discriminazione. Intanto, quei due diritti sono stati classificati individualmente, dato che la loro apparizione è stata separata in vari

dei questionari. Quella seconda analisi di giustificazioni ha originato tre gruppi diversi di argomenti: il primo identifica che quella categoria comprende diritti che sono negati alle persone LGBTI. D'altro canto, il secondo gruppo sostiene che quella è una forma di garantire l'inclusione di persone LGBTI dentro i servizi forniti dallo Stato. Per concludere, il terzo gruppo di giustificazioni sottolinea che quella sarebbe la forma di ritirare la precarietà delle vite LGBTI.

Dando un passo avanti verso l'analisi del diritto di genere, sono state identificate due giustificazioni principali. La prima si riferisce al bisogno del rispetto e all'autonomia delle persone transessuali che possano identificarsi della forma che vogliano e senza imposizioni della società. Il secondo gruppo riflette che l'identità di genere è l'entrata per rendere effettivi tutti i diritti fondamentali per le persone transessuali, e così garantire la loro dignità e mitigare la loro vulnerabilità fronte allo Stato, che non le riconosce come cittadine.

Ancora parlando di quella categoria si devono precisare due punti. Il primo si riferisce a un diritto estremamente specifico che ha puntato una delle organizzazioni brasiliane, cui ha affermato il bisogno di "diritto all'applicazione della pena privativa di libertà di conformità con l'identità di genere e in un ambiente libero di discriminazione". L'organizzazione indica rispetto alle giustificazioni di quel diritto che

ormai appena otto istituti penitenziari maschili in Brasile contano con spazi per donne transessuali, travestiti e uomini gay. Sullo svolgimento della pena privativa di libertà viene imposta la manutenzione del prigioniero in un ambiente sicuro e, nel caso della popolazione LGBT, la costruzione di saloni, vestiboli oppure spazi determinati per la loro permanenza dato le costanti minacce e lesioni a diritti che soffrono nelle carceri e prigioni maschili.

Dal brano richiama l'attenzione per una intersezione fra le oppressioni che ha sofferto la popolazione carceraria e la popolazione transessuale, aumentando il soffrimento e la violazione dei diritti di quelle persone.

Il secondo punto parla rispetto al procedimento di modifica del registro. Un'altra organizzazione ha sottolineato il bisogno di fare la modifica attraverso vie amministrative e non giudiziarie[8]. Quel punto è di grande importanza data la difficoltà di accesso alla giustizia che affrontano i LGBTI e la lentezza dei procedimento giudiziari.

A proposito della richiesta per rendere effettivi il diritto alla salute, le organizzazioni hanno focalizzato le sue giustificazioni in due

8 Le risposte ai questionari ci furono prima della decisione del STF nel RE nº 670.422 e nella ADI 4275, che ha autorizzato la modifica della registrazione di nome e genere delle persone transessuali dal genere percepito da loro stessi senza il bisogno del procedimento giudiziario.

motivi centrali: il primo parla rispetto alla mancanza di preparazione dei professionali della salute per affrontare con richieste specifiche delle persone LGBTI, anche relazionandosi ai frequenti atti discriminatori realizzati da professionali di quell'ambito verso queste persone. D'altro canto, si è ancora rilevata che la mancanza di programmi centrati nella "promozione, protezione e preservazione" della salute LGBTI ha un importante ruolo nella nulla capacità da combattere le infezioni di trasmissione sessuale dentro quella popolazione. Ad esempio, quando c'è istruzione sessuale nelle scuole si affronta veramente con uno standard egemonico che favorisce la eteronormatività.

Per finire, l'analisi delle ultime due categorie selezionate ha portato dei nuovi rifletti. Un punto comune fra i due gruppi di diritti (diritto al matrimonio e unione civile e diritto alla maternità/paternità/adozione) parla rispetto all'importanza di rendere positivi quei valori per la comunità LGBTI. Per dire, senza dipendere dalla conquista di quella garanzia attraverso vie giudiziarie, è essenziale che essa sia inclusa nel documento costituzionale. Quella preoccupazione delle organizzazioni è troppo importante, non solo perché l'inclusione testuale del diritto ha un valore simbolico considerevole, ma perché porta più sicurezza giuridica a quei individui che non dipenderebbe più dalla volontà e interpretazione giudiziarie di facile modifica.

All'approfondire dentro l'analisi, è possibile capire che la categoria di diritti all maternità/paternità/adozione focalizza la sua giustificazione sul bisogno di uguaglianza di diritto e riconoscimento dell'esistenza di una pluralità di accordi relazionali. Inoltre, gli argomenti relazionati al diritto al matrimonio e all'unione civile sono più diversificati e si separano in tre gruppi. La prima giustificazione è in relazione alla possibilità di garantire visibilità alle relazioni dello stesso sesso, prendendole dal mondo privato e portandole alla vita pubblica. Un'altra parla rispetto alla possibilità di stabilire quel diritto dalla sua previsione nel documento costituzionale senza poter essere revocato grazie a una approvazione di legge. Finalmente, l'argomento più ricorrente fa riferimento ai diritti derivati dal matrimonio o l'unione civile che infila come una tappa necessaria nella maggioranza degli ordinamenti per garantire altri diversi diritti civili.

Insomma, è possibile concludere che tutte le giustificazioni riguardano il bisogno di riconoscimento delle persone LGBTI in legame a vite che importano e soggetti di diritto. Si cerca il rispetto della loro dignità e garantire l'accesso agli stessi diritti come gli eterosessuali e omosessuali, diritti storica e contemporaneamente rifiutati ai e alle LGBTI.

3.2 L'(in)sufficinenza della protezione costituzionale di diritti LGBTI

Il secondo segmento d'analizzare anche fa riferimento alla seconda sezione dei questionari. Nello strumento si è investigato se le organizzazioni consideravano sufficiente o no la protezione costituzionale dei diritti LGBTI nel loro paese. Inoltre, si è sollecitato che presentassero le ragioni in virtù di cui caratterizzarono la protezione come sufficiente o insufficiente. L'analisi delle risposte segnò un esteso posizionamento riguardo l'insufficienza della protezione dato che tutte le organizzazioni hanno risposto che la tutela sarebbe insufficiente in Brasile.

Al ritornare all'analisi incrociata dei motivi puntati per caratterizzare la protezione come insufficiente, si evidenziano cinque diverse ragioni. Le organizzazioni brasiliane indicarono le successive giustificazioni: mancanza di accesso a diritti basici per i LGBTI; progressi nell'applicazione di diritti appena sostenuti su decisioni giudiziarie o misure amministrative; vantaggi che le persone eterosessuali e cisgender possiedono nel nostro sistema democratico; alta tassa di morti di LGBTI in Brasile; e non qualificazione del delitto di "omotransfobia". Rispetto al primo punto vengono sottolineate queste risposte:

Temi come la sessualità, genere e identità di genere non sono trattati di maniera espressa nella Costituzione Brasiliana, il che, aggiunto alla mancanza di legislazione infracostituzionale giusta, rende vulnerabile alla comunità LGBTI fronte all'ordine costituzionale.

La costituzione brasiliana non cita affatto nel suo documento l'orientamento sessuale e identità di genere, verificando con il processo di occultamento della comunità LGBTI+. D'altra parte, ancora rafforza valori tradizionali di diversità di sesso nel matrimonio (art. 226, § 3º, CF).

Il secondo punto rilevato si riferisce ai rischi e alle instabilità di una protezione eminentemente giudiziaria. La mancanza di previsione di diritti specifici nel documento costituzionale, unito alla composizione di asemblee legislative conservatrici e molto chiuse al tema della sessualità e identità di genere, risulta in una scommessa della militanza più che altro nel Potere Giudiziario mediante la tutela giudiziaria. Intanto, quella scommessa portò una serie di rischi: non solo perché l'applicazione del diritto si realizzi di forma incompleta (in virtù della mancanza di regolamentazione o d'impostazione di tutte le sfumature della tematica per le decisioni giudiziarie), ma anche dell'insicurezza giuridica generata dalla dipendenza delle interpretazione promosse da una giustizia volubile. Pertanto, una delle organizzazioni brasiliane sottolinea che la sicurezza e protezione dei LGBTI "dipende molto dall'interpretazione e della buona volontà delle persone che agiscono la macchina dello Stato",; il che, un'altra volta, riflette la precarietà dell'attuale panorama di riconoscimento di diritti alle persone LGBTI.

Il terzo punto rilevato traduce la struttura espressa da un società sotto lo standard egemonico che favorisce la eteronormatività, in cui quei o quelle che violano la norma di solito sono emarginati e messi sotto valore. Il quarto aspetto, a sua volta, riguarda la dimensione dei numeri di violenza contro la comunità LGBTI.

Per concludere, l'ultimo punto presentato parla rispetto alla non criminalizzazione dell'omotransfobia nell'ordinamento brasiliano. L'idea di usare il sistema penale, mezzo d'oppressione e perpetuazione di discriminazioni strutturali, per tutelare gli interessi dei e delle LGBTI è un tema controverso incluso dentro la militanza uomo e transessuale. Anche se ricorrere al diritto penale possa trasmettere la seducente immagine di come le vite LGBTI importano per la società, si deve notare che quello non cambierà la percezione della maggioranza della popolazione riguardo quelle identità e sessualità anomale, anche attuerà su un obiettivo estremamente limitato e distorto che già sovraccaricano neri e nere ogni giorno in Brasile. Quindi, la criminalizzazione solo avrebbe utilità per mandare in prigione coloro che il sistema già classifica come trasgressori propria prima di qualsiasi giudizio. Così, si bisogna riflettere profondamente riguardo la sua applicazione.

3.3 Le cause degli *status* di protezione costituzionale

In questa penúltima segmentazione si è voluto misurare quali sarebbero i fattori causanti dell'insufficienza di protezione. In tal senso si rilevano cinque diverse categorie di cause revelate. Comunque, tutte stanno profondamente collegate e fanno difficile delimitare con precisione quello che copre ognuna, sono queste: 1) la conformazione di legislatori conservatori; 2) la matrice socio-culturale eteronormativa presente in Brasile; 3) la matrice religiosa del paese e il suo snaturamento partendo dal fondamentalismo; 4) la mancanza d'istruzione sulla popolazione in temi di genere di sessualità; 5) la mancanza di dialogo del potere pubblico con i movimenti sociali.

La prima causa fa riferimento alla dimensione politica della giustizia e all'idea di rappresentanza. Come si evidenzia, una delle cause dell'insufficienza di protezione è giustamente collegata all'ingiustizia della falsa rappresentanza[9]. È così dato che persone LGBTI non riescono a essere elette e avere accesso a legiferare, le opportunità di rendere in

9 In tal senso, Corrales (2015, p. 7) sottolinea che fino all'anno 2014 soltanto c'erano state 15 persone, nella storia della formazione legislativa nei paesi di Latinoamericano e dei Caribi, che erano pubblicamente omosessuali e assumevano posti in assemblee legislative a livello federale. E quello si limitava a Argentina, Aruba, Brasile, Cile, Colombia, Costa Rica, Ecuador, Messico e Perù. Ormai in Brasile soltanto il deputato federale Jean Wyllys fa parte di quella categoria.

considerazione i suoi reali interessi sono proporzionalmente minori[10]. Questo peggiora fronte alla composizione di assemblee legislative eminentemente conservatrici, i cui integranti, oltre a non contare con esperienze di una persona LGBTI, si impegnano a non permettere il progresso dei loro diritti.

Le successive cause fanno riferimento a matrici socio culturali eteronormative e religiose installate nel nostro paese. Anche se siano parte di un gruppo separato, non lasciano di relazionarsi direttamente con le cause precedenti. Questo perché giustamente l'esistenza di una tradizione culturale eteronormativa che impedisce in grand parte l'accesso dai LGBTI ai poteri pubblici, e anche ritorna alla conformazione delle nostre assemblee legislative conservatrice in relazione a temi di sessualità e identità di genere. E ancora è grande la presenza di attori religiosi che compongono le assemblee legislative cui finiscono per influenzare la produzione normativa riguardo e le LGBTI. Quello che cataloghiamo come "fondamentalismo religioso" è in realtà un forma di snaturamento dei valori religiosi per basare la violazione di diritti fondamentali contro persone LGBTI; e, con base su argomenti religiosi, che proposte estremamente conservatrici furono legitimate (VITAL; LOPES, 2012, p. 150-167). La continuità di quella realtà e la difficoltà per modificare la mentalità sono direttamente collegate alle successive cause analizzate sostenute dal deficit d'istruzione.

Come si ha detto, un'altra causa evidenziata è stata la mancanza d'istruzione della popolazione riguardo questi temi. In questo punto, si rileva un fattore fondamentale per il progresso nella concertazione dei diritti LGBTI: l'istruzione. Senza che temi come genere e sessualità siano toccati dall'istituzione basica a quella superiore non ci sono forme di promuovere un cambiamento profondo del nel concepire della popolazione generale riguardo i LGBTI. Molte volte i pregiudizi sostenuti dall'ignoranza si deve combattere mediante un dibattito più esteso e un'istruzione che scomponga, in primo posto, concetti biologici e religiosi erroneamente diventati naturali e cristallizzati nella nostra società.

L'ultimo gruppo di cause si sostiene sulla stessa premessa di questo lavoro: il bisogno di costruzione di un diritto dal basso verso l'alto. Per dire, lo scarso progresso riguardo i diritti LGBTI si deve alla mancanza di dialogo del potere pubblico con i movimenti sociali. Questo perché, come si è già affermato, sono gli individui colpiti che hanno più legittimità per aiuto e per la propria costruzione di politiche pubbliche.

10 Andrew Reynolds in una ricerca empírica relazionata al tema (2013, p. 259) punta come risultato l'esistenza di un'associazione fra la presenza al meno piccola di legislatori pubblicamente gay e l'approvazione di normative che procedano sui diritti degli omosessuali, una volta che la presenza di gay dentro la legislazione abbia fatto un trasformazione sulla visione e voto dei suoi compagni eterosessuali.

Quindi, è essenziale che tanto il potere Legislativo quanto l'Esecutivo e il Giudiziario centrano la loro attenzione verso il movimento LGBTI e le organizzazioni che lo rappresentano. Un'organizzazione ha sottolineato dentro la propria risposta questo punto relazionato all'assemblea costituente brasiliana:

Nonostante la preoccupazione com il dibattito democratico, durante l'Assemblea Costituente, gruppi LGBTI+ hanno avuto meno influenza sul contenuto del documento costituzionale. Ad esempio, negli annali della costituente in cui si parla rispetto agli art. 226, § 3º, c'è stata una manifestazione di un pastore a favore dell espressa sostituzione di "unione stabile come entità familiare" per "unione stabile fra uomo e donna come entità familiare", al fine di evitare che coppie dello stesso sesso costituisce unione stabile. Dal 1988, gruppi LGTBI+ continuano lottando per l'applicazione dei suoi diritti di creazione di meccanismi di protezione, ma solo recentemente alcuni governi hanno cominciato a agendare di forma effettiva questioni legate all'orientamento sessuale e l'identità di genere. A tal fine, ancora c'è un ostacolo che impedisce il dialogo tra movimenti sociali legati alla causa e il potere pubblico (ancora fortemente legato a valori cristiani).

Come viene ritenuto, la mancanza di dialogo tende a partire dal proprio potere pubblico e non dai movimenti sociali. Invece, il movimento LGBTI ha fatto uno sforzo per raggiungere e influenzare il potere pubblico di qualche forma, come si mostra nel questionario, cercando che le sue richieste siano, almeno, ascoltate e prese in considerazione.

3.4 Ricercando alternative

L'ultimo tra i segmenti precisati per l'analisi ha cercato d'identificare forme di superare l'attuale paradigma di protezione costituzionale insufficiente. Pertanto, le organizzazioni sono state questionate riguardo come credevano che l'insufficienza della protezione potrebbe posizionarsi.

Al analizzare le risposte date all'interrogatorio si è identificato che due dei principali ambiti mettevano insieme la maggioranza delle suggestioni presentate: modifiche legislative e politiche d'istruzione. Più specificamente, si rilevano cinque gruppi di soluzioni: 1) proposte legislative; 2) creazione di politiche pubbliche; 3) modifiche sul modello d'istruzione; 4) esecuzione di ricerche riguardo ai problemi affrontati dalla comunità LGBTI; e 5) criminalizzazione della LGBTI fobia.

Rispetto alle proposte legislative, si è precisato il bisogno di esercitare l'*advocacy* insieme al Potere Legislativo con l'intenzione di affermare i diritti fondamentali delle persone LGBTI, garantendo lo *status* di cittadinanza a loro. Oltretutto, si è notato il bisogno dell'espressa

inclusione di diritti LGBTI nel documento costituzionale, così come "l'estensiva interpretazione dei principi di non discriminazione previsti in precedenza per accogliere la protezione della comunità LGBTI".

Fuori l'ottica meramente legislativa, si è evidenziato il bisogno d'idealizzazione ed esecuzione dal potere esecutivo di politiche pubbliche indirizzate verso i LGBTI perché i mandamenti legali siano effettivi. Quindi, non basta solo la modifica di legge o norma costituzionale se non viene accompagnata da una politica pubblica di qualità per la sua applicazione e per la consapevolezza della popolazione.

Pertanto, una delle forme più efficaci per modificare un contesto socioculturale sotto lo standard egemonico che favorisce la eteronormatività è la ristrutturazione del sistema d'istruzione. Questo fu puntato da quasi tutte le organizzazioni. Un'ottica pedagogica e d'istruzione si bisogna non solo per informare meglio alle persone riguardo tutte le questioni riguardanti all'identità di genere e la sessualità, ma anche per sensibilizzare e umanizzare i successivi legislatori, gestori pubblici e giudici. Senza una formazione interdisciplinare dall'istruzione basica fino a superiore/tecnica non c'è forma di modificare interamente la nostra realtà "omotransfobia".

La quarta proposta esaminata concorda com lo stesso obiettivo di questo lavoro. Si è suscitato il bisogno di fornire ricerche per produrre dati riguardo la realtà vissuta dai LGBTI. Com'è stato precisato, si considera essenziale l'ingaggio scientifico dentro la tematica, non solo per offrire argomenti riguardo il bisogno di modificare il paradigma attuale, anche per approfondire la conoscenza di una realtà che, in molti punti, manca d'informazioni più affidabili. La ricerca ha tentato di realizzare proprio questo. In tal senso, si rileva il successivo posizionamento presentato da una un'organizzazione brasiliana:

Il primo passo per soluzionare la mancanza di protezione per la comunità LGTBI+ è la produzione di dati che mostrano l'importanza dei problemi che questo segmento affronta. Così sarà possibile informare il dibattito e creare una piattaforma solida per il dialogo con il potere pubblico e rivendicare quei diritti. Ancora il movimento precisa di organizzarsi per supportare candidati LGBTI+ e alleati che saranno capaci d'influenzare l'agenda della comunità dentro i poteri legislativo ed esecutivo, contribuendo con la formazione di una legislazione che garantisca i diritti LGBTI+ e le politiche pubbliche di promozione e inclusione e lotta contro la violenza.

Per finire, è stato proposto da un'altra organizzazione che il primo passo per modificare la realtà attuale sarebbe la criminalizzazione delle pratiche LGBTI fobia. Prima discusso, il tema di criminalizzazione è enormemente controverso, incluso tra persone LGBTI, e si deve accompagnare sempre da una essenziale visione critica dell'istituto penale. Nel caso che la criminalizzazione si consideri come un'uscita

(una volta che non sembra possibile rilevarla *a priori*), allo stesso tempo si deve alzare la discussione riguardo la problematica della discriminazione strutturale del sistema penale, nonché il suo uso conforme all' *ultima ratio*, cercando evidenziare quale sarebbero le situazioni giuridiche che veramente meritano essere tutelate da quell'ambito del diritto. Peraltro, come sottolinea Thula Pires (2015, p. 278-279) riguardo la criminalizzazione del razzismo, le norme che puntano a lottare contro la discriminazione mediante la pena possono mancare di funzionalità una volta che le istituzioni di punizione prendono uno standard d'oppressione, senza includere atti di discriminazione di natura penale.

CONCLUSIONE

Brasile è il paese che uccide più persone LGBTI nel mondo. Anche se c'entri dentro una tradizione costituzionale con marcata estensione dell'agenda, la Costituzione del 1988 non possiede disposizioni specifiche riguardo la tutela dei diritti LGBTI. In tal senso, questo lavoro ha ricercato quale sarebbe l'estensione della protezione fornita dalla Costituzione brasiliana dall'ottica dei movimenti sociali, dando priorità alla costruzione di un diritto dal basso verso l'alto.

Quindi, si è delineata una ricostruzione storica del ruolo del movimento LGBTI brasiliano mediante tecniche di rassegna bibliografica per migliorare la comprensione della caratterizzazione e forme di agire del cosiddetto movimento. Dopo sono state analizzate le risposte di dieci organizzazioni brasiliane al questionario applicato. Dell'analisi documentale è stato possibile esprimere l'evidente insufficienza di protezione della nostra Costituzione riguardo le persone LGBTI, argomento puntato di maniera unanime da tutte le entità che hanno fornito risposte allo strumento.

Oltretutto, l'analisi dei questionari há permesso andare avanti sulla comprensione di come succede il processo per ignorare le persone LGBTI dentro documento costituzionale, e anche sulla ricerca di forme mediante le quali l'attuale paradigma si possa superare. A tal fine, anche si è concluso che il superamento deve succedere oltre al campo giuridico che si mostra estremamente limitato per istituire una trasformazione sociale profonda, anche che costituisca un'importante arma ad essere disputata e direzionata per la cosiddetta finalità. Per quello si bisogna il suo collegamento con altri ambiti come l'istruzione e la salute per promuovere l'applicazione della giustizia per le persone LGBTI.

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DIRITTO INTERNAZIONALE PRIVATO DELLA FAMIGLIA: INFLUENZA DELLA STORIA E DELLA GEOGRAFIA DEL BRASILE [1]

INTERNATIONAL PRIVATE FAMILY LAW: INFLUENCE OF BRAZIL'S HISTORY AND GEOGRAPHY

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Abstract : The article aims to introduce the evolutionary course of Private International Law in regards to Family Law in Brazil, with special focus on the advent of Brazilian nationality in the postcolonial context, the migration policies and the applicable law at the time. For this purpose, Brazilian History and Geography were revisited in order to ponder the political decisions that contributed to the development of the conflict method in Brazil. These are the premises developed throughout the text to analyse the formation of Private International Law of the Brazilian Family, which stands out within the American continent due to its trajectory, as will be discussed throughout the article.

Keywords : conflict of laws; nationality; residence

INTRODUZIONE

La scoperta del territorio che oggi ospita lo Stato brasiliano è stata preceduta dalla divisione delle terre virtualmente esistenti nel percorso

1 Il presente testo costituisce uno sviluppo della relazione intitolata "Criterio di collegamento nelle famiglie mosaico: proposta di soluzione, nel caso brasiliano, a partire dall'esperienza europea", svolta nel "1º Congresso Internazionale di Diritto Privato. Le tre facce del Diritto Privato: civile, commerciale e internazionale", tenutosi a San Paolo, dal 12 al 14 maggio 2014.

tra l'Europa e l'Asia tra due grandi potenze del periodo e, certamente, le due maggiori potenze in materia di navigazione. La scarsa precisione degli strumenti di misurazione[2] – se comparati con gli strumenti oggi esistenti - può aver stimolato una divisione che avrebbe recato enorme pregiudizio alla Corona portoghese[3] se non fosse stato per una serie di influenze topografiche e demografiche che hanno creato maggiori ostacoli alla Corona spagnola piuttosto che a quella portoghese.

Storia e geografia, così, sembrano avere influenzato la conduzione dell'attività di occupazione del territorio brasiliano. L'ipotesi da cui si parte, nella presente indagine, è quella secondo cui tali fattori avrebbero avuto un impatto sulle scelte politiche dello Stato brasiliano (in contrapposizione con le scelte degli Stati che si sono formati nell'allora America spagnola) quando si è trattato di scegliere la legge applicabile per regolare gli aspetti personali, specialmente quelli di natura familiare.

L'indagine cercherà, quindi, di confrontare fatti storici e aspetti geografici (fisici, umani, politici) che possano aver contribuito, in momenti successivi, alle decisioni politiche legate all'attribuzione della cittadinanza locale, alle politiche migratorie adottate e alla scelta dei criteri di collegamento nel Brasile coloniale (nonostante la decisione incombesse sulla Corona portoghese), nel primo Regno, nella vecchia Repubblica e nel periodo tra le Guerre.

1. STORIA E GEOGRAFIA NEL PERIODO COLONIALE

I termini del *Trattato di Capitolazione della Spartizione del Mare Oceano*, nome ufficiale del Trattato di Tordesillas, città dove è stato firmato nel 1494, sono una fonte di analisi delle ragioni che avrebbero portato Portogallo e Spagna a impegnarsi in una divisione delle terre ad ovest dell'arcipelago di Capo Verde a partire da dati parecchio imprecisi[4]. Non viene definito, per esempio, qual è il riferimento delle 370 leghe pensate come misura di distanza, visto che esistevano, nel XV secolo, diverse unità di misura designate per la parola 'lega' e neppure il punto iniziale di questa misurazione: se a partire dalla prima o dall'ultima isola dell'arcipelago da est verso ovest. Le cartine della prima metà del

2 "Quando sono iniziati i viaggi portoghesi verso la Guinea, le carte di navigazione non indicavano ancora latitudine e longitudine, ma solo percorsi e distanze. Il perfezionamento di strumenti come il quadrante e l'astrolabio, che consentivano di conoscere la localizzazione di una nave in base alla posizione degli astri, rappresentò un'importante innovazione". B. Fausto, *História do Brasil*. 14. ed. agg. e ampl, San Paolo 2012, p. 24.

3 Si vedano, al riguardo, le informazioni inserite nel capitolo 2 dell'opera di S. S. *Góes Filho*, *Navegantes, Bandeirantes, Diplomatas*. 2. ed. San Paolo 2001, p. 41-51.

4 "Solo alla fine del XVII secolo gli olandesi sono riusciti a sviluppare una tecnica precisa di misurazione della longitudine". B. Fausto, *História do Brasil*, cit., p. 40.

XVI secolo hanno rappresentato il meridiano con un'oscillazione fino a 800 km[5]. Un altro punto curioso indicato è l'uso di 370 leghe come riferimento e non un numero generico (300, 350, 400?).

Si sommi a questo l'incertezza che all'epoca esisteva ancora se il pianeta fosse piatto o rotondo (di cui è testimonianza il tentativo di Colombo di arrivare a Oriente per mezzo di una rotta tracciata in direzione Occidente), che ha finito con avere impatto in occasione della firma del Trattato di Madrid, del 1750, considerato il secondo principale strumento giuridico della conformazione del territorio brasiliano[6]. Conseguentemente, la convinzione secondo cui la Terra era rotonda - e che, pertanto, agli effetti che il meridiano di Tordesillas produceva nell'Atlantico si contrapponevano gli effetti che lo stesso meridiano avrebbe provocato lì, qualcosa, anzi, che si prevedeva nel 1529, in occasione della firma del Trattato di Saragozza - fu responsabile della percezione secondo cui non solo in America, ma anche in Asia, si sarebbero verificate violazioni dei limiti stabiliti dal Trattato del 1494. Tale constatazione finì con il consentire la riorganizzazione su base consensuale delle frontiere tra le colonie portoghesi e spagnole sulla base del principio del *uti possidetis, ita possideatis*.

Il ricorso al principio dell'uti possidetis è normalmente presentato come conseguenza dell'Unione Iberica, circostanza storica decorrente dall'estinzione della dinastia di Aviz. La morte di Don Sebastiano, allora Re del Portogallo, nel 1578, nella battaglia di Alcazarquibir, nel nord dell'Africa, elevò al trono portoghese il cardinale D. Enrico, di età avanzata. D. Enrico era zio di D. Sebastiano, che era morto senza lasciare eredi. Il regno di D. Enrico durò meno di due anni. La casata di Aviz non aveva eredi diretti, motivo per cui il Re di Spagna, Filippo II, la cui madre era la principessa Isabella di Portogallo (figlia del Re D. Manuel I, di Portogallo e fratelli dei Re D. Giovanni III - padre di D. Sebastiano - e D. Enrico) contese il trono con altri due eredi e venne alla fine riconosciuto Re di Portogallo, con il titolo di D. Filippo I, dalle corti di Tomar. Il riconoscimento fu concordato e valse al Portogallo il mantenimento della sua autonomia amministrativa, con l'indicazione, da parte di Madrid, di un Vice Re, normalmente un membro della nobiltà lusitana[7].

Uno degli argomenti proposti è che l'Unione Iberica sia

5 S. S. *Góes Filho, Navegantes, Bandeirantes, Diplomatas*, cit., p. 51.

6 "La trattativa e la firma del Trattato di Madrid, del 1750, (...) ha significato il riconoscimento giuridico dell'espansione delle frontiere coloniali in Brasile, che finì con raddoppiare e oltre l'estensione delle terre prima definite dalla linea di Tordesillas". S. Danese, *A diplomacia no processo de formação nacional do Brasil*, in Política Externa", 8, n. 1 (1999), pp. 98-117: p. 105.

7 C. G. Mota – A. Lopez, *História do Brasil: uma interpretação*. 4. ed. San Paolo 2015, p. 75-76.

stata responsabile del superamento dei limiti stabiliti nel Trattato di Tordesillas[8] e abbia condotto, anni dopo, ad un ricorso enfatico al principio dell'*uti possidetis*. Si deve, tuttavia, notare che l'accordo firmato tra Filippo II e le Corti di Tomar, che hanno garantito allo stesso la salita al trono di suo cugino, dei suoi zii e del nonno, con l'espressa previsione di un Vice Re, è stato responsabile del mantenimento delle Corti portoghesi nella "giurisdizione sui suoi possedimenti coloniali"[9].

È, comunque, necessario comprendere le ragioni che hanno portato la popolazione che si trovava nelle Americhe per delega o al servizio delle Corone (portoghese o spagnola) a infrangere i limiti stabiliti dal Trattato di Tordesillas. L'ipotesi su cui si indaga è che, oltre all'imprecisione dei termini del Trattato e alla situazione politica risultante dall'Unione Iberica, ragioni di natura geografica (fisica e umana) abbiano contribuito a questa inosservanza di quanto pattuito.

Lilia Schwarcz e Heloisa Starling citano Frate Vicente do Salvador, che già nel 1630 affermava che "nessun uomo su questa terra è repubblicano, né si occupa o tratta il bene comune, ma ognuno solo il suo bene privato"[10]. Quindi, nonostante gli argomenti presentati possano giustificare la prospettiva della Metropoli per il superamento dei limiti territoriali predeterminati, il presente lavoro vuole investigare le ragioni che, nella prospettiva delle popolazioni che già si trovavano là in quel periodo, hanno giustificato prima il raggiungimento della linea-limite e poi il superamento di essa.

Lo scopo, sia chiaro, è quello di mostrare la formazione del popolo brasiliano. E, a partire da questa dimostrazione, giustificare le scelte che influenzano il diritto internazionale privato.

1.1. Topografia

Uno degli interessi della geografia è quello di "apprendere come ogni società umana struttura e organizza lo spazio fisico-territoriale rispetto alle limitazioni imposte dall'ambiente naturale, da un lato, e dalla capacità tecnica, dal potere economico e dai valori socioculturali, dall'altro"[11].

Le trattative e la firma del Trattato di Tordesillas sono state precedute da diversi e successivi strumenti autorizzati dai Papi Sisto IV, Innocenzo VIII e Alessandro VI, ora privilegiando i portoghesi (i primi

8 Si veda, per esempio: P.B.A. Dallari, *Aspectos jurídicos da formação e da gestão do território nacional: o caso brasileiro*, in P. B.A. Dallari (Coord.), *Relações Internacionais: múltiplas dimensões*. San Paolo 2004, p. 11-18: p. 13.

9 C. G. Mota – A. Lopez, *História do Brasil: uma interpretação*, cit., p. 76.

10 L. M. Schwarcz– H. M. Starling, *Brasil: uma biografia*, San Paolo 2015, p. 19.

11 J.L Sanches Ross (Org.), *Geografia do Brasil*. 6. ed. 1. rist. San Paolo 2011, p. 16.

due), ora gli spagnoli (il terzo)[12] per quanto riguardava la divisione delle terre situate a ovest dell'Europa e dell'Africa, attribuendo virtualmente - e successivamente - le stesse porzioni di terra ora agli uni, ora agli altri. Le aspettative politiche delle due Corone erano quelle di scoprire, in ragione delle spedizioni marittime, niente più che isole e arcipelaghi fino a che non si raggiungessero le vaste terre orientali, senza che fosse possibile presumere o comprovare con precisione storica l'effettiva consapevolezza di quanto avessero questi Stati a disposizione in termini di territori e ricchezze. Anzi, la storiografia attuale è tassativa nell'indicare la scarsa rilevanza storica dell'indagine in merito alla eventuale intenzionalità delle scoperte avvenute a cavallo tra il XV e il XVI secolo. "Si tratta di una controversia che oggi interessa poco, in quanto appartiene più al campo della curiosità storica che alla comprensione dei processi storici"[13].

Indipendentemente da ciò, l'indagine che viene ora condotta è la seguente: qual è l'influenza che la topografia ha avuto nell'espansione coloniale delle Corone portoghese e spagnola a partire dal momento in cui i loro preposti si sono accorti che le terre raggiunte erano troppo estese per poter configurare delle isole? Si aveva la conoscenza del rilievo predominante nella costa est e ovest delle terre da scoprire da una o da entrambe le parti beneficate dal Trattato di Tordesillas? La Corona portoghese ha sfruttato il rilievo del territorio per raggiungere e superare il meridiano "definito" nel Trattato?

La litosfera o crosta terrestre è modellata dalla contrapposizione di due forze fisiche distinte e dalla loro azione complementare, anche se sono opposte. Dal centro della terra in direzione della superficie agiscono le forze interne o endogene, per mezzo della pressione esercitata dal manto e dal nucleo della Terra, modificando sostanzialmente la crosta terrestre, creando forme strutturali che sono, in seguito, modellate a ritmo lento e costante e scolpite dalle forze esogene o esterne, spinte esclusivamente dal calore solare che comanda i diversi tipi climatici oltre al movimento dell'aria e dell'acqua[14]. E il tutto avviene in modo ininterrotto nel tempo e nello spazio.

Se l'aspettativa era quella di scoprire e prendere possesso di isole e arcipelaghi, è possibile presumere che né i portoghesi né gli spagnoli avessero grandi informazioni riguardo al rilievo e alla topografia dei territori che si erano spartiti. Nonostante ciò, le differenze di accesso e il possesso effettivo che erano a disposizione degli esploratori erano assai significative e meritano di essere analizzate.

Trattandosi di terre fino ad allora presumibilmente sconosciute dalle nazioni europee, la loro natura giuridica era quella di *res nullius*,

12 S. S. *Góes Filho, Navegantes, Bandeirantes, Diplomatas*, cit., p. 43.

13 B. Fausto, *História do Brasil*, cit., p. 31.

14 J.L Sanches Ross (Org.), *Geografia do Brasil*, cit., p. 17-18.

il che ne consentiva la presa di possesso e l'acquisizione della proprietà per invenzione, conseguenza della scoperta. La spartizione definita dal Trattato di Tordesillas mirava, pertanto, a limitare giuridicamente le possibilità di acquisizione a titolo originario di questi territori da parte di altre nazioni, così come la frontiera tra l'area destinata alla Spagna e quella del Portogallo.

In questo ambito, assunse rilievo la finzione di una presa di possesso legata all'applicazione del principio di contiguità. Secondo questa teoria, il possesso effettivo del territorio da parte dei portoghesi o degli spagnoli si estendeva fittiziamente fino ai limiti territoriali effettivi (nel caso delle isole) o giuridici (frontiera "definita" dal meridiano di Tordesillas). La contiguità giustificava così la configurazione di non abbandono della porzione di terra che non fosse stata occupata in maniera effettiva (*res derelicta*). La conseguenza della sua incidenza è il necessario riconoscimento dell'illiceità della trasposizione del meridiano da parte dei coloni brasiliani.

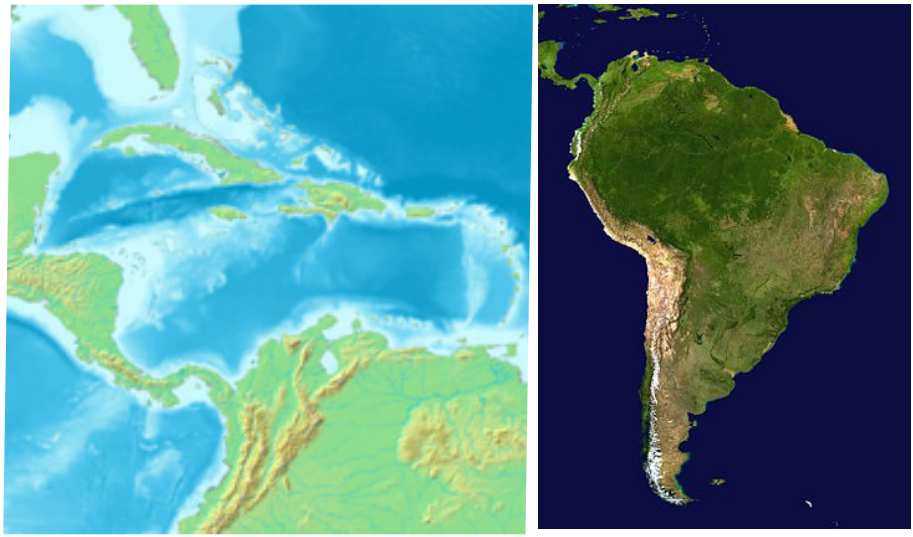
1.1.1. America portoghese

Dal punto di vista topografico, l'America portoghese era caratterizzata da un litorale esteso e con scarsa alternanza di asperità geografiche, con scarpate e basse catene montuose che si succedevano a distanza più o meno grande relativamente alla linea del mare e che terminavano in altipiani in cui cresceva una vegetazione densa, ma penetrabile qui e là, il che permetteva ai coloni di occupare il litorale e, decenni più tardi, di raggiungere le regioni più elevate senza grandi difficoltà.

L'avanzamento in direzione del meridiano di Tordesillas, tuttavia, non avvenne in maniera omogenea. L'occupazione eterogenea del territorio era il più delle volte legata all'interesse per lo sfruttamento economico delle ricchezze locali, senza che la tipografia abbia giocato qui alcun ruolo rilevante.

1.1.2. America spagnola

Anche dal punto di vista topografico, all'America spagnola fu assegnato dal Trattato di Tordesillas un terreno parecchio irregolare e accidentato. Con la finzione giuridica derivante dal principio di contiguità, il territorio passò in possesso della Corona spagnola subito dopo lo sbarco del primo spagnolo in terre americane, ma l'occupazione effettiva del territorio fu resa complicata in alcuni punti dall'esistenza di isole, come in America Centrale, con la loro vegetazione densa e invalicabile, come nella parte settentrionale dell'America del Sud, o dalle alte cordigliere, come nella Costa Ovest dell'America del Sud, come si vede nelle cartine qui di seguito:



Non si tratta, pertanto, com'è ovvio, di un tracciato di natura omogenea, ragion per cui si potrebbe affermare l'esistenza di nicchie territoriali attraverso cui la penetrazione dei territori della colonia spagnola poteva avvenire con minor difficoltà. Nonostante ciò, se confrontiamo questa ipotesi con l'occupazione del popolo nell'America spagnola (si veda, *infra*, il punto 1.2.2.), non è difficile concludere che la regione con le migliori condizioni per la penetrazione europea nel territorio, che sarebbe spettata, secondo la spartizione, alla Corona spagnola, era il bacino del Rio da Prata[15], esattamente dove si è avuto il maggior flusso spagnolo in direzione dell'interno della parte sud del continente americano.

Non a caso, si trattava della regione con maggiori scontri tra i coloni portoghesi e spagnoli e della regione in cui, a dispetto di un tracciato meno inospitale, i portoghesi sono riusciti ad avanzare in minor grado oltre il Meridiano di Tordesillas.

1.2. Popolazione originaria

Al loro arrivo nel territorio americano, gli europei convivevano con i popoli che si riunivano in agglomerati umani parecchio diversi tra loro, tanto con riguardo alla struttura sociale, politica, economica, religiosa, culturale[16], quanto in merito al livello di conoscenza

15 "Gli spagnoli si sono concentrati inizialmente nella regione di Rio da Prata e, nel Pacifico, sul litorale del Perù". P.B.A. Dallari, *Aspectos jurídicos da formação e da gestão do território nacional: o caso brasileiro*, in P. B.A. Dallari (Coord.), *Relações Internacionais: múltiplas dimensões*, cit., p. 13.

16 "L'espressione incontro delle culture divenne di uso comune al momento della celebrazione

accumulata per il controllo e la padronanza delle risorse e degli elementi naturali.

Se è vero che alcuni popoli mantenevano un rapporto contemplativo relativamente alla natura e alle sue risorse, costruendo i loro rifugi in base all'esistenza di condizioni benefiche e pianificando la loro migrazione a partire dalle avversità occasionali o stagionali, non è meno vero che altri popoli, nello stesso continente, dominavano tecniche parecchio avanzate di allevamento e addomesticamento di animali, di culture agricole[17], di ingegneria e architettura.

La struttura socio-politica sperimentata da questi popoli differiva anche enormemente da agglomerato umano ad agglomerato umano, potendosi osservare in queste strutture organizzazioni fortemente imbevute di influenze religiose derivanti da capacità di cure spirituali e corporee fino a complesse organizzazioni politiche[18] come gli imperi Inca, Maya e Azteco.

Il fattore che si cerca di investigare, quindi, è quello di sapere se il livello di organizzazione dei diversi popoli e le strategie di convivenza apprese dai coloni europei, tanto per convenienza, quanto per necessità o esigenze di sopravvivenza (coloniale) hanno avuto una qualche influenza sulla difficoltà o sulla facilità di avanzamento dell'occupazione dei territori portoghesi e spagnoli.

1.2.1. America portoghese

I popoli indigeni che occupavano il territorio attribuito alla Corona portoghese costituivano una molteplicità di gruppi di popolazioni, con culture e organizzazioni diverse, provenienti da gruppi etnici relativamente prossimi uno all'altro, con *ethos*[19] decisamente propri e,

del quinto centenario della scoperta dell'America. Visto che in questo continente esistevano culture antiche più distrutte che civilizzate dagli europei, si trattò di identificare l'espressione che dimostrasse rispetto per le civiltà autoctone, come fa l'espressione incontro di culture; nonostante non sia stato del tutto vero, visto che la civiltà che si è imposta è stata quella europea". S. S. *Góes Filho*, *Navegantes, Bandeirantes, Diplomatas*, cit., p. 85.

17 "Nell'America del Sud, nell'area corrispondente all'altopiano del Perù e della Bolivia, frontiera dei bacini idrografici che avrebbero formato il territorio brasiliano, i quechua costituivano una civiltà particolarmente avanzata e gerarchica. Sviluppavano una agricoltura da irrigazione su terrazzamenti sulle pareti delle Ande". C. G. Mota – A. Lopez, *História do Brasil: uma interpretação*, cit., p. 24.

18 "Una complessa interazione di fattori esterni, all'inizio del XVI secolo, diede alle diverse società indigene molte forma differenti: stati altamente strutturati, signorie più o meno stabili, tribù e gruppi nomadi o semi-nomadi". N. Wachtel, *Os* índios *e a conquista espanhola*, in L. Bethell (Org.), *História da América latina: América latina colonial*, volume I [The Cambridge history of latin America]. Trad.: M. C. Cescato, 2. ed. 3. rist. San Paolo – Brasília 2012, p. 195-240: p. 195.

19 "La pertinenza dell'introduzione del concetto di frontiera etnica consisterà nel fatto che l'emergenza e la sopravvivenza dell'*ethos* indigeno saranno strettamente legate all'affermazione

nella maggior parte dei casi, molto differenti, ma che si riconducevano "a due grandi 'ceppi' linguistici, il Macro-Jê e il Macro-Tupi. Questi due gruppi costituiscono le principali matrici linguistiche e genetiche che, anche in ultima istanza, hanno contribuito a formare il Brasile attuale". Questo spiega che, anche all'interno di un gruppo etnico e culturale relativamente omogeneo[20], "in un processo che si è svolto in un periodo di approssimativamente 4 mila anni" i popoli indigeni si sono suddivisi in "diverse famiglie linguistiche"[21].

Dall'altro lato, il tipo di sfruttamento delle risorse naturali messo in opera dalla maggior parte dei popoli comportava il frazionamento di questi gruppi in una diversità di raggruppamenti a bassa densità popolosa[22] e di breve durata[23].

e al riconoscimento di queste frontiere, di fronte all'interazione tra società indigene e la società nazionale". C. P. Caldeira, *Revisitando o* ethos *indígena e a nação no caminho da construção das identidades*. Tesi di master UFMG, 2006, p. 10. Ultimo accesso il 5 luglio 2016. Disponibile su: http://www.bibliotecadigital.ufmg.br/dspace/bitstream/handle/1843/ALDR-6WENT7/disserta__o_arquivo__nico.pdf?sequence=1.

20 S. Danese, *A diplomacia no processo de formação nacional do Brasil*, cit., p. 102.

21 C. G. Mota – A. Lopez, *História do Brasil: uma interpretação*, cit., p. 25-26.

22 C. G. Mota – A. Lopez, *História do Brasil: uma interpretação*, cit., p. 27.

23 J. Hemming, *Os* índios *do Brasil em 1500*, in L Bethell (Org.), *História da América latina: América latina colonial*, volume I [The Cambridge history of latin America]. Trad.: M.C. Cescato. 2. ed. 3. rist. San Paolo – Brasília 2012, p. 101-128: p. 104.

Il tipo di integrazione con la natura era, in generale, contemplativo, con un rispetto per gli *oikos* da cui vengono estratti gli alimenti e la protezione senza grandi iniziative culturali nel senso di controllare le risorse naturali, come animali e vegetali, nonostante esistesse una certa padronanza delle erbe medicinali, veleni etc. Questo caratterizzava uno sfruttamento semi-nomade, senza che si possa affermare che "fossero intuitivamente preoccupati della preservazione o del ristabilimento dell'equilibrio ecologico delle aree da loro occupate". Ma "non ci sono dubbi che, in base alla limitata portata delle loro attività e della tecnica rudimentale di cui disponevano, gli effetti prodotti non erano certo devastanti"[24].

Le contese per gli alimenti e il territorio ha messo, per molto tempo, a confronto i popoli indigeni, specialmente quelli che abitavano il fertile litorale est del continente americano.

> *"L'arrivo degli europei ha aggravato il quadro di ostilità esistente. In uno spazio temporale di approssimativamente mezzo secolo, i tupi che hanno resistito all'acculturazione e alla schiavitù sono stati spostati verso l'interno, mentre portoghesi, francesi e castigliani iniziavano una nuova fase per la contesa del litorale"*[25].

I portoghesi hanno trovato alleati occasionali tra i diversi gruppi di indigeni dispersi, che vivevano, assai spesso, in conflitto tra di loro[26]. Alleati contro altri gruppi indigeni, meno amichevoli, e anche contro gli altri europei che, esclusi, insorgevano contro la spartizione del continente americano tra spagnoli e portoghesi[27]. Nonostante ciò, gli indigeni tentarono di resistere all'avanzamento della colonizzazione europea per mezzo della lotta - principalmente di fronte al tentativo di schiavitù - e dell'isolamento, con spostamenti successivi in direzione dell'interno del continente[28].

> *"Durante tutti i secoli della conquista e dei domini coloniali, le tribù del Brasile subirono una*

24 B. Fausto, *História do Brasil*, cit., p. 31.

25 C. G. Mota – A. Lopez, *História do Brasil: uma interpretação*, cit., p. 30.

26 "In Europa, le lotte dividevano e facevano sanguinare le nazioni; invece, nel Nuovo Mondo, se esistevano delle guerre, erano, secondo i racconti europei, solo interne [tra gli indios]. Lo scontro doveva essere tra popoli uguali, nonostante il tempo mostrasse poi il contrario: genocidio, da un lato, conquista, dall'altro". L. M. Schwarcz– H. M. Starling, *Brasil: uma biografia*, cit., p. 30.

27 L. M. Schwarcz– H. M. Starling, *Brasil: uma biografia*, cit., p. 41.

28 B. Fausto, *História do Brasil*, cit., p. 38.

spaventosa catastrofe demografica. Morirono innumerevoli migliaia di indios, vittime delle malattie portate dall'Europa, e lo standard di occupazione territoriale venne totalmente rotto dall'invasione a partire da est"[29].

Oltre a questo, l'arrivo della manodopera schiava proveniente dall'Africa ha generato un intenso processo di mescolanza tra i tre popoli (americani, europei e africani) che fu accompagnato da contingenti migratori interne di grande rilevanza. "Diverse e successive migrazioni per tutto il litorale o verso l'interno, avvenute nel momento dell'apogeo o della decadenza delle attività economiche (...) e della ricerca di ricchezze nell'interno (...) hanno garantito alla popolazione brasiliana una composizione non solo razziale, ma regionale, garantendo una relativa omogeneità etnica, linguistica e culturale alla colonia"[30].

1.2.2. America spagnola

Le tre principali civiltà amerinde che occupavano lo spazio territoriale destinato alla Corona spagnola erano gli aztechi, localizzati nella regione che oggi compone il Messico, i maya, alla frontiera tra l'attuale Messico e l'America centrale e gli inca, nella costa ovest dell'America del Sud, che si estendevano nei territori attuali di Perù e Cile.

29 J. Hemming, *Os* índios *do Brasil em 1500*, in L Bethell (Org.), *História da América latina: América latina colonial*, volume I, cit., p. 105.

30 S. Danese, *A diplomacia no processo de formação nacional do Brasil*, cit., p. 102. Continua l'autore. "È questa omogeneizzazione a vari livelli che spiega quello che molto spesso sembra sorprendere i popoli europei: che un paese di dimensioni continentali e con una popolazione relativamente sparsa comporti solo alcune varianti sociolinguistiche che si manifestano nell'accento e in alcuni regionalismi e nessun dialetto o lingua differente".

La formazione di questi imperi avvenne mediante l'espansione territoriale e le guerre di conquista, con il soggiogamento di altri popoli, che erano artificiosamente integrati con la popolazione politicamente predominante. Ovviamente, questa integrazione artificiale era seguita da una grande tensione e, di conseguenza, il senso di appartenenza effettiva all'impero molte volte non si verificava. Al contrario, esso era soffocato dalla paura e dall'uso della forza. Questi popoli vivevano ancora, e già prima dell'arrivo degli spagnoli, una forte tensione religiosa, con antiche profezie che oscuravano il loro futuro e i cui contenuti sembravano stare per avverarsi - il che si deduceva a partire da elementi mitologici - e che promettevano, essenzialmente, il ritorno degli dei fondatori di quelle civiltà centenarie. Secondo Wachtel[31], per tutta l'America era disseminato "il mito del dio civilizzatore che, dopo aver regnato con benevolenza", era sparito misteriosamente e che aveva promesso agli uomini che un giorno sarebbe tornato. Ogni civiltà cercava di indicare con precisione il ritorno dei suoi dei utilizzando riferimenti propri della sua cultura. Gli aztechi prevedevano il ritorno del loro dio, Quetzalcóatl, in un anno *ce-acatl* (che avviene solo ogni 52 anni) mentre gli inca prevedevano la conclusione del loro impero durante il regno del loro 12º imperatore. L'effettivo arrivo degli spagnoli avvenne da est dell'attuale territorio messicano nel 1519 (un anno *ce-acatl*) e nel territorio ovest dell'attuale Perù l'arrivo avvenne via mare durante il regno di Atahualpa, esattamente il 12º governante inca. In questo senso, fatti e miti si sono mescolati e non sono pochi i collegamenti affrettati tra le figure degli spagnoli e degli dei civilizzatori. È anche vero che l'assimilazione tra dei e spagnoli a volte non giunse a compimento e si è immediatamente dissolta quando fu messa a confronto con il comportamento degli "dei" o più semplicemente, di fronte alla loro mortalità[32].

Dall'altro lato, è importante sottolineare che la struttura del dominio dei popoli conquistati dagli imperi amerindi si basava sulla produzione di ricchezza a beneficio dell'impero, con la sua redistribuzione in favore di tutti[33], cosa che teneva, in gran parte, sotto controllo le tensioni. L'arrivo degli spagnoli, con il controllo del potere politico, ha beneficiato, quindi, di una struttura politica centralizzatrice che godeva di un livello elevato di riconoscimento e anche di una certa legittimità. Ma ha anche beneficiato di un senso di rivincita e di rivolta dei popoli indigeni che costituivano le minoranze negli imperi e che presto si erano alleati agli spagnoli. Dal punto di vista economico,

31 N. Wachtel, *Os* índios *e a conquista espanhola*, in L. Bethell (Org.), *História da América latina: América latina colonial*, volume I, cit., p. 196-197.

32 N. Wachtel, *Os* índios *e a conquista espanhola*, in L. Bethell (Org.), *História da América latina: América latina colonial*, volume I, cit., p. 198.

33 N. Wachtel, *Os* índios *e a conquista espanhola*, in L. Bethell (Org.), *História da América latina: América latina colonial*, volume I, cit., p. 210.

tutta la comunità lavorava in complesse strutture organizzative in favore dell'impero[34], ma la ricchezza ritornava in qualche momento, in quanto ricchezza personale o familiare, nonostante in quantità minore relativamente a quanto prodotto, sebbene venisse accompagnata da miglioramenti e vantaggi per quella stessa comunità, forniti dal potere centrale.

La Corona spagnola ha mantenuto il modo di produzione della ricchezza, così come la titolarità di questa ricchezza nelle mani del nuovo potere centralizzato, ma la contropartita rappresentata dal ritorno di parte della ricchezza prodotta e dai benefici indiretti ha cessato di esistere, generando grande insoddisfazione.

Il declino della popolazione derivante principalmente dalle guerre di conquista, dai suicidi - anche di massa - e dalle malattie europee che hanno causato un enorme tasso di mortalità,[35] data l'assenza di resistenza delle popolazioni locali causata dal lungo tempo di isolamento, ha portato alla riduzione della capacità produttiva, con un conseguente aumento dei valori di argento che erano confiscati alla popolazione locale.

Tutto questo contesto sembra aver fatto perdere agli spagnoli l'interesse all'occupazione effettiva del territorio concesso alla Corona con il Trattato di Tordesillas. Per lunghi decenni, gli spagnoli si sono avvantaggiati delle strutture sociali, economiche e politiche mantenute dagli indigeni, senza aver considerato, forse, che l'interno del continente restava occupato solo sulla base del principio giuridico della contiguità, ma che, dal punto di vista empirico ed effettivo, il territorio interno restava, almeno agli occhi degli esploratori brasiliani che andavano ad avventurarsi nella direzione del Meridiano e che non esitarono a superare la linea di demarcazione, un'enorme regione composta da *res derelictae*, nei confronti della quale assumerà rilievo il principio dell'*uti possidetis, ita possideatis.*

1.3. A guisa di conclusione parziale

L'intenzione del presente ragionamento è quella di mostrare che, nel corso del periodo coloniale, la conformazione territoriale dell'America portoghese e dell'America spagnola si è sviluppata a partire da influenze imposte dalla geografia fisica e da quella umana ai colonizzatori. Ovviamente, decisioni politiche - giuste o sbagliate, poco

34 Si veda un'analisi dettagliata dell'esempio inca in Wachtel, *Os* índios *e a conquista espanhola*, in L. Bethell (Org.), *História da América latina: América latina colonial*, volume I, cit., p. 198.

35 Nei primi 80 anni di dominio spagnolo, la diminuzione della popolazione è stata di circa l'80% della popolazione indigena. Si veda . Wachtel, *Os* índios *e a conquista espanhola*, in L. Bethell (Org.), *História da América latina: América latina colonial*, volume I, cit., p. 200-202.

importa - sono state in grado di attenuare o di amplificare le difficoltà imposti dalla geografia esistente. Tali decisioni, appartenenti al campo della storia, saranno oggetto di analisi intrapresa nei prossimi punti di questo studio.

Nonostante ciò, considerando solo i fattori geografici, sembra che i portoghesi abbiano tratto beneficio dalle condizioni che hanno permesso loro di avanzare 'verso il *sertão*', arrivando e superando i limiti giuridicamente imposti dall'incontro delle volontà tra la Corona portoghese e spagnola con il beneplacito papale - e che ha portato il Re di Francia, Francesco I, a proclamare il suo desiderio di rileggere "la clausola del testamento di Adamo che ha diviso il mondo tra Portogallo e Spagna e mi ha escluso dalla divisione"[36].

Il 'coraggio' portoghese[37], nel senso di contrapporsi al titolo giuridico spagnolo, spiega la conformazione attuale del territorio brasiliano, che può avvenire solo a partire dal ricorso per via interpretativa al principio dell'*uti possidetis, ita possideatis*, il cui possesso è per di più facilitato dall'Unione Iberica a cui si è già fatto cenno.

D'altro canto, i rapporti dei coloni portoghesi e spagnoli con le popolazioni native, assai decimate da fattori diversi a cui si è fatto riferimento in questo studio, hanno finito col contribuire all'identità delle popolazioni in quanto popolo, il che sarà importante per la formazione del sentimento nazionale in occasione dell'indipendenza delle colonie. La mescolanza tra indios, portoghesi e negri[38], relativamente costante all'interno della colonia, può aver contribuito al consolidamento del sentimento di popolo della colonia stessa, ancor più quando si associa questa idea alla percezione secondo cui la logica delle bandiere prescindeva da una necessaria dimensione territoriale tipica del domicilio (le successive migrazioni lungo il litorale o verso l'interno di cui parla Sérgio Danese[39]). D'altra parte, nell'America spagnola, la diversità dei popoli e la struttura organizzativa sopra osservata hanno presto portato ad un'identificazione della popolazione a partire dal

36 *Apud* L. M. Schwarcz– H. M. Starling, *Brasil: uma biografia*, cit., p. 30.

37 Coraggio che ha avuto come motore l'interesse commerciale, dei *peruleiros*, mercanti ambulanti e commercianti portoghesi: "Obiettivo dei *peruleiros* era quello di raggiungere la Città imperiale di Potosì, situata nella Bolivia di oggi. Potosì era il principale centro produttore di argento dell'America del Sud e, con i suoi 150 mila abitanti, la maggior concentrazione urbana del Nuovo Mondo. Situata in una montagna sterile, dipendeva dalla fornitura esterna degli alimenti e dei prodotti agricoli consumati dalla sua popolazione. Questo la rendeva un mercato tra i più redditizi del pianeta. I *peruleiros* non impiegarono molto a notare le possibilità di guadagno offerte dalla piazza di Potosí". C. G. Mota – A. Lopez, *História do Brasil: uma interpretação*, cit., p. 76-77.

38 "Dal contatto con gli europei è derivata una popolazione meticcia, che mostra, ancora oggi, una presenza silenziosa nella formazione della società brasiliana". B. Fausto, *História do Brasil*, cit., p. 38.

39 S. Danese, *A diplomacia no processo de formação nacional do Brasil*, cit., p. 102.

luogo della loro provenienza[40], che era, inoltre, relativamente perenne.

Nazionalità e domicilio si notano, così, in quanto concetti giuridici legati a valori socialmente presenti fin dai tempi coloniali e possono, quindi, fornire indizi in merito a scelte che, in termini di diritto internazionale privato della famiglia, dovranno essere fatte in Brasile e negli Stati sovrani derivanti dalla riorganizzazione delle antiche colonie spagnole. Quindi è questo il motivo, e questa è la tesi che vogliamo difendere, per cui i brasiliani abbiano optato per mantenersi vincolati al criterio della nazionalità - ma già fin d'ora non solo per i motivi che qui abbiamo indicato - mentre i nostri vicini si sono presto arresi al domicilio come criterio di collegamento ideale per portare le leggi degli Stati indipendenti ad una più costante applicazione in materia di personalità, capacità e diritto di famiglia.

Per quanto concerne il caso brasiliano, tuttavia, è necessario aggiungere alcune altre considerazioni.

2. IL BRASILE INDIPENDENTE: L'IMPERO

Lo Stato luso-brasiliano ha preceduto di molto la nazione o il popolo brasiliano. Di conseguenza, il Brasile è esistito prima in forma virtuale, di cui è rappresentativa la firma stessa del Trattato di Tordesillas, anche prima della conferma dell'esistenza empirica e documentata del fatto che le terre che venivano suddivise esistessero effettivamente, costituendo, così, un vero e proprio "esercizio geniale di diplomazia precorritrice"[41].

Dall'esistenza virtuale si passa poi ad un'esistenza giuridico-amministrativa, rappresentata dallo sforzo intrapreso dalla Corona portoghese nella ristrutturazione di una burocrazia imponente e precedente ad un nucleo significativo di popolamento e che garantirà la sottomissione della colonia ad un potere emanato in nome della Metropoli da un'autorità centrale ad attuazione locale[42].

L'esistenza del fenomeno coloniale di fatto ha mostrato, tuttavia, di essere assai differente dall'esistenza politico-giuridica della Metropoli: "Il Brasile è andato creando, nel corso della sua formazione, un esempio perfetto di coincidenza totale tra geografia e demografia, tra sovranità e cittadinanza, tra Stato e Nazione"[43] sempre per mezzo della commistione e delle migrazioni interne, aumentando in questo caso il fattore dell'immigrazione internazionale mista di cui sono numerosi esempi tanto i contingenti di popoli francesi e olandesi che

40 N. Wachtel, *Os* índios *e a conquista espanhola*, in L. Bethell (Org.), *História da América latina: América latina colonial*, volume I, cit., p. 206.

41 S. Danese, *A diplomacia no processo de formação nacional do Brasil,* cit., p. 103.

42 S. Danese, *A diplomacia no processo de formação nacional do Brasil*, cit., p. 102.

43 S. Danese, A diplomacia no processo de formação nacional do Brasil, cit., p. 103.

ancora nel periodo coloniale si sono insediati nel territorio in nome dei loro Stati e che, con l'espulsione degli invasori, sono rimasti qui, quanto i contingenti di manodopera salariata accorsi qui in occasione dell'Impero.

In questo scenario, il Brasile è, come sottolinea Sérgio Danese, "un processo di costruzione di nazionalità *a posteriori* della formazione del paese sovrano"[44]. Ed è in questo senso che possiamo affermare che la nazionalità brasiliana non è all'origine del processo di indipendenza, ma è la conseguenza di questo processo, assumendo rilievo da quel momento in poi. Non è stata desiderata l'indipendenza perché i brasiliani erano un gruppo nazionale diverso da quello dominante. Il desiderio di indipendenza derivava da circostanze politiche che hanno causato una frattura di potere relativamente al governo centrale. Di conseguenza, dopo la dichiarazione di indipendenza del Brasile, alcune misure adottate dall'Impero hanno dimostrato tale realtà, come si cercherà di dimostrare in seguito.

2.1. Mantenimento della struttura giuridica della Corona portoghese

Tanto si è trattata di una frattura esclusivamente di potere che molte delle questioni attinenti allo Stato, come la struttura giuridica, hanno continuato ad essere sottoposte alle regole della Corona portoghese. Non veniva tuttavia mantenuta necessariamente la sottomissione alla Corona, visto che le eventuali modifiche alla legislazione portoghese non toccavano il sistema giuridico brasiliano che continuava a reggersi sul vetusto diritto portoghese.

Si trattava, quindi di determinare il mantenimento delle norme lusitane in vigore[45], come è il caso delle Ordinanze del Regno di Portogallo, conosciute come Ordinanze Filippine, fino a che si fossero

44 S. Danese, A diplomacia no processo de formação nacional do Brasil, cit., p. 103.

45 A differenza di quanto si è verificato nei paesi dell'antica America spagnola che si sono avvalsi del criterio di collegamento tipico dei sistemi di *common law*: "Volviendo a la metáfora de las independencias nacionales, puede verse que algo así fue lo que sucedió, durante un período muy largo de tiempo, con los países americanos que cortaron sus lazos con la Corona española en los albores del siglo XIX. Por solo nombrar lo que sucedió en el ámbito jurídico, que viene al caso en el contexto de esta contribución, los países se afanaron en construir sus ordenamentos jurídicos al margen, cuando no en contra, de la herencia hispánica, sin poder evitar que algunos trazos se mantuvieran sino indelebles al menos perceptibles. Pero, a cambio de eso, tanto era el ánimo de ruptura que algunos fueron a buscar inspiración incluso más allá de los contornos de su familia jurídica, señaladamente, en el derecho constitucional norteamericano" (D. P. Fernandez Arrroyo, *El derecho internacional privado en el diván - Tribulaciones de un ser complejo*, in *Derecho internacional privado y Derecho de la integración, Libro homenaje a Roberto Ruiz Díaz Labrano*, Asunción 2013, p. 17-35: ,p. 20).

organizzate le Corti brasiliane e il Potere legislativo fosse in condizione di deliberare, approvando eventualmente norme di natura e origine eminentemente brasiliana.

Nonostante ciò, nell'ambito del Diritto internazionale privato, il mantenimento delle norme di conflitto lusitane in vigore significherà la regolamentazione degli aspetti personali, come personalità, capacità e rapporti familiari fondata sulla legge nazionale degli interessati. Alla prima opportunità manifestatasi, il legislatore ordinario ha mantenuto il legame del sistema brasiliano al criterio della nazionalità come criterio di collegamento per regolare lo stato e la capacità delle persone fisiche in materia commerciale. Si è trattato del Decreto nº 737 del 1850 che ha regolamentato l'art. 27 del Codice Commerciale.

Tutto ciò ha portato a un'altra questione complessa da risolversi politicamente. Era necessario forgiare il popolo brasiliano, la Nazione brasiliana perché, a fianco del territorio e della sovranità, il Brasile potesse essere riconosciuto come Stato.

2.2. Necessità della formazione di un popolo brasiliano

La Costituzione dell'Impero prevedeva che fossero brasiliani i nati nel territorio nazionale, anche se figli di genitori stranieri, a meno che questi fossero al servizio dei loro Stati, com'è il caso, ad esempio, dei diplomatici stranieri. Questa regola, che consacra il principio dello *ius soli,* produceva, nella pratica, una formazione lenta e continua del popolo brasiliano, il quale avrebbe convissuto, per lungo tempo, con una maggioranza di stranieri o di non brasiliani. Questo è il motivo per cui, accanto ad altre regole che cercavano di assortire il criterio dello *ius soli* con quello dello *ius sanguinis*, il legislatore costituente imperiale ha deliberato, per di più, che "i nati in Portogallo e nei suoi possedimenti che, in quanto già residenti in Brasile all'epoca in cui era stata proclamata l'indipendenza nelle province in cui abitavano, vi avrebbero aderito, espressamente o tacitamente, con la continuazione della residenza"[46].

Si è quindi trattato, come si può vedere, di un tentativo di forgiare il popolo brasiliano per mezzo dell'attribuzione coercitiva della cittadinanza brasiliana agli stranieri di cittadinanza portoghese residenti in territorio brasiliano, ampliando, così, in modo rapido, il numero dei cittadini.

L'incidenza di tale regola solo per i portoghesi permette di concludere che l'idea di fondo è stata quella di determinare il verificarsi del fenomeno della successione di Stati: l'Impero brasiliano succedeva al Regno del Portogallo in termini di cittadinanza dei suoi sudditi

46 J. Dolinger – C. Tiburcio, *Direito internacional privado: parte geral e processo internacional*, 12. ed. Rio de Janeiro 2016, p. 123.

residenti nella ex Colonia.

Sembra, tuttavia, che tale questione possa comportare la mancata accettazione di questa attribuzione della cittadinanza brasiliana da parte dello Stato portoghese, che avrebbe, di conseguenza, potuto continuare ad annoverare quegli individui tra i suoi cittadini, creando, in pratica, una potenziale doppia cittadinanza per i portoghesi residenti in Brasile, che sarebbero stati portoghesi agli occhi del Portogallo e brasiliani agli occhi del Brasile.

Indipendentemente da questo, il fatto è che con questa decisione politica lo Stato brasiliano passava a contare su di un popolo brasiliano, corroborando, così, l'affermazione dell'ambasciatore Sérgio Danese sopra menzionata. Si garantiva anche a un'ampia gamma di residenti in Brasile l'applicazione delle leggi brasiliane (quelle portoghesi recepite in quel momento o quelle brasiliane che venissero ad essere in futuro approvate) per regolare l'acquisto e la perdita della loro personalità, le ipotesi di capacità o incapacità, così come i diritti attinenti ai rapporti familiari delle famiglie composte da brasiliani.

2.3. Il Brasile si allontana dall'America Latina in materia di Diritto internazionale privato delle persone

Con tali misure, il Diritto internazionale privato delle famiglie brasiliane si allontana diametralmente dal Diritto internazionale privato delle altre famiglie americane che, sotto l'influenza dei principi di *common law*, erano rette dal diritto materiale vigente nel luogo del domicilio della famiglia, senza tenere in considerazione la cittadinanza dei suoi membri. Il domicilio è stato quindi il criterio di collegamento adottato dalle ex colonie inglesi e spagnole nella misura in cui diventavano Stato indipendenti, mentre il Brasile, ancora a causa delle Ordinanze portoghesi, qui recepite per volontà dell'Impero, faceva applicare la legge materiale vigente nello Stato di cittadinanza del capo famiglia, riflettendo le divergenze che "sulla questione primordiale del sapere se la legge personale è quella della cittadinanza o quella del domicilio" sono esistite per tutto il XIX secolo, "a dispetto di tutti questi sforzi" rappresentati dalla pubblicazione delle opere di Savigny, Story, Laurent e Westlake, tra gli altri, e dalla firma di diversi trattati su questo tema, come racconta Pedro Lessa[47].

Così, nelle colonie spagnole, erano, di regola, applicati i propri diritti nazionali, ogni volta in cui si trattava di risolvere controversie relative alle famiglie ivi domiciliate. Invece, in Brasile, le questioni del diritto di famiglia attinenti alle famiglie domiciliate in Brasile che fossero presentate davanti alle autorità nazionali potevano essere risolte

47 P.A.C. Lessa, *O direito no século XIX*, in "Revista da Faculdade de Direito da USP". 8, n. 1, p. 161-207, (1900), p. 35-36.

tanto con l'applicazione della legge brasiliana, quanto di una legge straniera qualsiasi, visto che il criterio determinante dell'Impero era quello della cittadinanza del capo famiglia.

3. LA PROCLAMAZIONE DELLA REPUBBLICA

3.1. I contingenti di immigrati del Secondo Regno e dell'inizio della Repubblica

Durante la seconda metà del Secondo Regno e nei primordi della Repubblica, nuovi contingenti di immigrati sono accorsi in Brasile, tanto per mezzo di programmi di immigrazione mirata condotti dal Governo brasiliano[48], specialmente per la sostituzione della manodopera in schiavitù, abolita in tutto l'Impero, quanto in ragione dei disordini intervenuti nei paesi di origine di questi immigrati[49]. Si è avuta, addirittura, una immigrazione portoghese successiva alla Dichiarazione d'indipendenza, considerando che a tali immigrati non era applicato il criterio di concessione della cittadinanza brasiliana previsto nella Costituzione imperiale, che prevedeva la concessione della cittadinanza brasiliana solo ai portoghesi ivi residenti al tempo dell'indipendenza.

Si assisteva, quindi, ad una serie di situazioni in cui la legge applicabile era la legge straniera, nella misura in cui questi immigrati mantenevano la loro cittadinanza originaria e non vi fosse alcuna regola che li costringesse ad acquistare, per naturalizzazione, la cittadinanza brasiliana.

3.2. Naturalizzazione coercitiva

Con la proclamazione della Repubblica e l'elaborazione della Costituzione repubblicana del 1891, la questione della naturalizzazione

48 "Nel nostro Paese, l'immigrazione si è accresciuta con la Repubblica, che l'ha favorita con l'autonomia degli Stati derivante dalla federazione creata dalla Costituzione del 1891". C. Lafer, *Reflexões sobre o Tratado de Amizade, Comércio e Navegação Brasil-Japão, del 1895*. Il testo è stato usato come base per la conferenza in occasione dei 120 anni dalla sua celebrazione, nel Salone Nobile della Facoltà di Giurisprudenza della USP, gentilmente concesso dall'autore.

49 "I grandi flussi immigratori del XIX secolo e dei primi decenni del XX secolo sono stati processi di grande impatto sulla vita di molti paesi e sul sistema internazionale. Hanno portato, specialmente dall'Europa verso il continente americano, decine di milioni di persone, costrette dalle difficoltà e attratte da nuove opportunità. In questi processi sono state molto meno significative in termini numerici le immigrazioni dall'Asia verso le Americhe. È in questo macro contesto che si inseriscono le molteplici correnti migratorie, compresa quella giapponese, che sono approdate in Brasile". LAFER, Celso, come citato nella nota precedente.

coercitiva torna ad essere dibattuta e l'opzione politica che ha prevalso è stata nel senso di inserire una norma costituzionale, l'art. 69, che stabiliva un termine di sei mesi (a partire dalla data di promulgazione della Costituzione) perché gli stranieri (quindi, di qualsiasi nazionalità) che si trovassero in Brasile (quindi non necessariamente domiciliati nel paese) il 15 novembre 1889, data della caduta della Monarchia e della proclamazione della Repubblica, dichiarassero "il desiderio di conservare la cittadinanza di origine".

Non si trattava più di affrontare la questione precedente della successione degli Stati, quindi, nella misura in cui questa norma costituzionale toccava tutti gli stranieri indipendentemente dalla loro cittadinanza, includendo anche cittadini portoghesi[50]. D'altra parte, il criterio di attribuzione coercitiva della cittadinanza brasiliana è apparso mitigato nella Costituzione del 1891, nella misura in cui ha stabilito un termine ragionevole perché lo straniero manifestasse (espressamente, quindi) la sua volontà di mantenere la cittadinanza originaria. In caso di scadenza del termine senza manifestazione di volontà, e solo allora, l'individuo iniziava ad essere considerato brasiliano.

3.3. Formazione di una struttura giuridica eminentemente nazionale: mantenimento della cittadinanza come fattore di collegamento

La regola della legge nazionale è apparsa nell'art. 25 del nuovo Testo consolidato delle Leggi civili, di Carlos de Carvalho del 1899, ma ora con un'ampiezza più generale rispetto al Decreto 737/1850 che limitava la regola alle situazioni commerciali, facendo in modo che le questioni civili rimanessero nell'ambito delle Ordinanze Filippine.

Anche i progetti del Codice civile - con eccezione della Bozza delle Leggi civili elaborata da Teixeira de Freitas che richiedeva l'adozione del criterio di collegamento domiciliare - si sono mantenuti fedeli alla cittadinanza come criterio di collegamento, portando all'approvazione del Codice civile del 1916 che fissava, nella sua introduzione, la regola della cittadinanza, nell'art. 8º e quella del domicilio, nell'art. 9º, ma qui solo a carattere sussidiario e come conseguenza dell'eventuale apolidia o pluricittadinanza[51] dell'interessato.

La posizione dello Stato brasiliano, isolata nel contesto latino-americano, di mantenersi fedele alla cittadinanza come elemento di

50 Non si condivide, in questo senso, la posizione di J. Dolinger – C. Tiburcio, *Direito internacional privado: parte geral e processo internacional*, cit., p. 123, in quanto non sembra che la ragione sia stata la stessa che ha guidato, in Europa, lo stabilimento di una politica "per cui molte popolazioni erano state forzate a nuove cittadinanze come conseguenza di cessioni e annessioni di territori", casi, questi, che si collegherebbero con l'idea di successione di Stati.
51 L'eccezione non si configura se una delle cittadinanze fosse stata la brasiliana, che avrebbe prevalso.

collegamento rende difficoltose alcune delle importanti iniziative di estesa uniformazione delle regole di conflitto nel contesto continentale, di cui sono esempi il Trattato di diritto civile di Montevideo, del 1889 e la Convenzione dell'Avana di diritto internazionale privato del 1928 (Codice Bustamante).

Si viveva, insomma, in Brasile una situazione in cui la schiacciante maggioranza della popolazione brasiliana era formata da cittadini, con rare ipotesi di stranieri che si rivolgevano ai tribunali brasiliani nei primi anni di vigenza del Codice civile elaborato da Clóvis Beviláqua. Ma la situazione era pronta a modificarsi in seguito all'imminente scoppio della seconda guerra mondiale.

4. IL PERIODO TRA LE GUERRE

4.1. I contingenti migratori del periodo

Nel periodo tra le guerre, varie sono state i contingenti immigratori in direzione del Brasile. Alcuni si sono intensificati, altri sono iniziati, creando un gran numero di situazioni in cui le famiglie straniere, domiciliate in Brasile, rimanevano vincolate alle loro leggi nazionali. Le coppie e i rapporti di parentela esistenti in tale contesto erano soggetti alle norme vigenti nello Stato straniero, con la conseguenza di comportamenti che, molte volte, si allontanavano dai valori professati dalla società brasiliana.

Il regime di queste famiglie in base al diritto di famiglia straniero, secondo la propria cittadinanza, funzionava come un salvacondotto per la non integrazione ed accresceva, quindi, l'isolamento delle colonie di immigrati. Di conseguenza, essendo il diritto di famiglia un diritto molto influenzato dai valori professati socialmente, non è difficile percepire come la sottoposizione alle leggi nazionali delle famiglie può generare situazioni di matrimoni tra persone della stessa cittadinanza, rendendo difficile mantenere la caratteristica sociale della commistione tra i gruppi.

Inoltre, i gruppi di immigrazione più recenti erano molto diversi tra loro anche in confronto con i gruppi di immigrazione precedentemente verificabili nella storia brasiliana. Molti di questi gruppi parlavano anche lingue assai diverse dalle lingue neolatine alle quali i giudici erano abituati. A volte, la ricerca del diritto straniero portava ad un confronto con un testo scritto in caratteri diversi dal comune alfabeto latino, come gli ideogrammi orientali, le lettere di origine ebraica o l'alfabeto cirillico.

4.2. Assenza di ragioni politiche per una nuova naturalizzazione coercitiva

In questo contesto, era difficile immaginare un ambiente sociale propizio al mantenimento della cittadinanza come criterio di collegamento, nella misura in cui generava la sottoposizione delle famiglie ad una legge straniera, provocando matrimoni all'interno dello stesso gruppo di immigrati, mentre, al tempo stesso, creava difficoltà per i magistrati ad applicare alcune leggi straniere indicate dalle regole di conflitto nazionali.

E la naturalizzazione coercitiva, che era stata un meccanismo di correzione di questa rotta usato in ragione dei profondi cambiamenti strutturali dello Stato brasiliano come l'indipendenza e la caduta della Monarchia non trovava una ragione politica sufficiente la quale potesse giustificare un tale percorso.

4.3. Il domicilio come criterio di collegamento. Incidente oppure occasione?

Così, approfittando della richiesta politica per l'elaborazione di una Legge di introduzione al Codice civile che abrogasse l'Introduzione al Codice del 1916 e permettesse allo Stato nuovo di Getúlio Vargas di emanare leggi retroattive (come consentiva la Costituzione del 1937, ma impediva la norma sovra-ordinata dell'Introduzione che continuava a proteggere il diritto acquisito, la cosa giudicata e l'atto giuridico perfetto), i Ministri Hannemahn Guimarães, Orozimbo Nonato e Philadelpho Azevedo, avvalendosi dell'ausilio di grandi maestri del Diritto internazionale privato nazionale come Rodrigo Octávio e Eduardo Espínola, hanno modificato l'elemento di collegamento per le questioni personali, facendo risaltare, a partire dall'edizione del Decreto Legge 4.567 del 1942, la legge del domicilio per regolare la personalità, la capacità, il nome e i diritti di famiglia.

Il domicilio, si noti, è il criterio difeso da Savigny nella sua opera e ha raccolto gli interessi del sistema brasiliano in materia di diritti personali di oltre frontiera fin da allora, nonostante esista una tendenza importante nel diritto internazionale pattizio a favore della sostituzione del domicilio con la residenza abituale come criterio di collegamento.

CONCLUSIONE

Ci sono innegabile influenze sia della geografia che della storia brasiliane sulle decisioni politiche chi nel Brasile sono state prese, sia nell'impero che nella Repubblica, riguardano le famiglie formate con

elementi stranieri.

Si può anche affermare che il brusco cambiamento dell'elemento di connessione nel 1942 ebbe un ruolo preponderante nell'integrazione degli immigrati domiciliati nello Stato. Infatti, il fatto di esserci governati dalla legge di domicilio li obbligava ad essere più integrati alla cultura e all diritto personale brasiliano.

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LES CONSOMMATEURS HANDICAPÉS DANS LE DROIT PRIVÉ SOLIDAIRE
THE PERSON WITH DISABILITIES IN THE SOLIDARY PRIVATE LAW

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Résumé : Ce travail analyse l'évolution du droit privé, centré sur l'invidualisme et sur la codification totalisant, vers le droit privé solidaire, centré sur le solidarisme, que valorise la personne avant ses particularités et ses lois de protection. Ainsi, avec le renforcement des principes constitutionnels et des droits humains, la personne handicapée est décrite, en tant que consommatrice, comme hypervunérable digne de protection spécifique, qui ne sera effectivé qu'avec le dialogue entre le Code de la Protection des Consommateurs et le Statut de la Personne Handicapée.
Mots-clés : Hypervulnérabilité. Personne Handicapée. Dialogue des Sources. Droit des Consommateurs. Statut de la Personne Handicapée.

Abstract: This paper analyzes the evolution of private law, centered on individualism and totalizing codification, to the solidary private law, centered on solidarity, valuing the man considered at his peculiarities and his protective laws. So, with the enhancement of constitutional

principles and human rights, the disabled person is outlined as a hypervulnerable consumer worthy of specific protection, which will only be effective with the dialogue between the Consumer Protection Code and the Statute for Person with Disability.
Keywords: Hypervulnerability. Person with disability. Dialogue of sources. Consumer Law. Statute for Person with Disability.

1. Introduction

Le Droit Privé classique a toujours considéré les hommes *in abstrato*, comme des sujets rationnels et libres, capable d'auto-réguler leurs vies, soumis au même systéme juridique sous le mot «tous les personnes sont égales devant loi». Cette situation résulte des idéaux de liberté, d'égalité et de fraternité découlants de la Révolution Française, que prêchaient l'égalité formelle de toutes les personnes. Au cours des XVIIIe et XIXe siècles, les relations étaient realizé directement entre les personnes, sans l'intervention d'une entreprise. Le consommation était fait par une communication directe entre le consommateur et le fabricant ou prestataire de services, sans intermédiaires. Ainsi, avec une production essentiellement à la main, il était possible cette égalité, étant donné que les sujets avaient une autonomie pour décider les conditions contractuelles.

En raison de plusieurs transformations sociaux, arrivées spécialement après la Révolution Industrielle et avec la massification de la prodution et des contrats, l'individualisme centré sur la personne a subit la fragmentation, dans lequel l'individu était considéré par rapport à chacun des différents rôles qu'il détenait dans la société, résultant en une pluralité de rôles, de sources, de régimes et de lois.

Contrairement à l'homogénéité de la figure de l'individu, l'État a commencé à reconnaître la diversité des sujets qui composent la société, chacun avec ses particuliarités, rendant la personne le centre des relations. Ces nouveaux sujets ont alors commencé à revendiquer leurs propes lois, spéciales, subjectives et protectrices, lesquelles prenaient soin de ce qui est différent et faible, à savoir, ce qui est vulnérable.

Cette pluralité a modifié sensiblement le droit civil codifié et unitaire, ce qui était le centre du système juridique à l'époque. Dans ce contexte, le droit privé n'a pu pas rester indifférent à la reconnaissance de la faiblesse de certains groupes dans la société, et a dû développer des moyens (lois spéciales et microsystèmes) pour atteindre le principe d'égalité matériel, guidé par l'appréciation des principes constitutionnels et par des droits humains[1].

1 Jayme enseigne les quatre éléments de la culture posmoderne que influencent le droit: le pluralisme (des valeurs, le droit à la différence), le communication (l'intégration dans une societé mondiale sans frontières, le dialogue des sources), la narration (les normes que n'obligent pas,

Ainsi, telle tendance d'appréciation de la personne, des principes constitutionells et des droits humains a originé une nouvelle ère pour le Droit Privé, le qualifiant comme solidaire[2]. Ainsi, les différences entre les individus sont devenus identifiés et appréciés afin que la Loi pourrait donner un traitement spécial à ceux qui sont considerés différents, assurant l'égalité juridique et atténuant les inégalités sociales. En réponse, le principe de la vulnerabilité a été exalté, afin de faire face aux déséquilibres sociaux et juridiques auxquels ceux qui vivent en marge de la société sont soumis.

Dans les relations de consommation, le consommateur est supposé vulnérable en raison de sa position faible avant le fournisseur, ce qui justifie une tutelle spéciale fournie par le Droit de la Consommation. Il y a aussi des consommateurs qui sont dans un état latent de la vulnérabilité, i.e., ils ont l'hypervulnerabilité[3]: forme de faiblesse aiguë qui doit être reconnu et pris en compte pour la mise en œuvre correcte des droits et pour la réaffirmation de la dignité de ces consommateurs qui ont vulnérabilité aggravée et sont marginalisés par la société de consommation et de l'opulence[4].

Exemple de ces sujets sont des personnes handicapées, qui il y a plus de vingt-cinq ans ont des garanties constitutionnelles sur les droits sociaux minimaux, mais seulement maintenant et par des réglementations spécifiques gagnent, bien que précairement, des spaces sociaux, de travail et, maintenant, de consommation intégrée et intégrale, ce qui rend essentiel une tutelle plus efficace par le côté du Droit des Consommateurs, promouvant l'autonomisation des personnes hypervulnérables.

Avant le pluralisme législatif existant à propos des personnes

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mais décrivent des valeurs) et le retour des sentiments (la préservation de l'identité culturelle, la valorisation des droits de l'homme). (JAYME, Erik. Identité culturelle et intégration: le droit international privé postmoderne. *Recueil des Cours* 251(1995), p. 251-261.)

2 À ce propos: MARQUES, Claudia Lima; MIRAGEM, Bruno. O novo direito privado e a proteção dos vulneráveis. 2. ed. São Paulo: Revista dos Tribunais, 2014.

3 L'expression hypervulnérabilité a été utilisé la première fois pour le Ministre Antonio Herman Benjamin lorsque le procès REsp n. 586.316-MG. Le Minstre a décidé: "À L'Etat Social importent non seulement les vulnérables, mais surtout les hypervulnérables, parce que sont ceux qui, précisément parce qu'ils sont minoritaires et souvent victimes de discrimination ou ignorés, souffrent la plupart de la consommation de masse et la «pasteurisation» de las différences qui caractérisent et enrichissent la société moderne. (BRASIL. Superior Tribunal de Justiça. Recurso Especial n. 586.316-MG. Recorrente: Ministério Público do Estado de Minas Gerais. Recorrido: ABIA – Associação Brasileira das Indústrias de Alimentação. Relator: Min. Antonio Herman Benjamin. Julgado em: 19 mar. 2009.)

4 CARVALHO, Diógenes Faria de; SANTOS, Nivaldo dos. A vulnerabilidade psíquica e o superendividamento do consumidor. In: FERREIRA, Vitor Hugo do Amaral; CARVALHO, Diógenes Faria de; SANTOS, Nivaldo dos (orgs.). *Sociedade de Consumo*: Pesquisas em Direito do Consumidor. Goiânia: Espaço Acadêmico, 2015. p. 89.

handicapées en tant que consomattrices, ayant comme les plus pertinents le Code de la Protection des Consummateurs et le Statut de la Personne Handicapée, la nécessité d'un dialogue entre ces sources est mise en évidence, afin d'assurer l'instrumentalité du droit privé solidaire pour la réalisation de la dignité de la personne humaine.

2. Le Droit Privé Solidaire et le principe de la vulnérabilté du consommateur

Le Droit Privé Solidaire classique, ayant une forte influence française[5], dont le principal représentant est le Code Civil, le produit d'un phénomène de codification[6], avait comme postulat fondamental l'autonomie de la volonté[7], étant le contrat e le droit de propriété ses plus grands expressions. La liberté de manifestation de la volonté avec la correspondante liaison au engagé (*pacta sunt servanda*) et la liberté au exercice de la propriété étaient, alors, droits exercés plus absolument[8].

Le positivisme de la codification a agi sur la construction du droit moderne, mettant en débat le formalisme exacerbé et l'abstraction de la Loi, ce qui a soumis les individus à une ordre juridique unique et, ainsi, a remplacé la diversité naturelle des sujets et des leurs droits individuels par un ordre de «égaux devant la loi». Dan ce sens, Wieacker affirme que l'idée de l'égalité des droits et des devoirs de tous les gens *in abstrato* avait été forgé par le droit privé classique et que tous étaient soumis à la même loi[9], depuis que rationnels, libres et égaux devant la loi, capable d'auto-réguler leurs vies privée selon leur volonté pure.

De toute évidence, cette position juridique a éloigné la Loi de la réalité sociale: ce n'allait plus de la realité vers le Droit, mas du Droit vers la realité[10]. En réponse, la codification a donné lieu à la décodification[11] : l'État Social de Droit a retiré, à travers des lois et

5 PONTES DE MIRANDA, Francisco Cavalcanti. *Fontes e Evolução do Direito Civil Brasileiro*. Rio de Janeiro: Forense, 1981. p. 93.

6 MARQUES, Claudia Lima; MIRAGEM, Bruno. *O novo direito privado e a proteção dos vulneráveis*. São Paulo: Revista dos Tribunais, 2012. p. 15.

7 Couto e Silva ensiegne que «il est entendu par l'autonomie de la volonté à *facultas* la possibilité, bien que non illimité, qui ont les particuliers pour résoudre leurs conflits d'intérêts, pour créer des accords, pour faire du échange de biens et de impulsioner, à la fin, la vie dans la société». (SILVA, Clóvis V. do. Couto e. *A Obrigação como Processo*. Rio de Janeiro: FGV, 2006. p. 24.)

8 MIRAGEM, Bruno. *Curso de Direito do Consumidor*. 4. ed. São Paulo: Revista dos Tribunais, 2013. p. 38.

9 WIEACKER, Franz. *História do Direito Privado Moderno*. Trad. A. M. Botelho Hespanha. 2. ed. Lisboa: Calouste Gulbenkian, 1980. p. 298.

10 MIAILLE, Michel. *Introdução crítica ao direito*. 2. ed. Lisboa: Estampa, 1989. p. 181.

11 TEPEDINO, Gustavo. Premissas metodológicas para a constitucionalização do direito civil. *Temas de Direito Civil*, Rio de Janeiro: Renovar, 2008. p. 11.

guidé par des principes constitutionnels, la magnitude homogénéisante et unitaire du Code Civil du rôle central du système juridique privé et s'est tourné vers certains groupes dans la société, afin de poursuivre l'égalité substantielle[12] et non plus la purement formelle. Dans ce point de vue, l'homme cesse d'être une abstraction juridique et devient considérée en fonction de ses caractéristiques individuelles, donnant lieu au caractère démocratique de l'Etat[13].

Cette période a été caracterisée par la limitation de la volonté des parties, par l'appréciation des principes constitutionnels de la solidarité social et de la dignité de la personne humaine, changeant l'axe individualiste des systèmes juridiques pour le solidarisme, dans la mesure où le sujet est devenu considéré selon ses divers rôles dans la société (employé, locataire, consommateur, etc.). C'était dans ce contexte que les microsystèmes protectives ont apparu, lesquels cherchaient, et cherchent, à protéger certaines catégories de personnes, étant donné leurs caractéristiques particulières, et chaque catégorie doit recevoir une tutelle juridique adéquate et spécifique[14].

Dans le côté des consommateurs, la Seconde Guerre Mondiale a affecté ce processus de protection de façon décisive, car il y eu une production à grande échelle de biens de consommation, l'expansion du crédit et de l'activité de la publicité, ce qui a finalement conduit à une société de consommation de masses[15], aidant à déconstruire le droit privé alors en vigueur.

La consommation en masse, conjointement avec les techniques aggresives de publicité, a apporté la dépersonnalisation, la dématérialisation et la dépossession du contrat[16], tant à cause de sa normalisation par des conditions générales que des accords d'adhésion[17]. Alliée à cela, le déséquilibre contractuel a entraîné à l'atténuation de l'autonomie de la volonté et de la reconnaissance de ces sujets comme la partie faible dans la relation d'affaires, parce que la liberté d'embaucher de la partie faible du pacte (le consommateur)

12 PINHEIRO, Rosalice Fidalgo. *Contrato e direitos fundamentais*. Curitiba: Juruá, 2009. p. 53

13 PINHEIRO, Rosalice Fidalgo. Autonomia privada e estado democrático de direito. In: SARLET, Ingo Wolfgang; PAGLIARINI, Alexandre Couto (coord.). *Direitos humanos e democracia.* Rio de Janeiro: Forense, 2007. p. 498.

14 LORENZETTI, Ricardo Luis. *Fundamentos do direito privado*. São Paulo: Revista dos Tribunais, 1998. p. 53.

15 BAUDRILLARD, Jean. *A Sociedade de Consumo*. Trad. Artur Morão. Lisboa: Edições 70, 2007. p. 86-87.

16 MARQUES, Claudia Lima. *Confiança no Comércio Eletrônico e a Proteção do Consumidor:* um estudo dos negócios jurídicos de consumo no comércio eletrônico. São Paulo: Revista dos Tribunais, 2004. p. 38.

17 NORONHA, Fernando. Contratos de consumo, padronizados e de adesão. *Revista de Direito do Consumidor*, São Paulo, v. 20, out./dez. 1996. p. 94.

a été restreinte dans la mesure où sa volonté était limitée seulement à constater, ou non, l'ajustement, sans pertinence pour la définition de son contenu[18].

Cette nouvelle realité sociale, industrialisée et massifiée, a demandé normes de protection spécifiques pour le consommateur, afin de protéger les plus faibles[19] dans les relations naturellement inégalles[20]. Miragem enseigne que:

> *Avec l'avènement de la société de consommation des masses et de la nouvelle forme de production capitaliste, la reconnaissance du fait que, bien que tout les êtres humains soient considérablement égaux, ils peuvent occuper des positions inégales dans le cadre des relations sociales et économiques. Cette considération a inspiré la reprise, par la loi, de l'ancienne notion d'égalité, dérivée de la pensée d›Aristote, connu comme l›égalité matérielle, admettant la reconnaissance des différences, et en ce sens, la possibilité d›un traitement inégal pour les inégaux*[21].

De cette façon, la reconaissance de l'inégalité entre les sujets de droit a permis la création de lois spéciales subjectives et protectives, comme le Code de Protection du Consommateur, qui se concentre sur l'idée fondamentale de la protection des consommateurs face aux désobéissances des fournisseurs dans la société de consommation de masse: c'est un code spécial pour les inégaux, pour les différents dans des relations mixtes entre un consommateur et eun fournisseur[22].

De la notion d'inégalité et de la nécessité d'une tutelle spécifique, a été, donc, établi le principe de la vulnérabilité dans les relations de consommation, qui est une essai pour résoudre le chevauchement de la volonté du fournisseur – notamment plus fort en raison de sa puissance

18 MARQUES, Claudia Lima. *Contratos no Código de Defesa do Consumidor*: o novo regime das relações contratuais 4. ed. São Paulo: Revista dos Tribunais, 2002. p. 52 e ss.

19 GÔNGORA. Cláudia. *O direito do consumidor e o Mercosul:* relações de consumo no direito brasileiro. São Paulo: Método, 2001. p. 15.

20 BONATO, Cláudio. *Código de defesa do consumidor:* cláusulas abusivas. Porto Alegre: Livraria do Advogado, 2003. p. 72.

21 MIRAGEM, Bruno. *Curso de Direito do Consumidor*. 4. ed. São Paulo: Revista dos Tribunais, 2013. p. 40.

22 MARQUES, Claudia Lima; BEJNAMIN, Antônio Herman V.; MIRAGEM, Bruno. *Comentários ao Código de Defesa do Consumidor*. 4. ed. São Paulo: Revista dos Tribunais, 2006. p. 624.

économique, informationnelle, juridique ou technique[23] – sur la volonté du consommateur, comme un moyen de protéger ce sujet plus fragile et impuissant. Le but, par conséquent, est rétablir l'égalité matérielle dans la relation d'affaires. Selon Moraes, la vulnérabilité est «la qualité ou le condition de ce sujet plus faible de la relation de la consommation, compte tenu la possibilité qu'il puisse être offensé ou blessé, dans la sécurité physique ou psychologique, ainsi que dans les domaine économique, par le côté de ce sujet le plus puissant de la relation».[24]

Consolidé dans l'article 4, paragraphe I, de Code de la Protection du Consommateur, et dans l'article 5, XXXII, de la Constitution Fédérale de 1988, le princpe de la vulnérabilité est, en bref, la présomption absolue[25] de faiblesse du consommateur dans le marché de la consommation, de sorte que justifie l'exitence du Code lui-même[26]. Dans cette mesure, d'après Marques, la vulnérabilité est étroitement liée au principe de l'égalité :

> *L'égalité est une vue macro de l'homme et de la société, une notion plus objective e consolidée, dont l'inégalité est appéciée toujours par la comparation des situations et des personnes : aux égaux, on rend traitement égal, aux inégaux, on rend traitement inégal pour atteindre la justice. La vulnérabilité, alors, est la fille de ce principe, mais c'est une notion flexible et non consolidée, laquelle présente des traits de subjectivité qui la caractérisent : la vulnérabilité n'a pas besoin toujours d'une comparaison entre les situations et les sujets. On pourrait dire donc que la vulnérabilité est plus un état de la personne, un état de risque inhérent ou un signal excessif de confrontation d'intérêts identifié sur le marché (voir Rippert, La réglemorale, p. 153), et une situation permanente ou temporaire,*

23 MORAES. Paulo Valério dal Pai. *Código de defesa do consumidor – o princípio da vulnerabilidade:* no contrato, na publicidade, nas demais práticas comerciais. Porto Alegre: Síntese, 1999. p. 96.

24 MORAES. Paulo Valério dal Pai. *Código de defesa do consumidor – o princípio da vulnerabilidade:* no contrato, na publicidade, nas demais práticas comerciais. Porto Alegre: Síntese, 1999. p. 125.

25 MIRAGEM, Bruno. *Curso de Direito do Consumidor*. 4. ed. São Paulo: Revista dos Tribunais, 2013. p. 114.

26 BOURGOIGNIE, Thierry. Colloque Brésil Québec sur le droit de la consommation. In: BOURGOIGNIE, Thierry; RAMOS, Fabiana D'Andrea; FONSECA, Patrícia Galindo da. *La Protection du consommateur au Québec et au Brésil :* Échanges de droit comparé. Niterói: UFF, 2013. p. 15.

> *individuelle ou collective (Fiechter Boulevard, Rapport, p. 328), est la technique pour les appliquer bien, est la notion instrumentale qui guide et éclairel'application de ces normes protectives et rééquilibrés, à la recherche de la base de l'égalité et de justice équitable*[27].

Le droit privé est attentif au fait que la vulnérabilité met en évidence un aspect objectif, en s'éludant de la comparaison des situations et des sujets, en se distinguant de l'égalité formelle, car «il part de la notion de différence, pour ne pas exclure le different, mais pour l'inclure, fondée sur la protection de la personne humaine»[28]. Marques aussi systématise l'analyse de la protection des plus faibles dans le droit privé en deux étapes: la première en combattant la discrimination, et la seconde en exaltant la protection efficace qui respecte les différences et assure un accès sans discrimination[29].

Encore dans les leçons de Marques:

> *Il y a donc une nouvelle définition de l'égalité des plus faibles en droit privé, non seulement l'égalité formelle (dans la loi ou devant la loi), mais aussi matériel ou totale, une égalité des inégaux (traiter inégalement les inégaux et également les égaux). Une égalité matérielle qui ne sera nécessairement réalisé que avec l'intervention d'ordre (l'ordre publique de direction et de l'organisation) de l'Etat pour rééquilibrer cette relation intrinsèquement déséquilibrée, par la garantie des droits pour les faibles, par exemple, les consommateurs, et l'imposition de droits pour les plus forts, comme les fournisseurs de produits et de services dans la société de consommation ou dans le marché brésilien.*[30]

27 MARQUES, Claudia Lima; BEJNAMIN, Antônio Herman V.; MIRAGEM, Bruno. *Comentários ao Código de Defesa do Consumidor*. 4. ed. São Paulo: Revista dos Tribunais, 2006. p. 144.

28 MARQUES, Claudia Lima. Algumas observações sobre a pessoa no mercado e a proteção dos vulneráveis no direito privado brasileiro. In: GRUNDMANN, Stefan et. al. (org.). *Direito privado, Constituição e fronteiras*: encontros da Associação Luso-Alemã de Juristas no Brasil. São Paulo: Revista dos Tribunais, 2014. p. 330.

29 Sur la discrimination et les droits de l'homme, voir : LAFER, Celso. *A reconstrução dos direitos humanos*: dialogando com o pensamento de Hannah Arendt. São Paulo: Cia das Letras, 2003. p. 147.

30 MARQUES, Claudia Lima; BENJAMIN, Antonio Herman V.; BESSA, Leonardo Roscoe.

Dans cette logique, la Loi a reconnu l'existence d'inégalités de fait dans les relations privées, en entraînant, au Brésil, au cours des dernières décennies, une rénovation intense avec de forts afflux de la Constitution Fédérale de 1988, de la jurisprudence et de la doctrine, pour chercher l'idéal de justice[31]. En ce qui concerne la question, dans d'autres lignes, Miragem enseigne que :

> *Ce phénomène, connu sous le nom d'effet horizontal des droits fondamentaux, produit des répercussions profondes sur le droit privé brésilien (...). En soulignant l'importance de la Constitution comme le centre du système juridique, s'encourage une plus forte répercussion pratique à la protection des droits fondamentaux dans les relations juridiques de droit privé. L'effet horizontal des droits fondamentaux est basée sur la compréhension qu'ils établissent une influence notable dans les relations entre les privés (...). En ce sens, une relation juridique sous normes de droit privé ne reste plus rattaché par la présente, opérant également les normes du droit public et, en particulier, les droits fondamentaux.*[32]

Ainsi, on visualise la tendance solide d'appréciation des droits fondamentaux[33], des nouveaux rôles sociaux et économiques et aussi des particularités et caractéristiques de chaque personne, à travers la reconnaissance et la valorisation des différentes identités culturelles, donc mettant en évidence le multiculturalisme[34] social imminent. Selon Marques et Miragem:

> *C'est cet état de choses qui nous permet de reconnaître dans le droit privé contemporain une claire protection des vulnérables, comme une*

Manual de Direito do Consumidor. 3. ed. São Paulo: Revista dos Tribunais, 2008. p. 30-31.

31 «Le droit public et le droit privé ont, donc, égale fondamentation. (...) L›esprit à s›appliquer à l›étude du droit est l›esprit de justice. Il est certainement dans cet esprit que le droit privé doit être étudié.» (DUGUIT, Léon. *Fundamentos do direito*. Trad. Ricardo Rodrigues Gama. Campinas: LZN, 2003. p. 66-67.)

32 MIRAGEM, Bruno. *Direito Civil*: Responsabilidade Civil. São Paulo: Saraiva, 2015. p. 25-26.

33 Marmelstein affirme que les droits fondamentaux sont les normes étroitement liées à la dignité humaine et à la limitation du pouvoir, concrétisés dans la Constitution, ou, dans d'autres termes, les droits fondamentaux sont des droits humains déjà concrétisé. (MARMELSTEIN, George. *Curso de Direitos Fundamentais*. São Paulo: Atlas, 2008. p. 25-26.)

34 SEMPRINI, Andrea. *Multiculturalismo*. Bauru: EDUSC, 1999. p. 99.

> *sorte de commandement éthique et juridique qui sera réalisée par des lois protectrices, et surtout par l'action engagée du juriste à la réalisation du principe de la dignité de la personne humaine, à travers sa efficacité réelle aussi sur les relations privées.*[35]

Dans ce scénario, il s'affirme que le droit privé est en train de changer ou il sera bientôt un «droit privé solidaire» (*Solidarprivatrecht*)[36]. Par conséquent, basée sur cette nouvelle conception, il est possible d'équiper le droit privé pour protéger tandis qu'il distingue, afin d'assurer des conditions différenciées à ce sujet des droits les plus faibles par rapport aux relations de consommation.

3. L'hypervulnérabilité du consommateurs handicapés et le dialogue des sources

L'ordre juridique conteporaine est sensible à l'inégalité des négociations entre les parties de la relation de consommation et cherche infatigablement à l'équilibrer à travers le régime de protection des consommateurs, qui sont vulnérables[37]. Aussi dans le sens de la valorisationn de la diversité et des différences, il se passe que ces consommateurs circonscrites dans le manteau protecteur du Code de la Protection des Consommateurs ne sont pas homogènes[38], comprenant divers sous-groupes de consommateurs qui ont besoin de tutelles différenciées.

Nonobstant le principe de la vulnérabilité avoir pour fonction de protéger les plus faibles dans la relation consommation, il s'admet son classement selon des situations de vulnérabilité aggravées ou potentialisées – l'hypervulnérabilité.

L'hypervulnérabilité signifie une vulnérabilité générale de la personne phisique consommatrice aggravée par des circonstances personnelles, apparentes ou connues au fornisseur, étant inhérente et spécial sa personne[39]. De l'avis de la Haute Cour de Justice, les

35 MARQUES, Claudia Lima; MIRAGEM, Bruno. *O novo direito privado e a proteção dos vulneráveis*. São Paulo: Revista dos Tribunais, 2012. p. 106.

36 MARQUES, Claudia Lima; MIRAGEM, Bruno. *O novo direito privado e a proteção dos vulneráveis*. São Paulo: Revista dos Tribunais, 2012. p. 24.

37 NEGREIROS, Teresa. *Teoria do contrato*: novos paradigmas. 2. ed. Rio de Janeiro: Renovar, 2006. p. 389.

38 MACEDO JUNIOR, Ronaldo P. *Contratos relacionais e defesa do consumidor*, p. 85. *apud* NEGREIROS, Teresa. *Teoria do contrato*: novos paradigmas. 2. ed. Rio de Janeiro: Renovar, 2006. p. 491.

39 MARQUES, Claudia Lima; MIRAGEM, Bruno. *O novo direito privado e a proteção dos*

hypervulnérables sont «ceux qui, précisément parce qu'ils sont minoritaires et souvent victimes de discrimination ou ignorés, souffrent le plus avec la consommation de masse et de la «pasteurisation» des différences qui caractérisent et enrichissent la société moderne»[40].

Dans la doctrine de Marques et Miragem,

> *L'hypervulnérabilté est la situation sociale de fait et objective d'aggravation de la vulnérabilité de la personne phisique consommatrice, par des circonstances personnelles apparentes ou connues au fournisseur, comme son âge réduit (par example, le cas des aliments pour bébés ou de la publicité destinée aux enfants) ou âge enhardi (par example, du soin spécial pour les personnes âgées, autant dans le Code en dialogue avec le Statut des Personnes Âgées que de la publicité de crédit aux personnes âgées) ou une situation de malade (comme le cas de Gluten et de l'information sur l'étiquette des médicaments). En d'autres termes, alors que la vulnérabilité «générale» de l'article 4, paragraph I, est supposé et est inhérent à tous les consommateurs (en particulier en raison de sa position dans les contrats, thème de ce travail), l'hypervulnérabilité serait inhérent et «spécial» à la situation personnel d'un consommateur, soit permanent (prodigalité, invalidité, incapacité physique ou mentale), soit temporaire (maladie, grossesse, analphabétisme, âge).*[41]

En ce sens, une nouvelle tendance pour l'avenir du droit est observée, en fournissant plus des outils au «nouveau droit privé de solidarité», qui est la qualification de la vulnérabilité aggravée, ou, en d'autres termes, la reconnaissance de l'hypervulnérabilité comme l'instrument le plus efficace de protection et de la promotion de l'égalité matérielle. Marques et Miragem soulignent tel positionnement en enseignant que :

> *L'hypervulnérabilité est le degré exceptionnel*

vulneráveis. São Paulo: Revista dos Tribunais, 2012. p. 184.

40 BRASIL. Superior Tribunal de Justiça. Recurso Especial n. 586.316/MG. Recorrente: Ministério Público do Estado de Minas Gerais. Recorrido: ABIA – Associação Brasileira das Indústrias de Alimentação. Relator: Min. Antonio Herman Benjamin. Julgado em: 19 mar. 2009.

41 MARQUES, Claudia Lima; MIRAGEM, Bruno. *O novo direito privado e a proteção dos vulneráveis*. São Paulo: Revista dos Tribunais, 2012. p. 188-189.

> *(et «juridiquement pertinant») de la vulnérabilité générale des consommateurs. Il nous semble qu'ici les «incommodes» avec l'accès facilité à la consommation de qualité ne peuvent pas être toléré, c'est l'intérêt social qu'il n'y ait pas de discrimination à ces groupes de consommateurs hypervulnérables (et protégé par la Constitution!), (...) aussi même pour décourager que le Brésil continue de discriminer contre les personnes âgées, malades, handicapés physiques et mentaux à travers «mésaventures de consommation». En bref, cette nouvelle égalité «avec calme et âme» permet surmonter le formalisme et la vision «mécanique» (l'artmécanique) du droit à l'égalité dans le droit privé*[42].

C'est vrai que certaines classes, groupes ou catégories des personnes sont considerées hypervulnérables, et ont besoin, donc, d'une protection plus grande que les consommateurs en général[43]. Les savants ci-dessus affirment, en particulier aux personnes handicapées: «la reconaissance de la vulnérabilité des personnes handicapées influe sur le droit aussi dans ce qui concerne le droit publique que le droit privé. Les limites de l'autodétermination et à la liberté personnel sont pondérés en vue de la protection de la dignité et de l'intégrité des handicapés.»[44]

Benjamin soutient que le «handicap», dans la plupart des cas, est une définition culturelle, médicale ou scientifique d'une certaine capacité ou incapacité, d'une certaine limitation physique ou mentale, d'une faiblesse ou d'une caractéristique, car ce sont les rôles, les droits, les attentes et le *status* social qui délimitent cette handicap – ce qui est un concept social et flexible dans le temps et dans la société[45].

Partant, alors, du principe de la construction d'un droit privé plus solidaire et de l'idée de l'égalité matérielle,

42 MARQUES, Claudia Lima; MIRAGEM, Bruno. *O novo direito privado e a proteção dos vulneráveis*. São Paulo: Revista dos Tribunais, 2012. p. 193-194.

43 NISHIYAMA, Adolfo Mamoru; DENSA, Roberta. A Proteção dos consumidores hipervulneráveis: os portadores de deficiência, os idosos, as crianças e os adolescentes. *Revista de Direito do Consumidor*, São Paulo, v. 76, out.-dez./2010. p. 16.

44 MARQUES, Claudia Lima; MIRAGEM, Bruno. *O novo direito privado e a proteção dos vulneráveis*. São Paulo: Revista dos Tribunais, 2012. p. 166.

45 BENJAMIN, Antonio Herman de Vasconcelos. A tutela das pessoas portadoras de deficiência pelo Ministério Público. *Advocacia Pública & Sociedade*: direitos da pessoa portadora de deficiência. São Paulo, n. 1, p. 13-38, jan. 1997. p. 17.

> *la reconnaissance de la différence et de la vulnérabilité aggravée personnelle et sociale de ces indivius (personnes handicapées), dans differents degrés d'engagement des possibilités d'interaction et de développement personnel, mérite d›être vu avec plus d'attention par le Droit de la Consommation*[46].

Dans cette hypothése, la caractérisation du consommateur handicapé comme hypervulnérable, donc enveloppé par la vulnérabilité aggravée et digne de protection, reste établie. Ainsi est la compréhension de Nishiyama, qui stipule que:

> *L'hypervulnérabilité du consommateur avec handicap se trouve précisement dans la difficulté par lui trouvé d'avoir accès à des biens de consommation. Sa intégration sociale dépend beaucoup de la facilitation de son déplacement vers les lieux de consommation, sans avoir besoin de la dépendance des tiers. Dans cet aspect, la Loi 10.779/2001 de l'Estado de São Paulo, Brésil, a cherché, en quelque sorte, accomplir la commande constitutionnelle exigeant à des centres commerciaux et à des établissements similaires fournir des fauteuils roulants aux visiteurs handicapés et aux personnes âgées qui en ont besoin. On note que cette commande normative est dirigée vers le privé et non au Pouvoir Publique. Il est également à l'Etat de promouvoir la facilitation de l'accès des personnes handicapées aux biens de consommation, car la commande constitutionnelle est plutôt une norme coercitive qu'une simple déclaration de principe. Est le rôle de l'État, par conséquent, la construction de parcs et des bâtiments d'utilité publique et la fabrication de véhicules de transport collectif pour faciliter la mobilité des personnes handicapées à l'accès aux biens de consommation*[47].

46 MARQUES, Claudia Lima; MIRAGEM, Bruno. *O novo direito privado e a proteção dos vulneráveis*. São Paulo: Revista dos Tribunais, 2012. p. 162.

47 NISHIYAMA, Adolfo Mamoru; DENSA, Roberta. A Proteção dos consumidores hipervulneráveis: os portadores de deficiência, os idosos, as crianças e os adolescentes. *Revista de Direito do Consumidor*, São Paulo, v. 76, out.-dez./2010. p. 18.

C'est remarquable que, reconnue l'hypervulnérabilité des personnes handicapées, selon l'avis de Schmitt[48], la loi exige une protection plus intense en faveur des plus faibles, en raison de la vulnérabilité plus aiguë à des situations normales. Cette compréhension est même déjà reconnue dans les tribunaux brésiliens[49].

Pour protéger les personnes handicapées de manière efficace, la loi a cherché à conceptualiser qui sont ces personnes handicapées afin d'atténuer l'inégalité matérielle. Le Statut de la Personne Handicapée, considére, selon son article 2, la personne handicapée celle qui «a une insuffisance à long terme de la nature physique, mental, intellectuel ou sensoriel, laquelle, en interaction avec une ou plusieurs barrières, peut faire obstacle à leur pleine et effective participation à la société sur un pied d'égalité avec les autres».

Le Statu lui-même, avec le Code de Protéction du Consommateur[50], reconnait aussi l'hypervulnérabilité du handicapé: dans l'article 5, paragraphe unique, il dispose que, aux fins de la protection contre toute forme de négligence, de discrimination, d'exploitation, de la violence, de la torture, de la cruauté, de l'oppression et des traitements inhumains

48 SCHMITT, Cristiano Heineck. A "hipervulnerabilidade" do consumidor idoso. *Revista de Direito do Consumidor*, São Paulo, v. 70, 2010. p. 168.

49 «La catégorie éthico-politique, et aussi juridique, des sujets vulnérables comprennent un sous-groupe de sujets hypervulnérables, parmi lesquels se distinguent, pour des raisons évidentes, les personnes ayant un handicap physique, sensoriel ou mental. (...)». (BRÉSIL. Cour supérieure, Appel spécial n°. 931.513/RS, 1ère section, rapporteur: Min. Antonio Herman Benjamin, jugé le 25 Novembre 2009.) «(...) à l'État Social songent, non seulement les vulnérables, mais surtout l'hypervulnérables, car sont ceux qui, précisément parce qu'ils sont minoritaires et souvent victimes de discrimination ou ignorés, souffrent le plus avec la massification de la consommation (...). Être différent ou minoritaire, en raison d'une maladie ou toute autre raison, n'est pas être moins consommateur ni moins citoyen, ni mériter des droits de deuxième classe ou la protection rhétorique du législateur. (...)». (BRÉSIL. Cour supérieure, Appel spécial n°. 586.316/MG, Demandeur: Ministère public de l'État de Minas Gerais. Partie défenderesse: ABIA - Association brésilienne des industries alimentaires. Rapporteur: Min. Antonio Herman Benjamin, jugé le 19 Mars 2009.)

50 Le Code de la Protection des Consommateurs déjà prevoit formes d'hypervulnérabilité, ce qui est clairement perçu dans les articles 37, § 2º et 39, IV :
Art. 37. Il est interdit la publicité trompeuse ou abusive.
§ 2º. Est abusive, entre autres, la publicité discriminatoire de toute nature, qui incite à la violence, exploite la peur ou la superstition, *tire profit du manque de jugement et de l'expérience des enfants, ne respecte pas les valeurs environnementales, ou est susceptible d'induire le consommateur de se comporter d'une manière nuisible ou dangereux pour leur santé ou leur sécurité*.
Art. 39. Il est interdit au fournisseur de biens ou de services, entre autres pratiques abusives :
IV - *tirer profit sur la faiblesse ou l'ignorance du consommateur, compte tenu son âge, sa santé, ses connaissances ou sa condition sociale,* pour lui imposer ses produits ou services.

ou dégradants, sont «considérés particulièrement vulnérables les enfants, les adolescents, les femmes et les personnes âgées, avec handicap»[51], tout afin de protéger la dignité de la personne humaine[52,53], et les autres valeurs constitutionnellement établies.

C'est notable que l'intéraction du Conde de Protéction du Consommateur et du Statut de la Personne Handicapée est un example du pluralisme postmoderne de sources législatives[54] qui traitent des questions connexes. On pourrait penser à des méthodes traditionelles de résolution des conflits (apparents) ou de chevauchemets de ces normes. Toutefois, pour la protection efficace des consommateurs handicapés, ces sources ne doivent pas s'exclure; au contraire, ils doivent se compléter mutuellement afin que cette hypervulnérable soit protégé[55]. Marques appelle cette méthode «le dialogue des sources» :

> *C'est la mise en œuvre conjointe et coordonnée guidée par des valeurs constitutionnelles et, aujourd'hui, en particulier, par la lumière des*

51 Art. 5º du Statut de la Personne Handicapée. BRÉSIL, *Loi nº 13.146*, du 6 Juillet 2015. *Planalto*. Disponible sur : <http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13146.htm>. Accédé le 16 août 2015.

52 «Nous avons comme dignité de la personne humaine la qualité intrinsèque et distinctive reconnue dans chaque être humain, ce qui lui rend digne du même respect et de considération par l›Etat et par la communauté, ce qui implique, dans ce sens, un complexe de droits et de devoirs fondamentaux qui assurent la personne aussi contre tout acte de nature dégradante et inhumaine que comme les garantir les conditions minimales d'existence pour une vie saine, ainsi que la promotion de leur participation active et co-responsable dans les destins de leur existence et de la vie en communion avec d'autres êtres humains.» (SARLET, Ingo Wolfgang. Dignidade da pessoa humana e direitos fundamentais na Constituição Federal de 1988. Porto Alegre: Livraria do Advogado, 2004. *Apud* PICCIRILLO, Miguel Belinati. A dignidade da pessoa humana e a inclusão da pessoa com deficiência. In: FACHIN, Zulmar (coord.). *Direito fundamentais e cidadania*. São Paulo: Método, 2008. p. 162.)

53 «Dans cette ligne de raisonnement, nous pouvons voir que la dignité de la personne humaine a deux caractéristiques structurelles: un négatif, ce qui signifie l›affirmation de l›intégrité physique et spirituelle de l›homme comme une dimension nécessaire de sa individualité responsable, et un autre dispositif, qui est épuisé avec le large possibilité de développement et d'auto-détermination.» (NEME, Eliana Franco. Dignidade, igualdade e vagas reservadas. In: ARAUJO, Luis Alberto David (coords*.). Defesa dos direitos das pessoas portadoras de deficiência*. São Paulo: Revista dos Tribunais, 2006. p. 134.)

54 MARQUES, Claudia Lima. O "diálogo das fontes" como método da nova teoria geral do direito: um tributo à Erik Jayme. In. MARQUES, Claudia Lima (coord.). *Diálogo das Fontes*: do conflito à coordenação de normas do direito brasileiro. São Paulo: Revista dos Tribunais, 2012. p. 27.

55 FERREIRA, Vitor Hugo do Amaral; LIMA, Bruno Giacomini. *Homo Economicus*: os (des) encontros da sociedade de consumo superendividada. In: FERREIRA, Vitor Hugo do Amaral; CARVALHO, Diógenes Faria de; SANTOS, Nivaldo dos (orgs.). *Sociedade de Consumo*: Pesquisas em Direito do Consumidor. Goiânia: Espaço Acadêmico, 2015. p. 28.

> *droits humains. (...) C'est la coexistence de lois avec différents domaines d'application, mais convergent sur le même système juridique, pluriel, fluide, mutable et complexe*[56]*, (...) pour réussir un résultat juste et d'accord avec la société et (avec) le système de valeurs positivé à la Constitution ou reçu sur les droits de l'homme, même si la norme est présent dans diverses sources, dans loi spéciale, dans un microsystème ou dans une loi générale*[57].

C'est important de noter que ce n'est pas compatible avec la méthode de dialogue des sources un résultat contraire au consommateur, i.e., le dialogue sera toujours clairement orientée vers l'addition de droits, ne jamais sa diminuition. En conséquent, «le résultat de l'application coordonnée des normes juridiques, dans ce cas, semble être accepté seulement quand il agrandir le contenu ou l'extension des droits des consommateurs»[58], en optimisant les droits fondamentaux de ce sujet hypervulnérable.

Les instituts d'autonomie de la volonté et de la liberté des individus, bien que limitée dans cette ère de droit solidaire, continuent d'être appréciés. Cependant, la culture de la postmodernité valorise encore plus le «droit à la difference, qui est le droit à l'égalité matérielle reconstruit par des actions positives de l'Etat en faveur de l'individu identifié avec un certain groupe»[59], ce qui ne se confond pas avec l'idée

56 MARQUES, Claudia Lima. O "diálogo das fontes" como método da nova teoria geral do direito: um tributo à Erik Jayme. In. MARQUES, Claudia Lima (coord.). *Diálogo das Fontes*: do conflito à coordenação de normas do direito brasileiro. São Paulo: Revista dos Tribunais, 2012. p. 28.

57 MARQUES, Claudia Lima. O "diálogo das fontes" como método da nova teoria geral do direito: um tributo à Erik Jayme. In. MARQUES, Claudia Lima (coord.). *Diálogo das Fontes*: do conflito à coordenação de normas do direito brasileiro. São Paulo: Revista dos Tribunais, 2012. p. 25.

58 MIRAGEM, Bruno. *Eppur si muove*: diálogo das fontes como método de interpretação sistemática no direito brasileiro. In: MARQUES, Claudia Lima (coord.). *Diálogo das Fontes*: do conflito à coordenação de normas do direito brasileiro. São Paulo: Revista dos Tribunais, 2012. p. 101.

59 MARQUES, Claudia Lima. O "diálogo das fontes" como método da nova teoria geral do direito: um tributo à Erik Jayme. In. MARQUES, Claudia Lima (coord.). *Diálogo das Fontes*: do conflito à coordenação de normas do direito brasileiro. São Paulo: Revista dos Tribunais, 2012. p. 61

de paternalisme[60] d'Etat[61].

Sur le Droit de la Consommation, le dialogue des sources assure au consommateur une tutelle spécial et digne. Les groupes des personnes handicapées, qui ont vulnérabilité potentialisée ou aggravée, son aussi actifs dans le marché de consommation et souvent sont marginalisés, ce qui justifie *per se* le dialogue des sources (soit parmi des lois spéciales, des microsystèmes ou des traités), afin de suprimer l'hypervulnérabilité[62] et garantir la dignité humaine à travers une tutelle efficace.

La protection des personnes handicapées en tant que consommatrices s'ilustre, donc, question en ébullition dans le cadre réglementaire brésilien, beaucoup parce que la reconnaissance et la visibilité des personnes handicapées au Brésil augmentent annuellement, totalisant un pourcentage, calculé par l'IBGE (*Institut Brésilien de G*éographie et de *Statistique*) dans le recensement de 2010, de 24% de la population brésilienne[63].

Donc, dans cette idée de dialogue des sources entre le Statut de la Personne Handicapée et le Code de la Protection des Consommateurs, il y a le renforcement des droits d'accessibilité[64] (grâce à diverses

60 Supprimant l'idée de paternalisme d'État, le Statut des Personnes Handicapées établit dans son art. 8, qu'il est devoir de l'Etat, de la société et de la famille assurer à la personne handicapée, avec priorité, la réalisation des droits à la vie, à la santé, à la sexualité, à la paternité et à la maternité, à la nourriture, à le logement, à l'éducation, à la formation professionnelle, au travail, à la sécurité sociale, à l'adaptation et à la réadaptation, au transport, à l'accessibilité, à la culture, au sport, au tourisme, aux loisirs, à l'information, à la communication, aux avances scientifiques et technologiques, à la dignité, au respect, à la liberté, à la famille, entre autres.

61 SILVA, Virgílio Afonso da. *A constitucionalidade da restrição da publicidade de alimentos e bebidas não alcoólicas voltada ao público infantil* (Parecer). São Paulo: Instituto Alana, 2012. Disponible sur: <http://cirancaeconsumo.org.br/wp-content/uploads/2014/02/PArecer_Virgilio_Afonso_6_7_12.pdf>.
Accédé le 19 Juin 2015.

62 Selon Marques, la jurisprudence a consolidé la terminologie «hypervulnérable» d'abord dans les cas impliquant des personnes handicapées. MARQUES, Claudia Lima. O "diálogo das fontes" como método da nova teoria geral do direito: um tributo à Erik Jayme. In. MARQUES, Claudia Lima (coord.). *Diálogo das Fontes*: do conflito à coordenação de normas do direito brasileiro. São Paulo: Revista dos Tribunais, 2012. p. 45.

63 INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA (IBGE). Censo Demográfico de 2010. Disponible sur: <http://www.ibge.gov.br/home/presidencia/noticias/imprensa/ppts/00000008473104122012315727483985.pdf>. Accédé le 20 set. 2015.

64 Statut des Personnes Handicapées - Art. 53. L'accessibilité est droit qui assure aux personnes handicapées ou avec mobilité réduite vivre de façon autonome et d'exercer leurs droits de citoyenneté et de participation sociale..

technologies[65]) et d'information[66], y compris des coûts éventuelles pour le fournisseur[67], ce qui reflète directement sur le propre Code de la Protection des Consommateurs[68].

\4. Considérations finales

Placer la personne humaine au centre des relations juridiques a conduit à de nouveaux paramètres d'interprétation et d'application des normes en reconnaissant les différences qui existent entre les sujets des droits, et l'appréciation de la dignité humaine, ce qui a permis une meilleure tutelle des plus faibles à partir d'une vision solidariste[69].

Ainsi, contrairement à le Droit Privé Classique, le nouveaux Droit Privé tend à valoriser les différences, à voir l'homme dans ses multiples facettes et, guidés par des droits humains et des principes constitutionnels, il a commencé à reconnaître la faiblesse de l'individu dans leurs relations d'affaires. Cette idée a forgé le principe de la vulnérabilité, qui cherche à protéger les plus faibles principalement dans les relations de consommation face au déséquilibre naturel entre le fournisseur et le consommateur.

Les consommateurs, cependant, ne sont pas une catégorie

65 Statut des Personnes Handicapées - Art. 74. Il est garanti aux personnes handicapées l'accès aux biens, aux ressources, aux stratégies, aux pratiques, aux processus, aux méthodes et aux services de technologie d'assistance qui maximisent leur autonomie, à la mobilité personnelle et à la qualité de vie.

66 Statut des Personnes Handicapées - Art. 69. Le gouvernement doit assurer la disponibilité des informations correctes et claires sur les différents produits et services offerts par quelconques médias, y compris l'environnement virtuel, contenant la spécification correcte de quantité, de qualité, des caractéristiques, de la composition et du prix, ainsi que les possibles risques à la santé et à la sécurité des consommateurs handicapés, dans le cas de sa utilisation, en applicant les arts. 30-41 de la loi 8.078 du 11 Septembre 1990.

67 Statut des Personnes Handicapées - Art. 69.§ 1º Les canaux de commercialisation virtuels et les publicités diffusées dans la presse, l›Internet, la radio, la télévision et autres moyens de communication ouverte ou par signature doivent fournir, selon la compatibilité de médias, les outils d'accessibilité qui trait l'art. 67 de la présente loi, au détriment du fournisseur du produit ou service, sans blessure des dispositions sur les art. 36-38 de la loi 8.078 du 11 Septembre 1990.

68 Statut des Personnes Handicapées - Art. 100. La loi 8.078 du 11 Septembre 1990 (le Code de la Protection du Consommateur), prend effet avec les modifications suivantes : «Art. 6, paragraphe unique. L'information visée au paragraphe III du *caput* de cet article doit être accessible aux personnes handicapées, en observant ce qui est prévu par règlement.» et «Art. 43. §6. Toutes les informations visées dans le *caput* de cet article doivent être mis à disposition dans des formats accessibles, y compris pour les personnes handicapées à la demande de l'utilisateur.»

69 MARQUES, Claudia Lima. *Contratos no Código de Defesa do Consumidor*: o novo regime das relações contratuais. 4. ed. São Paulo: Revista dos Tribunais, 2002. p. 394.

homogène. Certaines conditions biologiques et sociales modifient le déséquilibre dans la relation de consommation de façon plus stridente, ce qui rend la vulnérabilité du consommateur encore plus élevé, et qui a été caractérisée par la doctrine, par la jurisprudence et par la loi comme l'hypervulnérabilité, la vulnérabilité aggravée ou la vulnérabilité spéciale.

La personne handicapée est une partie active du marché de la consommation et s'inscrit dans cette catégorie encore plus spécial de vulnérabilité, laquelle, en raison de leurs conditions personnelles ou sociales, a son accès aux biens et services encombrés, en la menant à la marginalisation pour plusieurs parfois. Ceci justifie la nécessité d'une protection plus efficace par le Droit des Consommateurs et d'autres sources législatives spéciales, en particulier le Statut de la Personne Handicapée.

On voit la préoccupation du législateur d'assurer des normes qui respectent et favorisent la protection et la tutelle du consommateur handicapé, en cherchant la dignité de la personne humaine dans la société de consommation post-moderne.[70]. La pluralité de sources, pourtant, n'a pas l'intention de retirer la légimité de l'un ou l'autre, mais oui l'action conjointe pour la protection de ces sujets de droit à travers le dialogue des sources[71]. Selon Marques,

> *La méthode de dialogue des sources clarifie la logique de tutelle et protection spéciale aux sujets vulnérables, le consommateur du CDC ou l'hypervulnérable (personnes âgées, les enfants, les handicapés, les malades), et la possibilité d'une vision unitaire et cohérente du Droit Privé, selon la Constitution.*[72]

70 Pour en savoir plus sur la société de consommation postmoderne, lire : BAUMAN, Zygmunt. *Vida para Consumo*: a transformação das pessoas em mercadoria. Rio de Janeiro: Zahar, 2007.

71 «Dans la pluralité des lois ou des sources, existants ou co-existants sur le même thème, au même temps qui ont des champs d'application, soient coïncidents ou pas, les critères traditionnels de la solution des conflits de lois dans le temps (Droit intertemporelle) trouvent leurs limites. Ceci arrive parce qu'il est supposé le retrait de l'une des lois (l'antérieure, la générale et la de hiérarchie inférieure) du système, ce qui explique pourquoi propose Erik Jayme le chemin du 'dialogue des sources'.» (MARQUES, Claudia Lima. Superação das antinomias pelo diálogo das fontes: o modelo brasileiro de coexistência entre o Código de Defesa do Consumidor e o Código Civil de 2002. *Revista de Direito do Consumidor*, São Paulo, v. 51, 2004. p. 35.)

72 MARQUES, Claudia Lima. O "diálogo das fontes" como método da nova teoria geral do direito: um tributo à Erik Jayme. In. MARQUES, Claudia Lima (coord.). *Diálogo das Fontes*: do conflito à coordenação de normas do direito brasileiro. São Paulo: Revista dos Tribunais, 2012. p. 66.

De cette façon, la combinaison de lois différentes, mais complémentaires dans la poursuite de l'égalité matérielle et de l'appréciation des droits fondamentaux des consommateurs handicapée, est le chemin à la réalisation de leur condition de personne humaine en tant que participant du marché des consommateurs, en fournissant des outils pour la promotion des droits à l'accessibilité et à l'information[73] chaque fois que *les besoins de l'individu soient pris en compte*[74]. Seulement de cette façon le nouveau Droit Privé atteindra son but de construire une société plus juste, libre et solidaire.

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74 JAYME, Erik. O direito internacional privado no novo milênio: A proteção da pessoa humana face à globalização. *Cadernos do Programa de Pós-Graduação em Direito (UFRGS)*, Porto Alegre, v. 1, 2003. p. 92.

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PRIVACY AND DATA PROTECTION - FROM EUROPE TO BRAZIL

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Abstract: The European General Data Protection Regulation ("GDPR") has entered into force in May 2018. It is the result of many years of debate on how to update privacy and data protection normative within the States members if the union. The discussion that lead to its adoption has served as a platform for legislation reform across the globe. Brazil was not immune to it. This papers uses comparative side-by-side analysis to understand how similar or dissimilar the recently approved General Data Protection Law (Lei Geral de Proteção de Dados Pessoais - "LGDP") is to its European counterpart. Systematically the paper is divided in two parts: one exposing the GDPR and another underscoring it to the LGDP. The six main axes used are: a) criteria in order to lawfully collect and process data; b) its major principles; c) obligations for the companies of having privacy by design and by default; d) data protection authorities; e) possible sanctions for breaches; and f) extraterritoriality of their application. It concludes that the Brazilian regulation has only minor differences from its system across the Atlantic and may even be said to be a "GDPR à la Brasileira".

Keyword: GDRP - LGDP - Data Protection - Privacy

I. THE GDPR AS A TEMPLATE FOR BRASIL

The European model of data protection is certainly considered as one of the most advanced in the field.[1] It entered into force in May 2018. It substituted a regime of more than 20 years based on the European Union Directive 95/46/EC.

The framework in Europe has at its core the fundamental rights of intimacy, privacy and private live, and the protection of data. They are enshrined in the Convention 108, European Convention on Human Rights and the Human Rights Charter of the European Union. All this creates a cluster of rights that need to be protected by the States within the European Union.

The GDPR is the next level in this field. As a EU Regulation, it acts as a general piece of legislation with direct effect on the whole European legal environment. Envisioning data as a transborder matter, these rules go beyond the European space and provide for a continuous protection even beyond the territorial limits of the EU. In other words, they are designed to have extraterritorial effect.

It is in this context that Brazil has drafted its new General Data Protection Legislation ("LGPD" in its original acronym). This legislation has benefited from the many years of discussion on the matter in Europe and in many countries around the world, including Latin America.[2] To a certain extent, the GDPR ended up as a basis for the Brazilian legislation recently approved.

The LGPD recognizes as well that privacy and data protection are a matter of fundamental rights. It also acts as a general regulation for the field. Furthermore, it extends the protection of data collected in Brazil to storing and processing outside the country.

The present article intends to present the Brazilian legislation through the lenses of the GDPR. In this sense, it will be divided in two parts: i) the GDPR exposed and ii) the LGDP compared. Both parts will cover 6 relevant axes: a) criteria in order to lawfully collect and process data; b) its major principles; c) obligations for the companies of having privacy by design and by default; d) data protection authorities; e) possible sanctions for breaches; and f) extraterritoriality of their application.

1 DE HERT, P., & PAPAKONSTANTINOU, V. The proposed data protection Regulation replacing Directive 95/46/EC: A sound system for the protection of individuals. In.: Computer Law & Security Review , 28, 130-142, 2012.

2 CARSON, Angelique. Consent Is King in Latin America: Navigating the Eight Existing DPAs with a Look to the Future. Available at: https://iapp.org/news/a/2013-06-03-consent-is-king-in-latin-america-navigating-the-eight-existing/

The logic of the paper is to explore the extent of which the Brazilian legislation is similar and at the same time relatively different from its European sister. As a matter of conclusion we will state that the LGPD can be seen as GDPR with a Brazilian flavor.

II. REGULATION IN THE EUROPEAN UNION (GDPR)

The new General Data Protection Regulation ('GDPR')[3] sets the processing of personal data relating to individuals in the European Union. When an individual, a company or an organization intends to process personal data in connection to a professional or commercial activity - for business purposes, socio-cultural or financial activities for example - then the GDPR has to be respected. As a EU Regulation, it is distinguished from the previous data protection Directive: EU Regulations are legal acts of the European Union that become immediately enforceable as law in all Member States at the same time, while Directives, in principle, need to be enacted into domestic law[4].

Personal data is defined broadly by the GDPR as "any information" relating to an "identified or identifiable natural person" and the natural persons under this protection are referred to as "data subjects". EU data protection laws uses the term "data controller" to define the entities that determine how and why data is processed and the term "data processors" referring to entities that process personal data on behalf of a data controller. As an example, the data controller could be a car manufacturer that uses its customers personal data to offer car parts, accessories and after-sales services whereas the data processor could be the third party vendors processing personal data on behalf of the car manufacturer.

The GDPR aims to protect all EU citizens[5] from having its personal or even sensitive information released to an untrusted environment and in that regard, it establishes how data controllers and data processors should perform activities such as collection, recording, storage, use, disclosure, erasure of data subjects personal data.

2.1 Art. 6 - Consent and other lawful means of acquiring and processing personal data:

3 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32016R0679 Consulted on November 1, 2018.

4 FOLSOM, Ralph H., LAKE Ralph B., NANDA, Ved P. European Union Law After Maastricht: A Practical Guide For Lawyers Outside the Common Market. The Hague: Kluwer. 2012, p. 5.

5 Its scope of protection encompass as well all residents of the EU.

The main rule, since the beginning of EU personal data protection normative, concerns the fact that individuals must give consent to the processing of their personal data for one or more specific purposes. As a practical matter, whenever an individual provides its personal data for a certain purpose such as opening a bank account, filling for a job application, buying clothes online or attending a doctor's appointment, the data subject must be informed about the purposes for the collection of its personal data and after, he or she must as well provide specific consent in relation to that data processing. In most cases, it means to sign a document authorizing the data to be processed for those pre-determined informed purposes or opt-in by ticking a box expressing consent on a website.

Nevertheless, consent is not the only lawful basis established by Art. 6. Potentially, the same amount of personal data is collected on the grounds of "legitimate interests" of the controller or on grounds that the data was "necessary to fulfill a contract" entered into by the data subject.[6]

Art. 6 of the GDPR establishes data processing should be lawful in one of the following cases: (a) after the data subject's consent; (b) for the performance of a contract; (c) to comply with legal obligations of the data controller; (d) to protect the vital interests of the data subject; (e) when is necessary for the public interest or the exercise of official authority; (f) when is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

2.2. Principles of protection:

One of the GDPR's objectives is to provide individuals with a stronger control on their personal data, with the aim to help restore consumers' trust in the digital economy. To pursue this objective, the new Regulation renewed some of the principles set out by Directive 95/46/EC and brought up some new ones, reinforcing data subjects rights in relation to their own data.[7]

The list of key principles in the GDPR's Article 5 is more detailed than the previous Directive. The GDPR principles begin by determining that the information should be: (a) "processed lawfully, fairly and in

6 EDWARDS, Lilian, VEALE, Michael. Slave to the algorithm? Why a 'right to an explanation' is probably not the remedy you are looking for. 16 Duke L. & Tech. Rev. 18. December 4, 2017. P. 32.

7 POST, Robert C. Data privacy and dignitary privacy: Google Spain, the right to be forgotten, and the construction of the public sphere. 67 Duke Law Journal. February 2018.

a transparent. manner" (lawfulness, fairness, and transparency); the information should also be (b) "collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes" (purpose limitation). The GDPR Principles continue with requirements of (c) data minimization; (d) data accuracy; (e) limited storage; (f) integrity and last is the accountability for the data controller.[8]

2.3 Privacy by Design and Privacy by Default:

Prior to the GDPR, compliance with personal data protection laws consisted on the creation of policies, structuring of contractual terms, requesting of authorizations, auditing systems and processes, etc. The GDPR introduced new requirements by asking organizations to take one step further and develop products taking privacy already into consideration. This will require a closer collaboration from different departments within an organization in order to develop policies, procedures and systems simultaneously with product development, all bearing in mind GDPR compliance. This concept is what is known as "privacy by design or privacy by default"[9]

Privacy by design means building systems and infrastructure with privacy at its core, fostering personal data protection and having in mind its principles before and during the system creation and construction. The concept of privacy by design already existed but the provisions of Article 25 of the GDPR are a novelty in terms of legislative requirement. These provisions do not give individuals rights, but try "to provide a societal framework for better privacy practices"[10].

2.4. The Data-privacy authorities:

The GDPR establishes that each EU Member State shall create internally a supervisory authority: a public institution which will act independently on monitoring and enforcing the application of the GDPR. Article 57 of the GDPR determines the tasks each supervisory authority shall develop on its territory, which includes: the promotion of public awareness and understanding of data processing risks and rules, advising

8 SCHWARTZ, Paul M., PEIFER, Karl-Nikolaus. Transatlantic Data Privacy Law. 106 Geo. L.Journal. November 2017.

9 PETERSEN, Kyle. GDPR: What (and why) you need to know about EU data protection law. 31 Utah Bar Journal. July/August, 2018.

10 EDWARDS, Lilian, VEALE, Michael. Slave to the algorithm? why a 'right to an explanation' is probably not the remedy you are looking for. 16 Duke L. & Tech. Rev. 18. December 4, 2017. P. 23.

other national institutions with regard to data processing, promoting the awareness of controllers and processors of their obligations under the GDPR, providing information to and handling complaints lodged by data subjects concerning the exercise of their privacy rights, conducting investigations on the application of the Regulation, giving advice, encouraging the creation of codes of conduct and the establishment of data protection certification mechanisms, among others.

One important prerequisite assigned to the data-privacy authority concerns data breaches: in case of a personal data breach, data controllers have the obligation to notify the supervisory authority "without undue delay". Such notification to the data-privacy authority should contain the description of the nature of the breach, the numbers of data subjects and personal data records involved and its likely consequences (whenever possible), the description of the measures taken or to be taken to address or reduce the impact of the breach, documenting all the breaches in order to allow the supervisory authority to verify compliance[11].

Each EU member country has its own supervisory authority and in trans-border data-breaches, for example, they should collaborate and work together. With the GDPR the supervisory authority is no longer required to approve each single data processing agreement or data transfer based on the Model Contract Clauses, however, data controllers have to follow internal record keeping requirements and appoint a Data Protection Officer ("DPO") whenever its operations require monitoring data subjects on a large scale or use of sensitive data. Data controllers have a great amount of work (in terms of data transfer agreements, technical measures related documentation, security measures, among others) that needs to be done in order to comply with the GDPR requirements in that regard.

2.5. Sanctions:

Infringement of this new data-protection regulation can be extremely expensive: administrative fines can reach up to 20 million euros or, in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is greater.

Those penalties are applicable to both controllers and processors which means that cloud services are also subject to GDPR enforcement.

Data protection authorities of each member state have the prerogative to carry out investigations, determine when entities have to undertake remedial measures for deficiencies and last but not least, to

11 VOSS, W. Gregory. Internal Compliance Mechanisms for Firms in the EU General Data Protection Regulation. 50 R.J.T. 783, 2016.

impose those administrative fines.[12]

2.6. Extraterritorial application

The territorial scope of EU data protection laws has been increased with the GDPR as the jurisdiction has been extended to be applicable to companies processing personal data of individuals residing in the European Union no matter where the company is actually located. With the past data protection laws, this matter was unclear and the topic has been discussed in court several times; now with the GDPR, this subject has been clarified.

It is the Article 3 of the Regulation that makes its applicability clear: it is applicable to the processing of personal data by controllers and processors in the EU, regardless of whether the processing takes place in the EU or not. The GDPR is also applicable to the processing of personal data of data subjects in the EU by a controller or processor not established in the EU, where the activities relate to: offering goods or services to EU citizens (irrespective of whether payment is required) and the monitoring of behaviour that takes place within the EU.

If a company outside the EU is reached by the GDPR's extraterritorial application, an European representative has to be designated to serve as a contact point for EU regulators and consumers. This representative can be a natural or legal person established in any EU country where one of its data subjects reside. Such representative must have access to all the company documentation related to GDPR compliance and in case of failure to comply with the GDPR rules, the European representative may also be subject to enforcement proceedings[13].

III) THE GENERAL DATA PROTECTION LAW IN BRASIL

The LGPD (Brazilian General Data Protection Law) intends to have a similar effect as the GDPR. It was drafted to have a wide scope on and off line, even if on such matters what first comes to mind is social media and data breaches. Furthermore, it aims at data collected and or held by both private and public sectors. The logic is to have a unified system in order to move beyond the sectorial specific regulations of today.

To have an idea, the LGPD touches upon at least 40 different

12 FACCIPONTI, Joseph P., MCGRAIL, Katherine. GDPR Is Here — What If You Didn't Prepare? Law 360. May 24, 2018.

13 FRANCKE, Glory. Time To Update Your Privacy Statement For GDPR. Law 360, September 26, 2017.

pieces of regulation scattered throughout different areas such as the health sector, the banking system and consumer protection.[14] The LGPD is not suppose to dispose of these laws and regulations, it seeks to held them together and provide a common framework.[15]

3.1. Consent and other lawful means of acquiring and processing personal data:

"Consent is king."[16] For long the logic of collecting and processing personal data was focused on consent. It was seen as being a formal key or a substancial necessary criteria. Behind it, there is a contactual rationale. Private data is an individual property and can be contracted; hence, the necessity of an agreement on the collection and processing of such information.

The US, for instance, has maintained from its inception a "notice and consent" approach.[17] It is focused on disclosures made through "privacy policies". These are statements disclosing what data is to be collected and how it will be treated. Individuals, then, have the choice to opt for the service under such conditions or not.

In Europe, as we have seen above, the system maintained a focus on consent but moved beyond it. The individual assent to have his or her personal data collected is seen as an insufficient criteria. On the one hand, it is necessary to be freely given, informed and specific. This creates a strong burden for companies to comply with. On the other hand, big data and many other positive usages of data might not be compatible alone with such a framework. The lawful means for processing information have concentrated in the mentioned six main basis present in art. 6 of the GDPR.

The LGPD has followed a similar path, rejecting the more broad US system. The Brazilian legislation (in art. 7) has included not only the six GDPR basis: (a) consent; (b) necessary for the performance of a contract; (c) necessary for compliance with a legal obligation;

14 For an overall proposal of how the framework acted, see: http://baptistaluz.com.br/wp-content/uploads/2017/11/Privacy-Hub-Leis-Setoriais.pdf.

15 Such a situation may create unexpected opposition. During the Presidential Assent there were claims that the law should leave space for some exceptions related to national security, banking and a few others. Failing to have that, the President should vetoed certain parts of it. It would have killed the unifying principle that inspired the legislation in the first place.

16 It has become a common frase to describe the relevance of consent to the data-protection field.

17 SLOAN, R. H. and WARNER R. Beyond Notice and Choice: Privacy, Norms, and Consent. In.: Suffolk University Journal of High Technology Law, No.: 2013-16, 12 Apr 2013. Available at SSRN: https://ssrn.com/abstract=2239099.

(d) necessary for the protection of vital interests; (e) implementation of public policies by the public administration; (f) legitimate interest. But also, four more: (g) research by public study entities; (h) exercise of rights in legal proceedings; (i) health protection; (j) protection to credit. Perhaps the last two are the most important addition. They might be subsumed under other headings but it is relevant that they were explicitly mentioned.

Some authors have pointed out the presente of the aforementioned specific criteria may be the result of discussions of other relevant domestic legislations. This may be actually true. There has been a debate on the Positive Credit History Law (Lei do Cadastro Positivo - Lei N. 12.414/2011).[18] Besides, there is also a relevant tradition of protection of how doctors regulate their own procedures. The federal doctor's board (Conselho Federal de Medicina) has been the focal point in determining institutional health-related practices, including personal data.

- Consent

One consequence for opting for a more European as opposed to an American approach is that consent has to be understood in a much more robust way. Both the EU and Brazilian legislations are in consonance that it is necessary for the individual to be substantially informed and be able to freely consent. The burden is allocated within the person or company seeking to collect and process the data.

One difference, however, might be seen in how consent has to be established for international transborder transfers. Art. 49(1) of the GDPR mentions "explicit consent". Art. 33, VII, of the LGPD states that they may occur when "specific and highlighted consent" is provided. The difference in the language of the two may have on privacy policies (and perhaps contracts) are designed and brought before individuals.[19]

- Legitimate interests

This is an addition to the Brazilian legal framework. It is a regulation that has an open texture aiming at providing some degree of flexibility to the strict adherence to consent. As mentioned above, it

18 ARRUDA, D. S. and FRANCO, P. Nova lei do cadastro positivo beneficia consumidor?Porque nem tudo que reluz é ouro. In.: Jota, January 12, 2018. Available at: https://www.jota.info/opiniao-e-analise/artigos/nova-lei-do-cadastro-positivo-beneficia-consumidor-12012018.

19 It is also a slight departure from the language in other Latin American countries and what experts have seen as a hindrance to the flow of data. See: CARSON, Angelique. Consent Is King in Latin America: Navigating the Eight Existing DPAs with a Look to the Future. Available at: https://iapp.org/news/a/2013-06-03-consent-is-king-in-latin-america-navigating-the-eight-existing/.

provides a lawful basis for the usage of data for beneficial purposes and allows for big data processing, artificial intelligence and other forms of processing that may need large data-sets.

Due to its open-texture, the outer limits of what means legitimate interests will depend very much on its interpretation. This means a legal risk for any company processing data under such basis. It is necessary to document what the interests are and to conduct a balancing exercise between the "necessity of processing on the legitimate interests of the data controller and the rights and interests of the "data subjects".[20]

3.2. Principles, rights and duties:

The LGPD follows the example of the GDPR. It establishes a series of principles under which the whole system of privacy and data protection has to be analyzed. This may have its origin in fact that both pieces of legislation are to be understood as providing more concretude for fundamental rights. It is as well a normative methodology that allows for flexibility; particularly necessary in dealing with a fast paced and constant changing field.

The main lines in both regulations are similar: purpose of the collection and processing; adequacy and compatibility (between collection and processing); limitation and minimization of data collection; processing and storage; transparency; non-discrimination; and accountability.

In the US, there are certain obligations for minimization and to a certain extent a high degree of transparency. The latter guaranteed by "privacy policy" disclosures. These are enforced mostly by the Federal Trade Commission (FTC) mandate to police unfair and deceptive practices.[21]

The LGPD has chosen to establish a series of general obligations for data processing and rights to data subjects, similarly as the GDPR. The bedrock is found in purpose, adequacy and limitation. The logic is that collection, processing as storage has to be limited to the needs and purposes of the activity. An assessment has to be made as to why the data is collected and whether it is necessary. If does not have a purpose, it should not be collected in the first place, and if it was, it should not be stored. On the other hand, if it had a purpose, the processing has to de adequate and compatible.

Limitation means not only in quantity (how much and which data it to be collected). It should be understood as well within a time framework. When the purpose is finished and it is not to fulfill another

20 This proportionality exercise follows from the language of art. 7, IX, of the LGPD.

21 For an overall view, see: SOLOVE, D. and HARTZOG, W. The FTC and the New Common Law of Privacy. In.: Columbia Law Review, vol. 114, 2014, 583.

one, should be eliminated. The mentality of data storage in default has to be changed for one of data management.[22]

Right of portability:

Among the rights established in the Brazilian legislation is the right of portability. Every individual has a right to request the data controller to transfer his or her personal data to another controller. The right is not in and on itself new. However, they were not general rights. Resolution 460/07 from ANATEL (Brazilian Telecommunications Regulatory Agency) allows for the portability of certain telecom data sets from one telecom company to the other. In the banking system there is as well a certain possibility to transfer certain data sets from one bank to another.[23]

The novelty in the LGPD is the fact that it creates a general right. Data Controllers are mandated to create procedure to transfer data to other controllers, presumably the provides the same or similar service.

Right of review of automated decisions:

Automated decision-making services have become more widely available and with it the risks. The GDPR establishes a right to a "human review". In other words, people may not be subject solely to an automated decision-making system. There has to be an option to review by a human person with the criteria for the decision available.

The Brazilian system has already had similar right, however, they applied to a very narrow field, credit scoring. The Positive Credit History Law (Lei do Cadastro Positivo - Lei N. 12.414/2011) provides for a right of an "explanation" of the criteria for processing and the mechanisms used by the algorithm.[24] This system was translated to the LGPD with the addition that it is applicable to all data-processing.

Some authors are of the opinion that the LGPD has a broader scope are relatively more protective than the GDPR. They understood that in the Brazilian system, "the impact on the data subject is presumed when automated decision making is based on profiling, and there is no limitation to situations when the data was provided by consent."[25]

Notification:

22 MAYER-SCHÖNBERGER, V. Delete: The Virtues of Forgetting in the Digital Age. Princeton, 2011.

23 More information one can find in the Central Bank website: https://www.bcb.gov.br/pre/bc_atende/port/portabilidade.asp.

24 Some aspects of the procedure may be excluded such as trade secrets and protected intellectual property rights.

25 BIONI, B.; OLIVEIRA GOMES, M. C. and MONTEIRO, R. L. GDPR matchup: Brazil's General Data Protection Law. IAPP, October 4, 2018. Available at: https://iapp.org/news/a/gdpr-matchup-brazils-general-data-protection-law/.

Data breaches have become more common. Cyber security has risen to a very important preoccupation. Consonant with logic of both instruments, they have provisions that make the individuals aware of breaches to their personal data. The definition of a data breach and of which data is considered personal have an important impact on how many notifications does a company have to send, to whom and due to what.

The LGPD circumscribes the breaches to those that may create risks or relevant damage to data subjects (art. 48, caput LGPD). Other pieces of legislation only create rights of receiving notification to data subjects in very specific cases. In most US states that do have statutes on the matter, a data subject only has a right to a notification when the data involves his or her name.[26]

The Brazilian and European systems converge in that data subjects do have general notification rights and that data-protection authorities have to be notified. The amount of time after the breach occurred that it must happen in the Brazilian legislation is not set. It only states that it must be within a reasonable amount of time and that it will be defined by the data-protection authority (art. 48, para. 1, LGPD).

Right to a compensation:

Art. 42 and following provide a liability regime and the means to find compensation to damages occurred as a result of carrying out the activity of processing personal data. This is similar to the European system that adopted a logic that damages have to be compensated.

It commands a standard of analysis that seems to be different from the one in the United States, for instance. In the latter constitutionally in other to have standing in Court - and have access to remedies such as compensation - the plaintiff has to show "concrete damage", known as well as injury-in-fact.[27]

The language of the European and Brazilian legislations should lead to a different analysis, particularly relating to moral damages. It mandates actual/effective indemnification. It also establishes it as a joint obligation for the chain of data processing. The controller, however, receives the main brunt of obligation.

3.3. Privacy by Design and by Default:

26 See for instance: California Security Breach Notification Statute - Cal. Civ. Code §§ 1798.29, 1798.82; and Michigan Security Breach Notification Statute - Mich. Comp. Laws §§ 445.63, 445.72.

27 In light of the Spokeo Case, it seems that it is not very easy to establish the connection between a breach in data security and a specific damage. (Spokeo, Inc. v. Robins, U.S. Supreme Court, 2016).

Privacy by design and by default, as we have seen, intend to regulate all fases in the development of a new product or service. Even early stages, planing of products and services have to include a concern for data protection and individual privacy. This pre-launching regulation is a novel concept for the Brazilian regulatory environment.

We can draw parallels to environment and health concerns. In all of them there is a need to assess the impact an activity and or a product may have vis-à-vis a relevant value, a clean environment, population's health and now privacy and data protection.

However, for the latter, it goes beyond what may accidentally happen or a normal result of the action. The activity - service or product - has to be by default designed to protect individual's privacy and data. It is not enough to have contention plans. These only have an ex post facto effect. While, the law commands a proactive approach.[28]

The two concepts have a direct link with the principles established in the legislation. The most obvious are security, prevention and accountability (art. 6 VII, VIII and X, LGPD). However, in order to guarantee purpose, suitability/adequacy and necessity (art. 6 I, II and III, LGPD), for instance, the procedures for collection and treatment of data have to be assessed and designed ab initio having privacy in mind.

The Brazilian legislation, as much as the European one, has an important emphasis on ex ante instruments such as licenses and processing documentation.[29] It goes as far as mandating data processing impact assessments (DPIAs).[30] These are not mandatory for every specific data processing activity, however, they may be requested even from the public sector (art. 32, LGPD).

Their methodology and specifics are not specified. They were left for the data protection agency to develop through secondary legislation. As we will see, with the Presidential veto to the portion of the statute that contained the provisions of a Brazilian data protection agency, the

28 Vide: GELLERT, R. Data protection: a risk regulation? Between the risk management of everything and the precautionary alternative. International Data Privacy Law , 5, 3-20, 2015; SPINA, A. A Regulatory Mariage de Figaro: risk regulation, data protection, and data ethics. European Journal of Risk Regulation , 8, 88-94, 2017.

29 For the relationship between a risk approach and ex ante documents see: ZANNATA, R. Proteção de Dados Pessoais como Regulação de Risco: uma nova moldura teórica? In.: Artigos Selecionados Rede de Pesquisa em Governança da Internet, 2017. Available at: https://www.researchgate.net/publication/322804864_Protecao_de_dados_pessoais_como_regulacao_do_risco_uma_nova_moldura_teorica.

30 See for instance, art. 10 para. 3: "The national authority may request of the controller an impact report on protection of personal data, when processing is based on her legitimate interest, being observed commercial and industrial secrecy." (Unofficial translation based on several unofficial translations available online. Just to mention one: https://www.pnm.adv.br/wp-content/uploads/2018/08/Brazilian-General-Data-Protection-Law.pdf).

standards to be followed tend to be in the air.

Due to the similarities between the two norms, it is safe to say that following the European model should not be far fetch from the needs of the Brazilian standards. It is safe to say that in the future, when eventually a Brazilian data protection agency is established, the assessments will have to adapt to its normative cannons. Any data controller and processor should be aware of such needs.

3.4. Data-Privacy Authority - Presidential veto:

Another important feature similar to both systems is a central data-protection authority (DPA). As seen above, the EU system establishes a domestic data-protection and a European data-protection system. Each national DPA serves as a nerve point, focusing data-protection regulation and oversight in one administrative body.

This tends to facilitate the process for data-processing organizations. They have to respond to one organ. This does not eliminate completely the sectoral specific regulation, nor the level of protection from individuals in every particular country. Banking authorities, for instance, are able to regulate data-flows and issue specific norms. However, the framework of analysis has to be under the overarching rules in the general data protection regulation.

The regulatory strategy is based on a dialogue between the country DPA and the data-controller (entity controlling the processing activity). The LGPD was drafted so that there is a DPA (a governmental agency) in charged with regulatory and oversight powers (arts. 55 and ff).[31] It has an extensive impact in how the regulation should work. Excluding its specific mandated clauses, the authority is mentioned 49 times in the whole legislation.

It is certainly seen as part of the basis of the legislation. Again, in view of the open texture and the many regulatory procedures ex ante and ex post present in the regulation, the agency has a fundamental role to play. It will set the standards and clarify substantially the rigor of the privacy demands.

As the LGPD sought presidential approval, there were doubts about the constitutional statute of the legislation as it stands.[32] It has

31 For the history of the provision: Artigo 19. Proteção de dados pessoais no Brasil. Análise dos projetos de lei em tramitação no Congresso Nacional. November, 2016; and Internet Lab. O que está em jogo no debate sobre proteção de dados pessoais no Brasil? 2016. Available at: http://artigo19.org/wp-content/blogs.dir/24/files/2017/01/Prote%C3%A7%C3%A3o-de-Dados-Pessoais-no-Brasil-ARTIGO-19.pdf and http://www.internetlab.org.br/wp-content/uploads/2016/05/reporta_apl_dados_pessoais_final.pdf.

32 The main argument was that the initiative of any legislation that intends to

lead to a presidential veto to some provisions, including the ones that establish the Brazilian data-protection authority (arts. 55 ff). It is expected that a new piece of legislation is proposed by the Executive in order to establish the authority. The form of proposition (through a new bill or a presidential decree - medida provisória) is up for debate.

This creates as well a possibility to reanalyze the structure of the agency and what are its main componentes. The original proposition stroke a balance between the many sectors involved and provided for an independent agency subject to the direct supervision of no other body.[33] Up until this moment, the proposal was not present to Congress and we cannot state that it will follow the same form. As understood from the EU model, it is important to guarantee that the authority is formally and substantially independent and has the authority to regulate the national data-protection policy.

3.5. Administrative Sanctions:

The Brazilian DPA, as per the approved legislation, no matter its format, will have the capacity to impose administrative sanctions. As the data-protection bill was proposed in 2011, it contained fines of up to 20% of the companies annual turnover. After the consultation period, the legislators found it proper to reformulate the sanctions system.

As much as the GDPR, it is as well an escalated system. It starts with a warning and ends with a fine of up to two percent (2%) of revenues in Brazil, capped to a maximum of fifty million reais (R$ 50,000,000.00) per infraction. It should be noted that differently from Europe the penalties, when monetary, are calculate in accordance with the domestic turnover (in Brazil) as opposed to worldwide. Furthermore, the cap is not the minimum and the percentage the maximum, it is established with the contrary logic.

Another aspect is that it does not have the same two tiered system for ordinary breaches versus more fundamental ones. However, the Brazilian legislations permits a certain leeway and proportional escalation. The methodology itself is not defined in the regulation. It is suppose to be established by the national authority after public consultation (art. 53, para. 4, LGPD).

The law prescribes the necessity of having administrative procedures with full defense for the aggrieved parties available (art.

create an executive organ has to come from the Executive Branch itself. The agency, as part of the federal public administration system, had to have been proposed by the Executive. Any doubts as to the initiative could be fatal to its existence and any decisions made could be questioned under the same basis.

33 Arts. 58 and 59, LGPD, vetoed as well by the President, established a multi-sectoral advisory body, which could be revised.

52, para.1). Moreover, it indicates some of the criteria that should be taken into consideration such as the severity and nature of the breach, the economic condition of the offender and its degree of cooperation. What is more important is that includes a clear obligation to respect a proportionality analysis (art. art. 52, para.1, XI).

3.6.Extraterritorial Effect:

Both the GDPR and the LGPD have a broad base scope. The option was to protect the data of all individuals resident in their territories. In Brazil, it was not different. Art. 3, in consonance with the Brazilian Internet Bill of Rights (Marco Civil da Internet, Lei 12.965/14), states that the law is applicable no matter the means employed or where data is located or the company has its headquarters. What is relevant to engage the obligations is: the processing operation being carried out in the country; the data collection done within the territory; or the purpose of the processing activity is to target (offer goods, services) to or based on data of individuals located in the national territory.

In this sense, it expanded the degree in which the domestic legislation is applicable. As much as the GDPR created what is called a "bubble of protection" for personal data of EU residents, the Brazilian legislations also extends to activities that may not occur within national territory. For instance. if personal data is collected under the aforementioned circumstances, it has to be protected no matter where it is stored, or being processed or even who is actually processing it. The obligation for the company continues and, remember, the company can be called to repair in a jointly and severely fashion.

IV) CONCLUSION - GDPR À BRASILEIRA

The GDPR updated European legislation on the matter for the 21st century. The Brazilian General Data Protection Legislation (LGPD) certainly has followed in its footsteps. Instead of continuing in a piecemeal type of sectorial regulation as has happened so far in countries such as the United States, Brazil has opted for a strong general system.

It is important to understand that the LGPD is not a precise copy of the GDPR. It differs in its granular application. It has to be highlighted that their constitutive principles have a similar basis and are intended to create a rights-based regulation with an open textured aimed to be further regulated and enforced by a central data-protection authority. [34]

34 The Presidential veto in Brazil makes this as a matter of fact possibly up for discussion. The structure, of the regulation, however, is based on the need of a data protection

As a matter of legal basis to acquire and process data, both follow a method of emphasis on freely given, informed consent. However, they open up, including the legitima interests of the controllers. Brazil goes even further including health and credit protection. Arguably, they could also be subsumed under other headings in the GDPR.

The two systems converge as well in prescribing privacy as matter of default and design. From the start the interests of privacy of data subjects have to be taken into consideration. They also establish very steep sanction mechanisms even if in the European case they mean analyzing the worldwide annual revenue of the companies and in Brazil the domestic.

Finally, the Brazilian data-protection system emulates the European in its notion that data may circulate, however, the standards of protection have to be maintained. The two regulations share the concept that its own regulation is from the of-set applicable wherever data collected of its citizens or residents is. It goes beyond the mere territorial approach to a extraterritorial one.

The LGPD, then, adds up a certain "Brazilian flavor" to the GDPR regulation. They do, however, share the same model, logic, even structure. It may allow an easier case for a free flow of information between the country and Europe and hopefully they may fulfill their mandates to protect individual's privacy and personal data.

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ARBITRATION IN INDIVIDUAL LABOR AND EMPLOYMENT CONFLICTS: A CONSTITUTIONAL AND LOGICAL-SYSTEMATIC INTERPRETATION OF CLT ARTICLE 507-A

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Abstract: This study seeks to present a brief analysis of article 507-A, added to the Consolidated Labor Laws (CLT) by Statute 13,467/2017 (Labor Reform Act), which provides the possibility of inserting an arbitration clause into individual employment contracts, as long as the presence of this clause is derived from the initiative of the employee themself or has their express agreement. The main purpose is to interpret this new provision in accordance with the 1988 Brazilian Federal Constitution, the Arbitration Act and the case law.

Keyword : Labor Reform; Arbitration; Individual labor conflicts.

1. Introduction

Article 507-A, added to the Consolidated Labor Laws (CLT) by Statute 13,467/2017 (Labor Reform Act), allows for the possibility of inserting an arbitration clause into individual employment contracts, provided that the presence of this clause is derived from the employee's initiative itself or enjoyed his express agreement, in verbis:

> *Art. 507-A. In individual employment contracts whose remuneration is higher than twice the maximum limit established for the benefits of the General Social Security System, an arbitration clause may be agreed provided that it is on the initiative of the employee or through its express agreement, as per the terms foreseen in Statute 9,307, of September 23rd 1996.*

As it is known, the resolution of a conflict via the arbitral route depends on the existence of an arbitration agreement, which can take two distinct forms: an arbitration clause or a compromissum to arbitration.

The arbitration clause (cláusula compromissória) is a legal agreement by which the parties, previously and in advance, undertake to submit conflicts that may arise at some future moment to dispute resolution through arbitration. It is distinct from the compromissum to arbitration, since the latter stipulates the arbitration route for the resolution of pre-existing disputes.

In the light of the provisions contained in article 114, paragraphs 1 and 2 of the 1988 Brazilian Federal Constitution (CRFB/88), previously, in case law, the prevailing view was that arbitration allowed only to resolve collective labor conflicts. According to this understanding, the statute was, however, incompatible with the resolution of individual labor conflicts, since article 1 of the Statute 9,307/96 (Arbitration Act) establishes that only disputes relating to freely transferable property rights were susceptible to resolution through this mechanism.

In order to justify the alleged incompatibility with the resolution of individual labor and employment conflicts, the majority of the judgments were based on the principle of protection, on the lack of balance between the parties, on the state of subordination, on the economic and legal weakness of the employees and on ideas of unwaivability and unrenouncability that govern labor rights. Sub-section I of Individual Grievances (SDI-I) of the Brazilian Superior Labor Court (TST) had already adopted this line of understanding, in accordance with the judgments transcribed below:

> *"Public-interest civil action. Labor Prosecution Office. Chamber of Arbitration. Imposition of obligation not to do. Abstention from practice of arbitration in the sphere of employment relations. [...] 3. Whether from the perspective of article 114, paragraphs 1 and 2 of the Federal Constitution, or in the light of article 1 of Statute 9,307/1996, the*

doctrine of arbitration does not apply as a way of resolving individual labor conflicts. Even regarding the performances deriving from the employment contract susceptible to settlement or waiver, the expression of the will of the employee, individually considered, must be appreciated with natural reservations, and must be examined by the Labour Court or, at the union level, through the execution of valid collective bargaining. Interpretation of articles 7, item XXVI, and 114, head provision, item I, of the Federal Constitution. 4. As a rule, economic weakness implies that the condition of the employee affects individual free will. Hence the need for state intervention or, by express constitutional authorization, of an entity of the representative class of the professional category, as a means of preventing the perversion of the legal and constitutional precepts that govern Individual Labor Law. Article 9 of the CLT. 5. The principle defense of the employee, one of the pillars of Labor Law, renders unviable any attempt to undertake arbitration, in the forms enshrined by Statute 9,307/1996, in the sphere of the Individual Labor Law. This protection also extends to the post-contractual period, covering the ratification of rescission, the determination of sums deriving therefrom and the possible execution of an agreement with a view to release from the terminated employment contract. The pre-eminence of the determination of the rescisory sums, comprising food, at a time of particular weakness of the ex-employee, frequently subject to insecurity related to unemployment, rightly rules out the possibility of adopting the arbitrational route as a means of resolving individual labor conflicts, in the light of the greater threat to the will of the worker in such a scenario. 6. The mediation of a private legal entity – 'arbitration chamber' – whether in the resolution of conflicts, or in the ratification of agreements involving individual labor rights, is not compatible with the model of state interventionism that orients labor relations in Brazil. [...]" (TST, SDI-I, E-ED-RR nº 25900-67.2008.5.03.0075, Justice-rapporteur João Oreste Dalazen, tried April 16th 2015, DEJT May 22nd 2015).

> *"ARBITRATION. APPLICABILITY TO THE INDIVIDUAL LABOR LAW. RELEASE FROM EMPLOYMENT CONTRACT. 1. Statute 9,307/96, in defining the arbitration court as an extrajudicial measure for the resolution of conflicts, restricted, in article 1, the field of action of the doctrine merely to disputes relating to freely transferable property rights. It so happens that, due to the protective principle which informs the individual labor law, and also due to the lack of balance between the parties, labor rights are unwaivable and unrenouncable. On the other hand, the constitutional convention legislator wished to allow the adoption of arbitration only for collective conflicts, in observance of article 114, paragraphs 1 and 2 of the Federal Constitution. Thus, arbitration is not compatible with the individual labor law. 2. It is important to highlight in this case, that arbitration is questioned as a means of general release from an employment contract. In this regard, the case law of this court considers that it is not valid to use the doctrine of arbitration as a support for the ratification of the rescission of an employment contract. Indeed, the ratification of the rescission of an employment contract can only be made by the union of the sector or by the agency of the Labor Ministry, there being no legal provision that this should be done through an arbitral report. Motions for Clarification heard and denied." (TST, SDI-I, E-ED-RR-79500-61.2006.5.05.0028, Justice-rapporteur João Batista Brito Pereira, DEJT March 30th 2010)*

The case law of the Brazilian Supreme Court has adopted the position that the applicability of arbitration as a means of resolving individual labor and employment conflicts is a matter of infraconstitutional nature, related to the interpretation concerning the Arbitration Act provisions, which ended up considering unviable the filling of extraordinary appeals[1]. This would confer greater importance

1.RE 681,357/BA, Justice-rapporteur Luiz Fux, single judge decision June 27th 2012, DJE June 27th 2012. In the same sense: RE 659,893/PR, Justice-rapporteur Ricardo Lewandowsky, single judge decision, June 17th 2014, DJE June 20th 2014; and ARE 730,630/MT, 2nd Panel, Justice-rapporteur Gilmar Mendes, tried June 24th 2014, unanimous vote, DJE August 18th

on the predominant interpretation of the Superior Labor Court of the matter.

In 2015, Statute 13,129 sought to introduce paragraph 4 on the Arbitration Act, aiming to enable the stipulation of an arbitration clause in employment contracts involving an employee who occupied or would occupy the position or role of statutory administrator or director. The provision foresaw, however, that the arbitration clause would only be effective if the employee took the initiative of instituting the arbitration or if it expressly agreed to its being instituted, verbis:

> *Paragraph 4 Provided that the employee occupies or comes to occupy the position or role of statutory administrator or director, in individual employment contracts an arbitration clause may be agreed, which will only be effective if the employee takes the initiative of instituting the arbitration or if it expressly agrees to its being instituted.*

As what regards to adhesion contracts, article 4, paragraph 2 of the Arbitration Act already foresaw that the effectiveness of the arbitration clause (which is to say, the possibility that the clause would produce effects) is conditional before the fact of the adherent's taking the initiative of instituting the arbitration or expressly agreeing to its being instituted[2].

However, the above transcribed article 4, paragraph 4 (the provision which sought to authorize arbitration as a means of resolving individual labor conflicts) was object to a veto signed by the then Vice-President of Brazil, Michel Temer, who followed the recommendation of the Ministry of Labor and Employment. The express reasons for the veto were the following:

> *The provision would authorize the arbitration clause in an individual employment contract. As such, it would also impose restrictions on its effectiveness in relations involving given employees, depending on their occupation. In this regard, it would end up making an undesirable distinction between employees, in addition to using a term not technically defined in labor legislation. As a result,*

2014.

2. Art. 4, Paragraph 2, Statute 9,307/96. In adhesion contracts, the arbitration clause shall only have effectivenss if the adherent takes the initiative of instituting the arbitration or expressly agrees to its being instituted, provided that this occurs in writing in an annexed document or in bold, with the signature, or analyzed specifically in relation to this clause.

> *it would put at risk the generality of workers who could find themselves subjected to the arbitration proceeding.*

With the upholding of the veto, the interpretation gained further force – which was already predominant in the case law – in the sense of the incompatibility of arbitration with individual labor disputes[3].

However, in introducing article 507-A to the text of the CLT, the Labor Reform put into effect by Statute 13,467/2017 reopened the debate regarding the applicability of arbitration as an extrajudicial means of resolving individual conflicts in the labor sphere.

2. The requirements stipulated by art. 507-A of the CLT

The new article 507-A provisions may be analyzed from different perspectives.

According to the wording used, the stipulation of the arbitration clause is allowed in contracts involving employees that receive monthly remuneration greater than twice the sum of the highest benefit paid by the General Social Security System. In practical terms, the provision for the resolution of conflicts by arbitral means shall be possible for employees with remuneration higher than R$11,291.60 (approximately US$ 2,900 in December 2018), according to the values in force in 2018 (Administrative Rule MF nº 15, published in the Official Gazette of January 17th 2018, whose article 2 establishes the welfare upper limit at R$5,645.80).

Unlike the criterion foresee in CLT's article 444, sole paragraph, article 507-A does not condition the possibility of inserting the arbitration clause on the fact of the employee's possessing a higher educational qualification.

The provision also uses the term "remuneration" (a broader concept than that of "salary", used in the cited article 444, sole paragraph), since remuneration encompasses the complex of payments habitually received by the employee, which covers payments in money or in commodities deriving from the employer or third parties. So, in accordance with the literalness of these legislative innovations, the possibility of adopting arbitration shall encompass a larger number of workers than the contractual freedom enshrined by article 444, sole paragraph.

Regarding the reading of the bill in the Chamber of Deputies,

3. On this subject, see VERÇOSA, Fabiane. Arbitragem para a resolução de conflitos trabalhistas no Direito brasileiro. In: MELO, Leonardo de Campos; BENEDUZI, Renato Resende (Coord.). A reforma da arbitragem. Rio de Janeiro: Forense, 2016, p. 483-502.

in justifying the insertion of the provision which allowed for the use of arbitration in individual conflicts, the Deputy Rapporteur ROGÉRIO MARINHO highlighted that he had taken "care not to indiscriminately allow it to all employees, since it is based on equivalence between the parties"[4]. However, the exclusively economic criterion which the legislator opted to adopt (based only on the requirement of remuneration greater than the twice the benefits ceiling of the General Social Security System - RGPS) does not come close to assuring or minimally guaranteeing equivalence between the parties in the negotiation or during the stipulation of the contractual clauses.

Even if the employee receives remuneration greater than twice the benefits ceiling of the RGPS (approximately US$ 2,900 in December 2018), in the vast majority of cases the state of subordination inherent to the search for employment (and the need for its maintenance as the sole or principal source of subsistence) inevitably relativizes and mitigates autonomy in the stipulation of contractual clauses, including in the possible agreement of an arbitration clause. Which is to say, in most cases, the employee will be in no position to effectively negotiate or interefere in the wording of the contractual clauses. In the expression of Anglo-Saxon origin, the contractual proposal of the employee is analyzed basically on a "take-it-or-leave-it"[5] basis.

Note, however, that article 507-A uses the concept of the arbitration clause and foresaw the possibility of its agreement provided that it was on the initiative of the employee or through its express agreement, as per the terms foreseen in Statute 9,307 of September 23rd 1996.

As previously highlighted, the arbitration clause is a legal agreement where resolution is stipulated through the arbitral route even before the existence of any conflict. The wording of the provision added to the CLT – at that time the object of sanction by the Brazilian President – resembles and is inspired, to some extent, by the previously

4. CHAMBER OF DEPUTIES, Special Commission formed to proffer an opinion on Bill nº 6,787/2016, of the Executive Branch, Report of the Deputy Rogério Marinho. Available at: www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=1544961, accessed on April 25th 2018.

5. An expression also used by the veteran U.S. Supreme Court Justice, Ruth Bader Ginsburg, on proferring her dissenting opinion in the cases Epic Systems Corp. vs. Lewis, Ernst & Young LLP vs. Morris and National Labor Relations Board vs. Murphy Oil USA, which concerned the possibility of employers inserting arbitration agreements into employment contracts and waiver on the participation of employees in class actions. In a decision proffered on May 21st 2018, by a majority of 5 votes to 4, the Court accepted the validity of the provision regarding the compulsory use of arbitration, with a waiver on the worker's right to appear as a substitute in class actions. The decision, however, did not cover unionized workers. Decision available at: https://www.supremecourt.gov/opinions/17pdf/16-285_q8l1.pdf, accessed on May 25th 2018.

mentioned article 4, paragraph 2 of the Arbitration Act according to which, in adhesion contracts, the arbitration clause shall only be effective if the adherent takes the initiative of instituting arbitration or expressly agrees to its being instituted.

The inspiration to the disciplining of adhesion contracts is not accidental, as we shall see below. In most cases, it does not require much effort to discover that the insertion of the arbitration clause derives from a mere imposition of the employer – even if the text of the clause is highlighted or written in a separate instrument, has the worker's signature highlighted or obeys any other formality.

3. The possibility of arbitrating individual labor and employment conflicts

Despite these aspects, with all due respect to those who adopt a contrary position[6], and notwithstanding the imprecisions in the wording of article 507-A of the CLT, nothing in the foregoing up to the present is sufficient to support the idea – prevalent until then – regarding the absolute incompatibility of arbitration with the proper way of resolving individual labor and employment conflicts, notably concerning disputes where credits are discussed deriving from now extinct employment relations. This is because, once a contract is terminated, the rights potentially violated are converted, in most cases, into credit rights. And these rights are duly inserted in the sphere of the waivability of the parties, whether as freely transferable property rights or as proprietarial consequences of unwaivable rights[7]. Such is this the case that the legal system allows – and the Courts also approve and encourage – the settlement of individual labor and employment conflicts.

As IARA ALVES CORDEIRO PACHECO highlights, unwaivable rights are those which are unrenounceable, unignorable and

6. Those who consider article 507-A of the CLT unconstitutional and claim the inapplicability of arbitration to individual employment contracts include, among others, FELICIANO, Guilherme Guimarães [et al]. Comentários à lei da reforma trabalhista: dogmática, visão crítica e interpretação constitucional. São Paulo: LTr, 2018, p. 123-126; and MILANI, Fabio Rodrigo. A inaplicabilidade da cláusula compromissória aos contratos individuais de trabalho. In: DALLEGRAVE NETO, José Afonso; KAJOTA, Ernani [coord.], Reforma trabalhista ponto a ponto: estudos em homenagem ao professor Luiz Eduardo Gunther. São Paulo: LTr, 2018, p. 186-194.

7. For the applicablity of arbitration to individual labor conflicts, see: SANTOS, Enoque Ribeiro dos. Aplicabilidade da arbitragem nas lides individuais de trabalho. In: MIESSA, Élisson; CORREIA, Henrique [org.]. A reforma trabalhista e seus impactos. Salvador: JusPodivm, 2017, p. 891-905; e BERNARDES, Felipe. Manual de Processo do Trabalho. Salvador: JusPodivm, 2018, p. 121-126.

inviolable in relation to which default cannot be induced and confession does not produce effects[8].

On the other hand, regarding labor and employment disputes, the worker can opt not to sue the other party and there is express provision for the statutory limit applicable for the exercise of the right of the corresponding action (article 7, item XXIX, Brazilian Federal Constitution -CRFB/88).

In addition to this, in a labor suit, the application of the doctrine of confession is settled, although articles 345, item II, and 392 of the Civil Procedure Code (CPC/2015), which textually foresee the nonexistence of confession regarding recognizably waivable rights (in this regard, see Precedents 9 and 74 of the Superior Labor Court - TST)[9].

In the Brazilian legal system, there is, moreover, no express prohibition on the use of arbitration in individual labor and employment disputes. Neither is there any provision that restricts the hearing of these disputes exclusively to the Labor Court. As it is known, if the law does not restrict it, it is not up to the interpreter to do so.

By contrast, article 3, paragraph 1, of the CPC/2015, is express in establishing that arbitration is allowed, in accordance with the law, and CLT's article 507-A hereby expressly enshrines the applicability of the doctrine to individual labor conflicts.

Although much less frequent, one similarly cannot ignore the existence of cases where elements of the economic and legal weakness of the employee are revealed in a highly mitigated or rarified manner, such as in cases involving director employees and high-ranking executives of financial institutions or multi-national companies (so-called C-Levels), with substantial monthly earnings and a high level of expertise and technical knowledge in their field of action. As REINALDO DE FRANCISCO FERNANDES highlights, "the greater the autonomy of the employee, the lesser will be the state intervention, which is to say, autonomy is the direct reason for the unwaivability of the rights of the employment relationship"[10].

MAURO SCHIAVI is also emphatic in maintaining that "for some kind of labor or employment contracts where the worker presents more rarified weakness, such as high-ranking employees, arbitration

8. PACHECO, Iara Alves Cordeiro. Os direitos trabalhistas e a arbitragem. São Paulo: LTr, 2003, p. 122.

9. According to REINALDO DE FRANCISCO FERNANDES, "in addition to the inapplicability of confession, another premise of unwaiverable rights is the nonexistence of limitation on the exercise of the right of action and its precepts." (FERNANDES, Reinaldo de Francisco. O direito do trabalho como direito (in)disponível e a autonomia da vontade nos contratos de trabalho. In: MANNRICH, Nelson; FERNANDES, Reinaldo de Francisco [coord.]. Temas contemporâneos de Direito do Trabalho. São Paulo: LTr, 2016, p. 194).

10. FERNANDES, Reinaldo de Francisco. Op. cit., p. 198.

may be used, provided that the worker's adherence is spontaneous, and it follows the termination of the employment contract"[11].

Arbitration, as it occurs in numerous other countries, can make important contributions to the resolution of individual labor and employment disputes, especially in cases concerning highly specialized subject, when the parties may elect arbitrators who possess a high degree of technical knowledge about a given area of knowledge. The doctrine may also assure confidentiality to the proceeding, which shall benefit the preservation of the intimacy and privacy of those involved, in addition to preventing damages to employees that wish to relocate in the labor market. The swiftness and unappealability of the decisions are also aspects which, in many cases, can offer advantages to the arbitral proceeding as an effective and efficient way of resolving individual labor conflicts.

AMAURI MASCARO NASCIMENTO and SÔNIA MASCARO NASCIMENTO highlight that the use of arbitration as a heteronomous mechanism for resolving conflicts is present in almost every country, although to a greater or lesser extent, "its being difficult to find a country where labor conflicts cannot be decided by these means"[12].

As such, despite being possible to criticize the wording and criteria adopted by article 507-A from different perspectives, we believe that arbitration, in principle, is a valid way of resolving individual labor conflicts which discuss, following the termination of the employment contract, rights located in the sphere of the waivability of the parties (whether waivable rights or the financial consequence of unwaivable rights). We agree with the opinion of the Portuguese jurist MANUEL BARRADAS, for whom "clearly, labor rights, disputes over which are submitted to arbitration after the labor relationship has terminated and which have a merely economic or proprietarial nature, are susceptible to resolution by arbitration"[13].

It thus remains to proceed to the analysis of the best interpretation to be conferred on the terms of the new provision included in the CLT.

4. Employment contracts and adhesion contracts: the requirements of the employee's initiative or its express agreement

In labor matters, clearly, the use of arbitration will require extra care and caution, above all due to the underlying principles inherent to this legal field.

11. SCHIAVI, Mauro. A reforma trabalhista e o processo do trabalho: aspectos processuais da Lei n. 13.467/17, 2. ed. São Paulo: LTr, 2018, p. 80.

12. NASCIMENTO; Amauri Mascaro; NASCIMENTO, Sônia Mascaro. Curso de direito processual do trabalho, 29th ed. São Paulo: Saraiva, 2014, p. 53.

13. BARRADAS, Manuel. Manual de Arbitragem. Coimbra: Almedina, 2010, p. 134.

As previously stated, the exclusively economic criterion which the legislator opted to adopt in article 507-A (whose scientific ground is not clear, based only on the requirement of remuneration higher than twice ceiling of the RGPS) does not come close to minimally assuring or guaranteeing equivalence between the parties in the negotiation or in the stipulation of the contractual clauses, especially regarding the possible inclusion of an arbitration clause, agreed before the effective existence of a conflict.

Even if it involves an employee with remuneration greater than R$11,291.60 (approximately US$ 2,900 according to the exchange rates in force in December 2018), an employment contract does not cease to be, with rare exceptions, a true adhesion contract, without greater freedom or margin for interference of the worker in the stipulation of its clauses. As MAURICIO GODINHO DELGADO and GABRIELA NEVES DELGADO highlight, an employment contract is probably the most important adhesion contract known to the contemporary economic and social system[14].

It is no accident, as has been previously seen in this study, that the wording of article 507-A sought inspiration in the discipline of adhesion contracts (article 4, paragraph 2, of the Arbitration Act), in establishing the possibility of stipulating an arbitration clause provided that this is on the initiative of the employee or through its express approval, as per the terms foreseen in Statute 9,307, of September 23rd 1996.

Note that the provision added to the CLT makes express reference to the discipline of Statute 9,307/96 (Arbitration Act). Moreover, it establishes the requirements of the employee's initiative or its express agreement, without, however, establishing parameters for the fulfilment of these requirements, which could lead to diverse interpretations, and consequenlty, considerable legal uncertainty.

Due to the fact that an employment contract is, as a rule, an adhesion contract, and according to the logical-systematic interpretation – made in reference to the provision of article 4, paragraph 2 of the Arbitration Act –, we believe that the employee's initiative or its express agreement are not mere requirements of validity of the arbitration clause (to be fulfilled at the time of the signing of the legal business), but rather a condition of its efficacy (understood as the capacity of the arbitration

14. DELGADO, Gabriela Neves; DELGADO, Mauricio Godinho. A reforma trabalhista no Brasil: com os comentários à Lei n. 13.467/2017. São Paulo: LTr, 2017, p. 158 and 192. In the same regard, commenting on the lack of real freedom in the agreement of the arbitration accord, ANTONIO UMBERTO DE SOUZA JÚNIOR states that an employment contract is "a true adhesion contract imposed, as a rule, on the worker who, anxious for admission and fearing unemployment, can rarely resist in practice" (SOUZA JÚNIOR, Antonio Umberto de [et al]. Reforma Trabalhista: análise comparativa e crítica da Lei nº 13,467/2017 e da Med. Prov. nº 808/2017, 2nd ed. São Paulo: Rideel, 2018, p. 295).

clause to produce specific effects).

Which is to say, once a conflict of interests has arisen, it will only be possible for the arbitration clause to produce effects (field of efficacy) in two hypotheses: (i) if the initiative for the specific institution of arbitration comes freely from the adhering worker itself; or (ii) if the initiative to institute arbitration comes from the employer, in which case the worker must demonstrate its express agreement to the use of this course to resolve the dispute (agreement must be expressed explicitly and unequivocally before the arbitral judge, since silence, in this case, cannot be interpreted as approval).

In every case, if the worker opts for the judicial route to resolve the dispute, the employers cannot oppose this choice. In other words, according to the interpretation hereby proposed, it is possible to sign an arbitration agreement (arbitration clause or compromissum to arbitration) in the sphere of the individual employment relationship, as foreseen in article 507-A of the CLT. However, this does not prevent the worker from having access to the judicial branch, if it so wishes.

It is noted that article 507-A does not offer any provision regarding which party shall bear the costs of instituting and realizing the arbitral proceeding. Moreover, in accordance with article 13, paragraph 7 of the Arbitration Act, the arbitrator or arbitral court may order the advancing of funds for costs and measures that it considers necessary.

Due to the fact that the costs of the arbitral proceeding are generally considerably higher than those inherent to labor complaints in Brazil, one cannot prevent the worker, if it so wishes, from opting for the judicial route.

This interpretation is consistent with the constitutional principle of access to justice (article 5, item XXXV, CRFB/88), with the guarantee of free and full legal assistance to those that can prove financial insufficiency (article 5, item LXXIV, CRFB/88) and with the principle of protection that orients the Labor Law. It does not prevent, however, the necessary respect for individual freedom and the free will of parties who – in a sincere, valid and spontaneous manner – express the desire to submit a given conflict to resolution through arbitration (which could be an effective, efficient and appropriate way of analyzing the individual dispute).

The interpretation hereby proposed would also avoid numerous discussions about the effective enforceability of the expression of the will of the worker regarding the arbitration agreement. As already highlighted, the signing of individual employment contracts occurs, as a rule, in an environment where there is a lack of freedom for the stipulation of clauses by the worker. In addition to this, the mere observance of a given formality (such as the insertion of a text in bold, the wording of a clause in a separate instrument, or the highlighted

signature of the worker), despite being desirable, is not in itself sufficient to demonstrate free will regarding the sincere and spontaneous choice of the arbitral route, especially in the light of principles of protection and the primacy of reality that orient the Labor Law.

In the sphere of consumer relations, it is highlighted that article 51, item VII, of the Consumer Protection Code (CDC) establishes the nullity of a contractual clause which requires the compulsory use of arbitration[15].

It is opportune and pertinent here to cite the analogy with the Consumer Law, since this is a field where the parties generally negotiate in a situation of legal-economic imbalance and where adhesion contracts are frequent, as occurs in individual labor relations.

The understanding of the Superior Court of Justice (STJ) is no different, which – in interpreting article 51, item VII, of the CDC and article 4, paragraph 2 of the Arbitration Act – has repeatedly conditioned the effectiveness of the arbitration clause on the fact that (i) the adherent itself (consumer) takes the initiative of instituting the arbitration; or (ii) the consumer, at the time of the institution of the arbitration, clearly and explicitly expresses its agreement to the use of this means of resolving the conflict.

The STJ, thus, understands that it is possible to insert an arbitration clause in an adhesion contract derived from a consumer relationship, as foreseen in article 4, paragraph 2 of Statute 9,307/96. However, the effectiveness of the clause (understood as its capacity to produce effects) is conditional on the fulfilment of one of the previously mentioned conditions (initiative of the consumer to institute arbitration or demonstration of its express agreement). In all cases, in the light of the prohibition on clauses that require the compulsory use of arbitration (art. 51, VII, CDC), one cannot prevent the consumer from having access to the judicial branch, if it so desires (article 5, item XXXV, CRFB/88).

It is noted that, according to the STJ, the initiative for the specific institution of arbitration must come freely from the consumer (adherent) itself or, if such initiative comes from the supplier, the adherent must demonstrate its express agreement to the use of this means to resolve the dispute (agreement must be expressed in an explicit, emphatic manner without defects before the arbitrator, since silence, for the STJ, cannot be interpreted as approval).

FELIPE BERNARDES notes that the text of article 507-A of the CLT – though it foresees in an atechnical manner the possibility of an arbitration clause "on the initiative of the employee" – is very similar to the wording used by the STJ in their decisions, and goes as

15 Art. 51. Contractual clauses are null, by force of law, regarding the provision of products and services, which: VII – order the compulsory use of arbitration.

far as to say that the new public sector provision sought inspiration in the case law of the cited Superior Court[16].

Indeed, considering the similarity of the requirements regarding the initiative of the adherent party (offeree) regarding the institution of arbitration or the manifestation of its express agreement (art. 507-A of the CLT and art. 4, paragraph 2 of the Arbitration Act), and considering the similar characteristics between the contracts involving employment relations and those regarding consumer relations (generally marked by the legal vulnerability of one of the parties), the analysis of the case law already developed in the sphere of the STJ acquires great importance and can serve as a valuable interpretative reference for the labor area.

In this regard, to confirm the interpretative criteria described above, I shall proceed to transcribe some important judgments made by the STJ regarding the existence of arbitration clauses in adhesion contracts and in consumer relations:

> *"[...] 6. Thus, the institution of arbitration by the consumer binds the supplier, but the opposite is not true, since the filing of arbitration by the offeror depends on the express ratification of the vulnerable offeree, its not being sufficient to accept the clause made at the time of the signing of the adhesion contract. As a result, any form of abuse is avoided, inasmuch as the consumer holds, should he so wish, the power of freeing himself from the arbitral route to resolve a possible dispute with the service provider or supplier. The refusal of the consumer does not require any motivation. His filing of an action in the courts will amount to a tacit refusal (or renunciation) of the arbitration clause.7. Thus an arbitral clause is possible in an adhesion consumer contract when it is clear that it is not imposed by the supplier or the vulnerability of the consumer, and when the initiative for its institution occurs from the consumer or, in the case of the initiative of the supplier, it expressly agrees with or ratifies the institution, removing any possibility of abuse.8. In this hypothesis, the records reveal an adhesion consumer contract where an arbitration clause was stipulated. Despite its initial manifestation, the mere filing of this action by the consumer is sufficient to demonstrate its disinterest in adopting arbitration –*

16 BERNARDES, Felipe. Op. cit., p. 125.

there would be no posterior enforceable ratification of the clause [...]" (STJ, 4th Panel, Special Appeal nº 1,189,050/SP, Justice-rapporteur Luis Felipe Salomão, tried March 1st 2016, unanimous vote, DJE March 14th 2016).

"[...] 5. Article 51, item VII, of the CDC limits itself to prohibiting the prior and compulsory adoption of arbitratrion at the time of the signing of the contract, but does not prevent, subsequently, in the light or a potential dispute, there being consensus between the parties (particularly regarding the acquiescence of the consumer), the institution of the arbitral proceeding. 6. In the hypothesis under judgment, the attitude of the appellant (consumer) in filing the principle action before the state court, evidences, though implicitly, its disagreement with submitting to the arbitral proceeding, preventing, thus, as per the terms of article 51, item VII, of the CDC, the prevalence of the clause that imposes its use, given that it would have occurred compulsorily." (STJ, 3rd Panel, Special Appeal nº 1,628,819/MG, Justice-rapporteur Nancy Andrighi, tried February 27th 2018, unanimous vote, DJE March 15th 2018).

"[...] It can be seen on pages 13-35 (e-STJ) that the contract attached to the records is an adhesion contract. As such, the understanding of the lower court is in accord with the case law of this court, in the sense that one can only contemplate the effectiveness of the arbitration clause foreseen in an adhesion contract if the consumer takes the initiative of instituting the arbitral proceeding, or if it subsequently ratifies its institution, at the time of the specific dispute, confirming the intention of the previous decision. [...]" (STJ, Special Appeal nº 1,649,252/GO, Justice-rapporteur Marco Aurélio Belizze, single judge decision, February 10th 2017, DJE March 8th 2017).

"1. With the promulgation of the Arbitration Law, three regulations with different degrees of specificity come to harmoniously coexist: (i) the general rule, which obliges observance of arbitration when

agreed by the parties, with derogation of state jurisdiction; (ii) the specific rule, contained in article 4, paragraph 2, of Statute 9,307/96 and applicable to generic adhesion contracts, which restricts the efficacy of the arbitration clause; and (iii) the even more specific rule, contained in article 51, item VII, of the CDC, which applies to contracts deriving from consumer relations, whether adhesion contracts or not, imposing the nullity of any clause that determines the compulsory use of arbitration, even if the requirements of article 4, paragraph 2, of Statute 9,307/96 are satisfied. 2. Article 51, item VII, of the CDC limits itself to prohibiting the prior and compulsory adoption of arbitration, at the time of the signing of the contract, but does not bar, in the light of a potential dispute, there subsequently being consensus between the parties (in particular, the acquiescence of the consumer), an arbitral proceeding's be instituted. (...)" (STJ, 3rd Panel, Special Appeal nº 1,169,841/RJ, Justice-rapporteur Nancy Andrighi, tried November 6th 2012, unanimous vote, DJE November 14th 2012)

5. Necessity of effective existence of a conflict of interests and of a doubtful legal relationship

The use of arbitration in the resolution of individual employment conflicts will also certainly be the object of broad discussion in the legal literature and in the decisions of the Brazilian courts. As HOMERO BATISTA affirms, "there will be great judicial controversy in this regard, bearing in mind that, in analogous cases, the Labor Courts did not accept this alternative way of resolving conflicts, believing that labor credits are located in the context of unwaivable rights, a subject immune to arbitration as determined by Statute 9,307/1996"[17].

However, in adopting current jurists' opinion, which allows, in principle, for arbitration to be used in the resolution of such conflicts – notably those relating to already extinct labor relations where only freely transferable property rights or proprietary consequences of unwaivable rights are discussed –, it becomes necessary to establish an interpretation that systematically analyzes and harmonizes the content of article 507-A of the CLT with the terms of the Arbitration

17 SILVA, Homero Batista Mateus da. Comentários à reforma trabalhista. São Paulo: Editora Revista dos Tribunais, 2017, p. 70.

Act (particularly its article 4, paragraph 2), with the constitutional principle of access to justice (article 5, item XXXV, CRFB/88), with the guarantee of free and full legal assistance to those who can prove financial insufficiency (article 5, item LXXIV, CRFB/88), and with the underlying principles inherent to the Labor Law.

In the light of the revocation of article 477, paragraph 1 of the CLT by the Labor Reform Act[18], it is also important to highlight that the doctrine of arbitration and the arbitration courts cannot serve, in any case, to enable the perpetration of frauds. The choice of the arbitral route obviously presupposes the effective existence of a conflict of interests, which may obtain an appropriate, swift and effective solution through this mechanism.

The search for arbitration with the simple purpose of awarding severance pay and obtaining general release regarding the terminated contract – in order to avoid and hamper prevent any subsequent discussion of labor rights – is a practice that clearly suffers nullity, and, as such, must be suppressed.

The enthusiastic authors of arbitration themselves had already recognized the impossibility of using the institution for the simple discharge of severance pay. See, in this regard, the opinion of the jurist ANA LÚCIA PEREIRA:

> *"[...] submitting severance pay to arbitration is to render clear and unequivocal the duress and defect of the consent, given that the employee has no alternative. He is not being given any alternative to choosing, or not choosing, arbitration, since if we consider severance pay as being an alimentary sum, indispensable to his survival until he receives a new salary, the employee will not have the option of saying that he doesn't agree to the arbitration. So, arbitration must effectively be used as a choice so that the employee can claim its pendencies, in the same way that it would if it were appealing to the Labour Court, having already also received its severance payment, FGTS (Workers Severance Guarantee Fund) withdrawal bills and its unemployment compensation. [...]"*[19]

18. Article 477, paragraph 1, of the CLT, provided that a request for dismissal or receipt of release from the termination of an employment contract, signed by an employee who has performed over one year of service for the company, shall only be valid when done with the assistance of the respective union of the professional class or with the authority of the Labor Ministry.

19. PEREIRA, Ana Lúcia. Considerações sobre a utilização da arbitragem nos contratos

It is worth recalling that, in the recent past, Statute 9,958/2000 introduced to the CLT articles 625-A to 625-H, providing the possibility of the resolution of extrajudicial labor disputes through so-called "Prior Conciliation Commissions" ("Comissões de Conciliação Prévia" - CCPs), to which was assigned jurisdiction to seek conciliation regarding individual labor conflicts. According to the wording of article 625-E, sole paragraph of the CLT, the conciliation term drafted before the CCP shall have general discharging efficacy, except regarding expressly reserved sums.

However, it was not uncommon to use the doctrine in a distorted manner, as an instrument for fraudulent practises, where agreements were duly ratfiied when there were not even disputes, let alone mutual concessions. As such, in practice, the CCPs were often used as a simple means of seeking to obtain the desired general discharging effectiveness.

In view of this situation, it was not unusual for case law to determine the invalidity of agreements signed before CCPs, as can be verified from the judgments transcribed below:

> *"PAYMENT OF TERMINATION SUMS BEFORE THE PRIOR CONCILIATION COMMISSION. PERVERSION OF THE DOCTRINE. FRAUD EVIDENCED. NULLITY OF THE AGREEMENT. The purpose of the prior conciliation commissions, instituted by companies and unions, is to seek to conciliate individual labor conflicts, in the strict terms contained in article 625-A of the CLT. Effectively, they cannot function as a ratifying instance of termination. Once fraud is characterized, the nullity of the agreement must be declared. Ordinary appeal denied." (Regional Labor Court – TRT–6th Region, 3rd Panel, RO nº 0001891-29.2015.5.06.0102, Judge-rapporteur Ana Catarina Cisneiros Barbosa de Araujo, tried June 5th 2017, publication June 8th 2017)".*
>
> *"ACCORD BEFORE THE PRIOR CONCILIATION COMMISSION. INVALIDITY. INDISPENSABILITY OF THE EXISTENCE OF FUNDS OF DUBIOUS OR CONTROVERSIAL STATUS. IMPOSSIBILITY OF USE OF PRIOR CONCILIATION COMMISSION MERELY FOR THE PAYMENT OF RESCISSORY FUNDS. The Prior Conciliation*

individuais de trabalho. Revista de Arbitragem e Mediação, São Paulo, v. 23, Oct-Dec. 2009, p. 104.

> *Commission constitutes a means of resolving labor disputes, which possesses effectiveness to terminate obligations, but, for this purpose, the agreement signed must be valid, which is not the case here. The agreement constitutes the resolution of the conflict between the parties, through the mutual concession of the litigants. Thus, for the transaction to be characterized, it is necessary that the matter discussed is controversial. Acording to Dorval Lacerda, cited by Arnaldo Süssekind, a transaction 'is a legal act whereby the parties, making reciprocal concessions, terminate litigious or doubtful obligations' (A renúncia no direito do Trabalho, 1943, págs. 91, 179 e 180, apud Instituições de Direito do Trabalho, 20th edition, São Paulo, Editora LTr, 2002, p. 207). Thus, the doubt or controversy regarding the intention of the party constitutes a requirement indispensable to the validity of the transaction." (Regional Labor Court – TRT-2nd Region, 4th Panel, RO nº 0002520-43.2011.5.02.0073, Judge-rapporteur Ivani Contini Bramante, tried Dec. 9th 2014, publication January 9th 2015).*

In regulating the law, the Ministry of Labor and Employment issued Administrative Ruling nº 329/2002, which established the following understanding:

> *Art. 11. The conciliation must restrict itself to conciliating rights or controversial payments. Sole pargraph. The portion owed by way of FGTS (Workers Severance Guarantee Fund) cannot be the object of the settlement, inlcuding the fine of 40% on all the deposits due during the validity of the employment contract, as per the terms of Statute 8,036, of May 11th 1990.*

Thus, in accordance with case law, and in keeping with the interpretation conferred by the judicial branch itself, an agreement signed before the CCP shall only be valid where, in fact, there was an effective settlement (which presupposes the existence of reciprocal concessions), and not only a waiver of rights or the submission of one party to the other. Obviously, it is still important that there be a litigious relationship and an effective controversy regarding the sums due; the

doctrine cannot serve as a mere means for obtaining general release regarding the extinct contract and, thus, as an obstacle to access to justice.

The analysis of these past experiences proves relevant, in order to avoid the repetition – through new doctrines incorporated into the CLT, as is the case with arbitration – of the same errors of the past, which could generate declarations of nullity and consequent nonuse.

As verified in the experience of the CCPs, the function of arbitration chambers as mere ratifying agents of the termination of employment contracts – without there effectively being a questionable legal relationship, and through the insertion of clauses of general release – constitutes complete and absolute distortion, as well as fraud and flagrant nullity.

If the employer uses this doctrine with such a (deviation from) purpose, potential decisions proffered or agreements signed on an arbitral basis may potentially have their validity challenged before the judicial branch.

6. Conclusion

Once an employment contract is terminated, the rights potentially infringed are transformed, in most cases, into credit rights, with a clear economic bias. And such rights are duly inserted into the sphere of the waivability of the parties, either as freely transferable property rights or as financial consequences of unwaivable rights. The conflicts of interest relating to such rights are, in principle, resolvable through the institution of arbitration.

Regarding the provisions contained in the new article 507-A of the CLT, we understand that, in addition to the fact that the arbitration clause is only possible in contracts involving employees that receive remuneration greater than twice the benefits ceiling of the RGPS, the production of the effects of the clause shall depend on the initiative of the worker to institute the arbitration or to express its clear, express and unequivocal agreement.

In the same sense as the interpretation adopted by the STJ in relation to article 4, paragraph 2 of the Arbitration Act, and article 51, item VII of the CDC, we believe that, following the effective emergence of the conflict, the initiative for the specific institution of the arbitration must freely come from the adherent itself (in this case, the worker) or, if the initiative for the institution of the arbitration comes from the employer or receiver of services, the worker must provide its express agreement with the use of this means for resolving the dispute (the agreement must be explicity and emphatically expressed without defects before the arbitral court, since silence, according to the STJ,

cannot be interpreted as approval).

In other words, the employee's initiative or the communication of its express agreement (requirements established in article 507-A of the CLT) are not mere requirements of validity of the arbitration clause (to be fulfilled on the signing of the legal agreement), but rather a condition of its effectiveness (understood as the capacity of the arbitration clause to produce specific effects) and must be fulfilled following the effective emergence of the conflict.

Either way, if the worker opts for the judicial route to resolve the dispute, the employer cannot oppose such a choice.

This interpretation has proven to be consistent with the constitutional principle of access to justice (article 5, item XXXV, CRFB/88), with the guarantee of free and full legal assistance to those who can prove economic insufficiency (article 5, item LXXIV, CRFB/88), with the principle of protection that orients the Labor Law and with the case law of the STJ regarding arbitration in consumer relations (a field also marked by the legal vulnerability of one of the parties). This, however, does not prevent the necessary respect for individual freedom and the free will of the parties – in a valid, sincere and spontaneous manner – to express the desire to submit a given conflict to resolution by the route of arbitration, which can be an effective, efficient and appropriate way to analyze the individual dispute following the termination of the employment contract.

In the light of the revocation of article 477, paragraph 1 of the CLT by the Labor Reform Act, the doctrine of arbitration and the arbitral chambers cannot enable, in any case, the perpetration of frauds. The choice of the arbitral course clearly presupposes the effective existence of a conflict of interests and of a doubtful legal relationship, where transferable rights or financial consequences of non-transferable rights are discussed.

The search for arbitration by employers, with the simple aim of paying termination sums and obtaining a general release regarding the extinct contract – in order to avoid rendering unviable any subsequent discussion, as a simple mechanism for preventing the filing of labor actions – is a practice that possesses clear nullity and, as such, must be opposed. In simple terms, arbitral chambers cannot serve as ratifying agents of contractual rescissions, payments of rescissory sums or a means to restrict access to justice, under penalty of the complete perversion of the doctrine.

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PRISON OVERCROWDING IN BRAZIL: WHAT CAN THE JUDICIARY DO?

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Abstract: As a field of study, this paper has the judicial activism regarding prison's public policies. It intends to question if could be possible a judicial control over public policies in the context of Brazilian's overcrowded prisons. The prisons are inhumane, violating the inmates' fundamental rights. This judicial review is grounded in the current separation of powers conception. In addition, the Constitution and the ordinary law of criminal punishment impose to the public administrator the respect about the prisoners' rights and must implement policies to reduce the inmate's overcrowding. In the omission of the Executive, the Judiciary can order that one to build more prisons. However, there are restrictions regarding the discretion of the public administrator, although he must build and restore the prisons, he can choose the way to this end. To reach this conclusion, have been used books, papers, judicial decisions and data about the prison system.

Keyword: Judicial control; Public policies; overcrowded prisons; Separation of powers.

1. INTRODUCTION

In Brazil, the management of prison is a State's responsibility. The overcrowding of inmates in prisons is practically a public knowledge, mainly because of the news about rebellions in these places. The number of inmates is well above its maximum capacity, and the

prisoners there are living in inhumane conditions. Besides, it is known that penitentiaries are, most of the time, ruled not by the government, but by the criminal organizations. Therefore, it is noted that the State does not exercise its power in these situations, either for political disinterest or for not implementing effective policies to improve the prison's unities.

Beyond that, in Brazil, there is a substantial debate about judicial activism when they interfere in the others State's power, like Executive and Legislative. The Judiciary, when doing this, uses the moral or juridical principles to reinterpret the rules, jeopardizing legal certainty and the predictability of law. Regarding the Executive, many times the Judiciary intervenes and determines the public policies to protect certain fundamental rights.

Facing these two scenarios, the main objective of this paper is to discuss the possibility of judicial control of public policies, especially those related to the overcrowding of the prison system and its precarious conditions. For this matter, the first two parts serve to analyze if there are political and normative groundings to allow a judicial control of public policies.

About the political foundations, it is important to talk about the violation or not concerning the separation of powers. After analysis, we will discuss if the 1988's Brazilian Constitution and its fundamental rights allow or not this judicial control. Yet, regarding the prison' situation, it is crucial to know if the ordinary legislator imposes any objective about the matter to the public administration.

In the third part of this paper, realizing if the judicial control of public policies is possible or not, we will investigate if there are any limitations to the Judiciary. Is it allowed to interfere in an unrestricted way? Or does it need to respect the Executive's discretion? In addition, it is important to debate about the reserve of the possible and if it justifies a release of the public manager in not implementing fundamental rights.

It will be used legal literature on the subject, as well as documents and judicial decisions to verify some data. The research is qualitative, because it worries to argue, concluding about the possibility or not of the judicial control in public policies, looking for reuniting and perhaps expanding the ideas brought by the literature.

2. POLITICAL AND CONSTITUTIONAL FOUNDATIONS

One of the main arguments about the impossibility of the judicial control of public policies, that concerns to the groundings of the modern State, is the separation of powers, *i.e*., the existence of an Executive, Legislative and Judiciary. This idea goes back to John Locke in the 17th century, and to Montesquieu in the 18th century, that created

the division in three powers or functions of the State.

In the context of the liberal revolutions of the Modern Age, one of the powers was the most important, that is the Legislative, avoiding the abuses of the dictator or monarch, and creating a law that mirrored the pure reason and obeyed to the letter. Therefore, the Judiciary did not have discretion when judging. It was not allowed to interpret or apply the law in a way that contradicted or was beyond the legal text. In this scenario, the most valuable rights were those in which the State should guarantee freedom, avoiding interference in social life.

With the crisis of the liberal model and the Industrial Revolution at the end of the 19th century, because of the abusive treatment of the disadvantaged classes, it was necessary others types of rights, that needed the State interfering in the private relationships among the citizens. The social rights emerge, which ensure greater equality through the limitation of freedom, in the so-called Welfare State. The Executive gains strength, having to take actions for the purpose of protecting and guarantee these new rights. Nevertheless, these rights were seen as mere policies, objectives, without binding force to the public manager to act.

After The World War II, it was necessary to value the individual and social rights, in order to be more effective, preventing what happened in the Nazism, for example, when the State, trying to achieve social purposes to favour its people, ignored and violated minorities' rights. The human values take an important role and, in a juridical way, is represented by the so called "principles". Then rises the postpositivism, giving the groundings to a neo-constitutionalist politics, *i.e.*, the constitutional rights are not just promises or ordinary programs, but they now have the binding force to all State's power, in a democratic rule of law system. The Judiciary begins to gain importance, leaving the function of only reproduce the literality of the law, by getting to judge also based in moral values, making the adequacy of the legislation with the Constitution.

Therefore, the Judiciary increased its relevance to the people, being its main function to judge cases not only based on the legislation, but also on the constitutional norms. In this matter, emerged the possibility of all the others power's acts of being analyzed by the Judiciary. In other words, the judges could control administrative acts and legislation based on its constitutionality. However, not only the Supreme Court has this role of adequacy through a concentrated control, all the judges can perform this operation in a way restricted to the parties in conflict, through a diffuse control. According to Valentin Cornejo (2002, p. 226), the Judiciary has the role of mediating the legislator's and the constitutional power's will.

In the Brazilian democratic rule of law, the Constitution of 1988 declares the foundations of the republic in the first article, as the

dignity of the human person in item III. In its third article, there are the objectives to be pursued, which, in short, propose a fair society with less inequality that can ensure the development and the good of all. Beyond that, the fifth article of the Constitution brings a wide list of fundamental rights and guarantees of the individual and the collective. The individual rights, *e.g.*, the protection of the prisoner's physical and moral integrity provided by item XLIX, have immediate effectiveness, according to § 1st of the same article. Which means that all the State's powers must drive themselves to ensure these rights. If any of them are disrespected, the case can be brought before the Judiciary so that the violation can be corrected or compensated.

The Brazilian State must pursue these constitutional goals on all fronts, either through general legislation or through public policies that ensure in some way the fundamental rights and seek these goals.

According to the second article of the Brazilian Constitution, the separation of power is flexible. Although the powers are independent, they are harmonious, which means that they have to interact with each other, with the view to avoid abuses. That is the idea of the checks and balances system, which one power can supervise and control the other to some extent.

With the idea of a second and third generation of rights, intending more equality, welfare among people and the collective rights, there is a new perspective from the Judiciary, by being a protector of the fundamental and human rights. This means a transformation of the original separation of powers' concept. In fact, there is only one power, which comes from the people and is divided into functions (ZANETI JR., 2013, p. 48), aiming to optimize the state's activity. This is in accordance with Justice Edson Fachin, from the Brazilian Supreme Court, in his vote for the Extraordinary Appeal 592.581/RS.

For Osvaldo Canela Júnior (2011, p. 85), the Executive, Legislative and Judiciary are merely forms of expression from the people's power, and all of them have to pursue the Republic's goals. Although they are independents expressions, they are harmonious. One can control the main role of the other. The separation of these roles is not an end in itself, but it means to reach the constitutional's objectives. If one of these expressions fails in its task, there will be another to complement it. It will be a due interference since the greater goal is the constitutional's objectives and not the separation of powers.

In this way, the judicial control of public policies would be within the current state logic, according to a modern conception of separation of powers. This argument also derives from the failure of the others Brazilians powers, *i.e.*, in the words of Zaneti Jr. (2013, p. 47), when exists a political dysfunction. The Executive, many times, does not fulfil its role in the implementation of the fundamental rights,

without making public policies for this end. Although it is known that the Executive has the priority in carrying out public policies, it has the accountability about its actions, leaving to the Judiciary to be the last resort to the citizens for the implementation of constitutional and legal policies.

Therefore, the judicial branch has the legitimacy to control the public policies'. This can also occur because of a non-democratic representativeness of others powers, a crisis coming from the Brazilians' disbelief in their politicians, inasmuch as, in general, they seem more concerned with maintaining their power, building patrimony through their mandates, than seeking the interest of those who voted for them. This situation often happens through corruption and favours exchanged with some private companies. Selfishly, these politicians act aiming less at the population and more at their own interests.

Even if it could be said that they fight for the public interest and the good for the people, the elective positions tend to seek the majority's interests. In a democratic rule of law, mainly with the postmodernity, there is a growing difference about moral values inside the same nation. Each group of people can give more importance to diverse values. This situation flows to a social pluralism, which forms groups with different ambitions from the majority.

To the minority remains a Judiciary that can give effect to its rights when the majority does not care about it. Since the citizen does not achieve the effectiveness of his rights through the traditional political system, he seeks the Judiciary. The judges become important in the politics since now they can materialize rights that are forgotten by the other powers (CORNEJO, 2002, p. 257-258), and because they are closer to the people than the traditional politicians in parliament are.

Because of this modification of the society to a plural one, which moral values have different weights, and because legal certainty can often lead to injustice due to the hardness of the norms that do not evolve with society, the Judiciary gain importance. This occurs because it is necessary to give specific rules to each case, instead of having abstract and general rules that do not suit many sectors of the society. The judgement of a specific case by the judge is fit to conceive the peculiarities and give a decision closer to the reality. Therefore, the determination about any norm occurs after considering the specific case, *a posteriori*, and not before it. (CORNEJO, 2002, p. 234).

The judicial control of the public policies is the reflex of the fourth generation rights, *i.e.*, those that ensure citizens their participation in the political choices. At the same time, if they could vote or collaborate with a participative budget, they also can become politically involved after the political choices, questioning, through the Judiciary, the public policies that are or should be created.

Nowadays, the State has also two basic roles, the function of government and the function of guarantee (ZANETI JR., 2013, p. 49-50). Valentin Cornejo (2002, p. 255) brings a similar idea, with different names, calling the first a function of direction, usually carried out by the Executive or Legislative, which have the mandates through people vote to choose the ways of the nation. However, these ways can often offend interests of other groups of people. Therefore, rises the second function of guarantee, to protect the fundamental rights of these groups. The function of direction chooses the moral values that need protection, and then the function of guarantee will act to fulfil this protection. Both functions are connected and are impossible to analyze without a concrete case, in which the judge is the fittest to investigate.

Thus, the judicial review of public policies has a democratic justification, either because the Judiciary must prevent the majority from suppressing the rights of the minority, as for reason that the Judiciary was created through democratic ways, by the Constitution. The Judiciary has as an end to seek the effectiveness of the constitutional rights and goals, as have the other powers. The judicial activism, also called judicialization of politics, is not necessarily bad. In fact, it is a phenomenon that seeks to balance the powers, giving more importance to the Judiciary to control acts of others, rather than just being the mouth of the law and making simply formal assessments.

The Executive, for its own organization, do not have the popular direct representation as one can think. People do not elect most of its staff. In Brazil, the staff people are chosen by the Executive chief or have the jobs through public tendering. The only one who would have this pure democratic legitimacy is its chief, *e.g.*, the president. In this way, unelected people make many of the administrative choices, only being approved by the elected one.

By the political and constitutional point of view, it would be possible to the Judiciary intervene in the Executive's acts, including ones regarding public policies. However, it is necessary that the judges who make this control are also alert to the factual possibilities of the State, which involve, for example, the existence of resources to implement a public policy.

Although the judiciary can intercede, such activity cannot occur in an abusive or disproportionate manner, but rather in a cautious way. The limits will be discussed below, but first, it is necessary to show the legal foundations to the possibility of control regarding the prison overcrowding.

3. LEGAL FOUNDATIONS REGARDING THE PRISONS POLICIES

In relation to establishments that comply with criminal sentences, in the case of the state of Ceará, in Brazil, for example, which ultimately reflects the whole country, there is overcrowding that exceeds half the vacancies available for imprisonment. To be more accurate, according to the Ceará State Penitentiary System Report of the State Security Secretary (2017, online), referring to the month of June 2017, there is a 55% surplus in all establishments. In addition, most of the Brazilian penitentiaries are in a state of pity, according to Justice Ricardo Lewandowski from Brazilian Supreme Court in his vote in the case of Extraordinary Appeal 592.581/RS. The prisons are unhealthy, with garbage exposed in their own cells and in the common areas. The cells are crowded to the point that in some prisons inmates sleep with nets one on top of the other, with no room to move around. It is notorious that such conditions are worthy of medieval dungeons, where there was no concern for illness or a minimum of well-being for the prisoner.

Via the documentary *O Grito das Prisões*, a Portuguese version for The Scream of Prisons, created by Fátima Souza in 2008, which accompanied the visit of federal deputies in prisons during the *CPI do Sistema Carcerário*, that is a parliament investigation about the Brazilian prisons system, one can perceive the enormous precariousness and inhumane treatment of inmates. Such video is easily found on the *Youtube* website (2008, online).

It is noted that the dignity of the human person, already mentioned, is not observed. The same thing happens with respect for the physical and moral integrity of those who are incarcerated, who are often still in provisional custody, confined with those who have already been convicted. The overcrowding of prisons is also a consequence of the lack of action of the Executive, state or federal, for the construction and renovation of prison units. One way of trying to respect the constitutional commandments would be public policies to reform these establishments.

However, as noted by Justice Cármen Lúcia from Brazilian Supreme Court, in the aforementioned case, the construction of prisons is not part of the political agenda of candidates for Executive positions, due to the fact that it does not attract the voter. In addition, for the popular imagination, the more the convicted suffer for a crime, the better. For many, they deserve this unworthy treatment. Nevertheless, a more dignified prison would help the public safety problem, since the prisoners' revolt against the State and society would be softer. Being treated by the State as they are today, the chance of recidivism is higher. Therefore, the prison does not lead to a resocialization, which is one of the main functions of criminal sanction.

As Cesare Beccaria, On Crimes and Punishments (2003, p. 21), taught in the 18th century, if punishment has no practical utility,

which is the prevention of crimes, it ends up being unfair. However, in the Brazilian reality, the penalty has a "disutility" in execution today, contributing to the increase of crimes.

Since the Executive fails to solve one of the reasons for high crime and to treat convicts with dignity, it is necessary for the other powers to control the omission in order to protect the prisoners' rights. In addition, the interests of prisoners are part of the rights of a special minority, one that has its political rights suspended and cannot vote, not having representatives. In this way, there must be some function of the State that protects this minority in which tends to be abused by the majority. The judge must carry out this protection of minorities, even those who have offended society in some way.

The Executive not carrying out its directive or government function in an adequate manner to the constitutional precepts regarding prisons, *i.e.*, not building more of them in order to avoid overcrowding and all other problems caused by this, rises to the function of guarantee, which the Judiciary will act to fill the omission of the public administration.

In addition to the democratic and constitutional foundations for the judge to interfere in public policies aimed at the creation of prisons vacancies, there are still legal foundations. The Legislative itself has already obliged the Executive through the *Lei de Execução Penal*, with number 7210/84, that the only restricted rights of the prisoner would be those provided for in the criminal conviction sentence, as prescribed in article 3. Thus, all other rights, such as physical integrity, health, and moral dignity, should be respected and guaranteed by the State, after all, it imprisons these individuals, and it has the responsibility to guard them. Article 40 imposes this protection.

The same legislation also provides in article 203 that, from the date of promulgation of this bill, which was on July 11, 1984, the public administration would have six months to conform to its dictates, leaving prison establishments in conditions of decent use, without overcrowding. In addition, in article 88, it is predicted that the cells of the units dedicated to the closed regime should be individual, and the health of the place is one of the conditions imposed by law.

The law determines that each prisoner in the closed regime will have his own individual cell. Knowing the number of prisoners, it is possible to know the deficit of vacancies. According to a research made by the *Conselho Nacional de Justiça*, through the *Departamento de Monitoramento e Fiscalização do Sistema Carcerário e do Sistema de Execução de Medidas Socioeducativas (DMF)*, in 2014 the prison deficit was 354,244 vacancies throughout Brazil.

Justice Celso de Mello pointed out in the mentioned case that the treatment of inmates in prison, which is below the minimum criteria of

dignity, due to the very poor structure of the establishments and by the contempt of the State for this matter, is almost a torture and a deviation of execution. Torture is not allowed under the Brazilian Constitution, according to article 5, item III. A law prohibits the deviation or excess of execution: *Lei de Execução Penal* that, in article 185, states that when there is a violation of rights other than those restricted in the conviction, there will be this excess, which is prohibited. The same law, in article 66, item VII, says that the Judiciary must inspect the prisons, adopting measures for the proper functioning and clarifying responsibilities. Item VIII allows the interdiction of the establishment.

Both the Public Prosecutor's Office, according to article 68, item II, letter "b", and the Public Defender's Office, pursuant to article 81-B, the item I, letter "f", may propose an incident procedure which the judge will determine the measures in order to avoid this excess. This deviation happens in relation to all the prisoners since they are all submitted to degrading circumstances that did not result from a condemnatory sentence. Thus, the effectiveness of a judicial decision is only manifested through obligations directed to the public administrator to carry out the necessary public policies.

Facing the constitutional and legal grounds about the overcrowded prisons, also knowing the number of vacancies required, it is concluded that there is no wide discretion on the part of the public administration regarding construction or expansion of prisons, in order to create new vacancies. The law imposes what should be the prisoners' accommodations, just as both it and the Constitution determine the respect of the prisoner's other rights. There is no room for the public administrator to decide whether to expand the vacancies or not since both the Constitution and Legislative have already decided. The omission of the Executive in this regard is not justifiable. It must simply follow the normative determinations. As for budget constraints, the subject will be dealt with in the next topic.

4. THINKING ABOUT JUDICIAL CONTROL RESTRICTIONS ON PRISON OVERCROWDING

One of the restrictions to the judicial review in a matter of public policies is the reserve of the possible, which concerns the availability of resources for the implementation of rights. These resources can be related to finances, time, intellect, among others situations. Most of the State's expenditure is pointed out in its annual budget, *i.e.*, before starting a new financial year - it is generally known what is going to be spent and where the money will come from. In this way, because its resources are already bound, one can argue that this situation can no longer be modified.

In fact, generally, this condition exists, having to observe the resources available and possible to acquire. However, during the judicial control, the Treasury must prove such circumstance. It has to present to the judge the State budget, showing that there are no resources available for the implementation of the right questioned judicially (PELLEGRINI, 2009, p. 48). Towards this, the argument of the reserve possibly cannot be regarded as absolute and it is unacceptable that the mere indication of this claim automatically removes the State's duty to ensure rights.

In addition, there is the possibility that the judge may determine the allocation of resources in the following year for the realization of the right. According to Ada Pellegrini (2009, p. 48), the State would suffer a double obligation: firstly, allocating resources in the future budget and, secondly, the implementation of the right through that resource. It would be an obligation to reserve and another to use, enforcing the public policy.

This double obligation exists due to the guarantee of immediate application of the fundamental rights predicted in article 5, § 1st, of the Brazilian Federal Constitution. Thus, the judge can, when provoked, enforce a fundamental right through the diffuse control of the constitutionality in actions and omissions of the other powers. Additionally, the article 536, *caput*, of the Code of Civil Procedure, states that the judge, to ensure compliance with the sentence, can take necessary measures. The first paragraph of the same article clarifies that it is an exemplary list because it includes the expression *entre outras medidas*, which means "among other measures". Therefore, the judge could use these devices to compel the reserve of resources to future financial years, as it is appropriate and necessary to protect fundamental rights.

Another problem of judicial control of public policies is that the Judiciary does not have the knowledge, data and time needed to know if it is possible for the State to implement fundamental rights. It is known that the Brazilian Judiciary suffers from a great demand, challenging the judge to make fast but efficient decisions resolving the conflict satisfactorily. The choice regarding public policies requires time to study and for data analysis to learn the possibility of its realization. Public administration generally has trained and specialized personnel in certain areas of knowledge in which public policy will be carried out, and the Executive is the State expression that has the most competence for such studies (CORTEZ, 2013, p.292).

In this way, with the lack of time to study these cases deeply, the judicial command for implementation of rights may end up causing a chain effect that damages other rights, by taking from the administration of human and material resources, allocating them to another right. There is the possibility of competition between rights that the court is unlikely

to foresee (BUCCI, 2006, p. 36).

According to Hermes Zaneti Jr. (2013, p. 58-59), the merely rhetorical arguments about "reserve of the possible" claim that there are no resources available or that is not provided in the budget, is not enough. The same goes for the idea that State activity is very complex to the Judiciary when it can fail to conceive all the data and variables involved in the matter. The public administrator should prove such arguments during the judicial procedure that reviews public policies.

On the other hand, the judge cannot be careless and pronounce decisions that do not fit reality, such as the immediate implementation of a measure that requires planning and resources that do not exist. In addition, the judge, when giving the decision regarding a certain public policy, must supervise the entire process of this enforcement, verifying if its decision is being fulfilled or not.

In the same direction, Maria Paula Dallari Bucci (2006, p. 36) affirms that judicial activism in the control of public policies cannot be carried out in an irresponsible way. Judicial dialogue and coordination are required with the power responsible for implementation. Together they have to choose priority and how the enforcement of rights will be done in a more adequate and safe manner. If the Judiciary decides alone, ignoring the limitations of the Executive, Legislative and their own, there may be a de-structuring of plans already elaborated or in execution.

Moreover, the judge cannot intervene when his own decisions fail to remedy the lack or misuse of the acts of other powers since the Judiciary is often unable to evaluate a particular policy or implement one. Therefore, if the judge himself perceives that the subject is too complex so that he does not have the time or the knowledge necessary to evaluate the situation, he should not interfere or it is necessary that he does it in a more lenient way. His decision may dismantle the State plans or even be useless, leading to disbelief in judicial activity (ZANETI JR., 2013, p. 47).

Now, it is required to bring the issue of the limits of judicial control in public policies to the problem of prison overcrowding. At first, the argument of the reserve of the possible cannot be accepted, since there would be resources available for the expansion of prison vacancies, even partially, for the construction of new prisons, including for semi-open and open regimes or for improvements on existing establishments. These resources are not used properly, according to Justice Ricardo Lewandowski from Brazilian Supreme Court in his vote on the Extraordinary Appeal 592.581/RS. Until 2015, the Penitentiary Fund of the Justice Ministry, part of the Executive, raised R$ 2,324,710,885.64. However, until 2013, only R$ 357,200,572.00 was used.

The complementary law No. 79 of 1994, which established this Penitentiary Fund, includes in its article 3rd all possibilities for the application of resources, which in some way involve prisons and prisoners, victims, crime reduction, or scientific research in the area. From nineteen items, twelve are aimed at the improvement of prisons or for the resocialization of prisoners. Of all of them, item I stands out, which states that the resources of the fund must also be applied to "construction, reform, extension and improvement" of the prisons.

Furthermore, the same law, in its § 5th of the mentioned article, establishes that at least thirty per cent of this fund should be invested for the purposes of item I, that is, from the money available above, it should have been invested, at least, about seven hundred million Brazilian *reais*. In addition, the law, in § 6th of the same 3rd article, prohibits the contingency of the funds from the National Penitentiary Fund, *i.e.*, the Executive cannot delay the application or cease to apply such resources to the destination legally determined.

There are available resources, but still lacking the efficiency from the public administrators by using them, either because they build overpriced constructions, in which the purpose is to support determined groups allied to them, or because of a political apathy, not paying attention to the prison problem. Thus, there is no need to speak in the reserve of the possible.

Even if it were a case of scarce resources, it would be possible, regarding the expansion of vacancies, for the Judiciary determines to the public administrator to allocate money in subsequent financial years and to determine the drafting of a plan to cover the deficit of the penitentiary system.

Note that there is a choice by the public administrator as to what fundamental rights will be enforced. Governments may choose to prioritise some interests instead of others, which is part of the discretion of the Executive in the enforcement of public policies. In fact, there is this margin of choice for the administration, but it is not as wide as one might think, because the Brazilian Constitution already has rights that must be implemented, leaving other interests aside (BUCCI, 2006, p. 9). For example, building more prison units to protect the prisoner's physical and moral integrity would take precedence in building an aquarium, for example.

Similarly, Valentin Cornejo (2002, p. 262) teaches that judicial evaluation of public policies is subject to two parameters. It must comply with certain procedures provided by law and the purposes of public policy must be chosen by the public administration, giving it a margin of discretion. This parameter, paradoxically, also extends the judicial power over public policy, since the Judiciary will be able to analyze whether the ends of public policy are in agreement with

constitutional and legal norms.

The judicial control can choose which right should be prioritized, since the judge demonstrates that, constitutionally, some interests must be guaranteed first than others. The limitation of judicial control is on how this enforcement should take place, *i.e.*, the planning, the schedule, the execution. Therefore, in the case of prison overcrowding, the Judiciary could determine the construction to cover the vacancies' deficit, but the public bidding of a company, the schedule, the materials used and the place is left to the discretion of the public administrator.

Moreover, the judge, in these cases, does not have knowledge of how to carry out the constructions. His decision cannot interfere in the executive stage or the building's plans of increasing vacancies. Respecting the margin of discretion, the judge will only oblige the administrator to prepare this plan within a plausible time, that is, an adequate time for the Executive to do the necessary studies. However, this does not mean that the Judiciary will be inert during planning and execution. If the administration fails to carry out the plan, or does not justify it, the Judiciary may impose a penalties or even hold the public manager responsible for administrative dishonesty, which, according to Ada Pellegrini (2009, p. 51), are the best options for sanctioning and oblige the failing Executive to implement public policies.

Although the manager has a margin of discretion, *i.e.*, being able to choose one or another interest, in this respect, the judge can control if there is an insult or an ineffectiveness in the enforcement of fundamental rights. For example, because of the State's omission, it is ignoring prisoners' fundamental rights, and the judge can determine the obligation of guarantee. Likewise, if there is an excess on the part of the State, *i.e.*, a public policy that seeks to protect one interest, but, consequently, it harms others, it is also possible to complain in the Judiciary.

There is a connection between two prohibitions arising from the proportionality principle, which is the prohibition of insufficient protection and the prohibition of excess (ZANETI JR., 2013, p. 66). According to this principle, the enforcement and protection of fundamental rights must be carried out through measures that can reach their goal. In addition, the measure has to be the least burdensome, pondering the competing rights in the case, that is, to analyze, in face of factual circumstances, which right would be more urgent to be protected. Thus, there must be a positive cost benefit in realizing rights.

In case of State omission regarding penitentiary establishments, there is insufficient protection, which is not allowed by the principle of proportionality, since the essential core of the rights to the physical and moral integrity of the prisoner, which were not restricted by the conviction, are being violated. There is also an offense to the existential

minimum of the human person. The first step to avoid this insufficient protection is increased vacancies through new prisons. This can affect the poor condition of the cells, making them cleaner because of the smaller number of people. For example, less garbage would be accumulated and collected, protecting the health of inmates.

Once again, in regard to administration's discretion, that although it is subject to judicial control, on the other hand, it cannot be so invaded in the hypothesis of how public policy will develop. In summary, the Judiciary can oversee and determine "for what" is the public policy, while the "how" it will be done is reserved for the Executive. Nevertheless, from the moment that the "how" does not fit with the purpose "for what", the interference of the Judiciary is justified.

CONCLUSION

This paper highlighted the main foundations that allow judicial control of public policies, especially in the discussions that affect the overcrowding of penitentiary establishments and their precarious accommodations. The evolution of the conception of the Liberal State to the Social and then to the Democratic Rule of Law demonstrates that in the first two, the Legislative and the Executive had great importance. The Judiciary only came to play a role as relevant in the last state model, in which the principles and fundamental rights provided in the Constitution became part of the goals of a nation, and are parameters to control of the other powers activities.

Since the foundations, objectives of the Republic and the fundamental rights are important to a civilized nation, it is necessary mechanisms for the implementation of constitutional precepts, which are enforced by the Judiciary. In this way, the idea of the separation of powers wears new clothes, being only means to reach the ends mentioned above. It would be possible then a mutual control between the powers, one completing the other whenever there is a fault, by either an abuse, deviation or omission.

The judicial interference in public policies of the public administrator does not violate the separation of powers, because it is a citizen's way of participating in political decisions. The judge ensures the rights of minorities, which tend to be ignored or disrespected by the majority represented by the Executive and Legislative. Giving this competence to the Judiciary is to achieve a balance and harmonization between these functions of the State.

Given that the prisoner's rights are constitutionally established and also in legislation, requiring the Executive to implement these rights, such as physical and moral integrity, the Judiciary can review public policies. It can determine to the public manager to formulate a

plan within a reasonable time, reserve budgetary resources and carry out the construction of new prisons or reforms of existing ones, in order to increase the number of prison vacancies.

Therefore, the management's discretion is respected. The public manager can do the public bidding, choose the materials needed for the construction, and draw up the most appropriate plan. This discretion does not cover failure to enforce the inmate's fundamental rights. In this way, the judge, who does not have the time and the knowledge to do this planning and execution, respects the separation of powers.

This paper results that there is a possibility for the Judiciary reviews public policies, and that the argument of reserve of possible is not enough to remove from the Executive the obligation to implement fundamental rights. It is concluded, therefore, that the judge can determine the elaboration of public policies for constitutional purposes, but he cannot say how this should be done, being left to the discretion of the public manager. However, this does not mean that the role of the Judiciary ends there. The judge should continue to monitor and correct the course of public policy if it deviates from the effectiveness of fundamental rights.

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ADMINISTRATIVE CONTRACTS IN THE LIGHT OF NEW FORMS OF MANAGEMENT AND SUSTAINABILITY: FOR THE ACHIEVEMENT OF SUSTAINABLE DEVELOPMENT IN BRAZIL[1]

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ABSTRACT: The legal inclusion of environmental considerations in public contracts becomes a reality to be observed by public authorities in order to achieve the constitutionally established principle of sustainable development. To effectively be able to assess the incorporation of environmental concerns at all stages of forming the administrative contract, emphasizing the sustainability of it, it is necessary to adopt planning mechanisms, implementation, evaluation and monitoring, if the so-called PDCA cycle (acronym for Plan, Do, Check and Action). Thus, this study aims to analyze the issue of sustainable procurement, focusing on the stages of the administrative agreement by the PDCA method, seeking to establish to what extent we can assess and measure the sustainability practice by the Public Administration for subsequently case study of administrative contracts signed by the São Paulo Court of Justice.
KEYWORDS: administrative contracts; quality management; PDCA

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Cycle; sustainability.

1. INTRODUCTION

The incorporation of the environmental dimension through a growing infra-constitutional legislation by the national legal system as an instrument to promote a high degree of protection of sustainable development itself has been gradually reinforced in the different fields and sectors of Public Administration.

The awareness of the need to support the decision-making process by the Government, at all and any levels, presupposes, *ab initio*, an analysis of the mechanisms that can combine and reconcile economic and social developments with the protection of the environment, so as to transform them into sustainable development, or, in Sachs's words, "... socially inclusive development, environmentally sustainable and economically sustainable"[2].

The set of rules and principles of Environmental Law that we see today is a reflection of the growing problems of ecological imbalances that may occur even in the scope of administrative activities, which, in turn, reflects the mandatory observance of the environmental pillar as an integral part of the concept of sustainable development, currently considered as one of the foundations of the principles sources of the Brazilian legislative system, as recognized in article 225, *caput*, of the Federal Constitution of 1988.

The sustainable development principle is based on two types of solidarity that complement each other, according to Sachs' words, "... the solidarity synchronous with present generations and diachronic solidarity with future generations."[3] According to Silva, "... the principle of sustainable development therefore leads the nations to adopt a holistic view of the interdependence of the biosphere, the relationship between human beings and the environment, that is, to integrate development policies and environment."[4]

One of the consequences of sustainable development occurs through the recognition of the integration of the environmental dimension into all nations' plans, programs, projects and actions. Viana

2 SACHS, Ignacy. O Desenvolvimento Sustentável: do conceito à ação, de Estocolmo a Joanesburgo. In: **Proteção Internacional do Meio Ambiente**. VARELLA, Marcelo; BARROS-PLATIAU, Ana Flavia. Brasília: UNICEB/UnB/UNITAR, 2009, p. 28.

3 Ibid., p. 28.

4 SILVA, Solange Teles da. **O Direito Ambiental Internacional**. Coleção Para Entender. Belo Horizonte: Del Rey, 2009, p. 105.

translated well the need of this integration in the international scope by showing that

> *(...) the only viable solution, in this field as in any other, is the weighting, that is, the application of the laws and international principles that govern the environmental protection policy, in a coherent way, taking into account the peculiar activities that exist in each region, so that an entire sector of the community is neither harmed nor damaged, effectively preserving the ideal of balanced sustained development.*[5]

As a meta-principle of the Environmental Law, the sustainable development permeates all and any initiative, whether governmental or not, public or private, and serves as a guiding principle for the creation of new principles, norms and acts that promote adequate environmental protection.

In this context, due to the advent of a period sharply aimed at environmental protection - and not restricted to the elaboration of norms - it was necessary the creation of a system aimed at interfacing Public Administration activities (largely marked by the composition of administrative contracts), so as to ensure that its conformation is recognized by an ecologically balanced compatibility between economic and social orders, as an imperative for the faithful fulfillment of sustainable development in the promotion of the common good[6].

In order to establish its evolution, it is important to be mention that in 1987 the Brundtland Commission Report (or simply the Brundtland Report) named as "Our Common Future", focused on solidarity with future and present generations, defined the sustainable development such as "... that which seeks to meet the needs of the current generation without compromising the ability of future generations to meet their own needs."[7]

After twenty (20) years of the Conference on the Environment in

5 VIANA, Rui Geraldo C. A política ambiental em nível internacional e sua influência no direito pátrio. In: **O direito internacional no terceiro milênio**. FONSECA, Roberto Franco; BAPTISTA, Luiz Otavio (Org.). São Paulo: LTr, 1998, p. 920.

6 CALDAS, Roberto Correia da Silva Gomes. PPP's – parcerias público-privadas e meio ambiente". **RECHTD - Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito**, v. 3, No. 1, January-June/2011, p. 65-74. Available at: http://www.revistas.unisinos.br/index.php/RECHTD/article/view/674/ 1760, accessed on: April 9,2016.

7 **Brundtland Report**. Available at: http://www.un-documents.net/ocf-02.htm#I, accessed on: April 9, 2016. Free translation.

Stockholm, the sustainable development was reaffirmed at the United Nations Conference on Trade and Development (UNCTAD, also known as ECO-92, Rio-92 or Earth Summit), beginning with its Declaration, in stating in Principle 3 that "The right to development must be exercised in a way that allows the development and environmental needs of present and future generations to be addressed equitably."[8] As in 1972, the concept of development permeates the entire document, acting as the structuring axis of its other principles.

Agenda 21, an extensive document formulated in Rio-92 as a participatory planning instrument for the construction of sustainable societies, and guided by the pillars of environmental protection, social justice and economic efficiency, is fully supported by the sustainable development[9].

It is also worth noting that in the international scenario, from 1972 to 1992, a number of specific treaties emerged that included a direct or indirect mention of sustainable development, such as the 1979 Geneva Convention on Long-range Transboundary Air Pollution, the 1982 Convention on the Law of the Sea and the 1985 Vienna Convention for the Protection of the Ozone Layer, as well as the aforementioned Brundtland Report of 1987, which adopted a new concept for environmental degradation by inserting the responsibility of preserving the ecosystem for future generations[10].

On the other hand, sensitive to this international scenario, Brazil at the local level also started to reveal a "movement" towards the environmental protection. And the "movement" expression is now selected since it is the best one to indicate that the government's position regarding the environmental protection is not something that happened suddenly, but as a result of a process following several actions, including from a participatory approach, throughout the time.

Thus, the national governmental actions protecting the environment linked to the sustainable development, are given at the

8 **Rio Declaration on Environment and Development (*Declaração sobre Meio Ambiente e Desenvolvimento - Rio 1992*)**. Available at: <http://www.direitoshumanos.usp.br/index.php/Direito-ao-Desenvolvimento/declaracao-sobre-meio-ambiente-e-desenvolvimento.html, accessed on: April 9,2016.

9 **Agenda 21**. Brasília: House of Representatives (*Câmara dos Deputados*), Coordenação de Publicações, 1995. Available at: http://www.onu.org.br/rio20/img/2012/01/agenda21.pdf, accessed on: April 9,2016.

10 MATA DIZ, Jamile Bergamaschine; SOARES ALMEIDA, Felipe Toledo. A incorporação dos princípios ambientais internacionais pelo sistema jurídico brasileiro e a promoção da sustentabilidade ambiental. In: **Direito e sustentabilidade I**. CUNHA, Belinda Pereira; SILVA, Maria dos Remédios Fontes; DOMINGOS, Terezinha de Oliveira (Coord.). Florianópolis: CONPEDI, 2014, p. 111-138, Available at: www.publicadireito.com.br/artigos/?cod=cff131894d0d56ca, accessed on: April 9,2016.

international level, *e.g.*, with the State participating in international conferences as well as signatories to important conventions and other international acts, including the Declaration arising from the United Nations Conference on Trade and Development - UNCTAD, and, with the creation of the National Environmental Policy in 1988, the incorporation into the law of environmental crimes, the emergence of specialized environmental protection attorneys, among others, or even by encouraging partnerships with sectors of civil society, both by raising awareness of the population in general, and the creation of non-governmental organizations (NGOs), including the adoption of more sustainable practices by companies.

The focus of the present study, given the above framework, will be to analyze the normative set of administrative contracts as an instrument of sustainable development in the promotion of the common good, with the consequent application of the guidelines for an ecologically balanced environment resulting from sustainable biddings, according to a criticism of the planning, execution, evaluation and control mechanisms, as found in the quality management method of the PDCA cycle, in order to assess the incorporation by the Public Administration of the covenant administrative environmental dimension.

The selection of the subject of the present study was largely due to three main aspects: i) the incorporation of the environmental dimension in the activities, in general, of Public Administration, especially from the constitutional recognition of sustainable development; ii) consideration of the environmental dimension in the draft, execution, evaluation and control of administrative contracts; and iii) the immediate and direct interconnection between administrative contracts and sustainability.

Subsequently, a case study will be presented involving an analysis of the Environmental Management Plan, specifically in relation to the sustainable administrative contracts executed by the Court of Justice of the State of São Paulo, based on a project being implemented by UNINOVE - Nove de Julho University.

The work methodology shall focus on the main aspects established for an interdisciplinary research that involves Environmental Law topics and their treatment by the Administrative, due especially to the specific and singular character that must be present in any analysis of a legal system whose focus is based on increasing the environmental protection.

In this sense, it is necessary to use methods that allow analyzing the evolution of the construction of Environmental Law and its application to administrative contracts. The deductive method will allow to establish the conceptual premises and practices applied to the subject of environmental protection within the framework of national public contracting, through a case study procedure that will, in turn,

enable a verification of the concrete application of sustainability by the exercise of an activity of public nature by a court of justice.

2. THE INTEGRATION OF THE ENVIRONMENTAL DIMENSION AND SYSTEMIC TRANSVERSALITY

The term "transversality" refers to the ability of a sector to reach all other areas with which it can correlate, and, within the legal universe, this transversality, more specifically within the scope of environmental public policies, arises from the moment in which there is a need for its integration (of environmental issues) with other sectoral public policies (energy, transport, health, agriculture, trade, *etc.*).

It is noted that the environment, due to the enormous reach of its definition and its components (natural or artificial), interpenetrates all economic and social sectors, and imposes its condition of ecological patrimony in traditional areas with purpose to search the environmental system's equilibrium.

In the horizontal dimension of the principle of integration, transversality becomes responsible for introducing environmental sustainability in the planning and implementation of public policies, of public or private actions, coinciding with the so-called regulatory governance before mentioned[11]. Thus, "The principles of political integration and planning meet the idea of economic, environmental and social integration. Political integration involves the creation of new structures, the reform of existing institutions and the transformation of current political processes."[12]

According to the doctrine[13], the transversality of an environmental normalization is due to the horizontal character and the power of interaction with the other areas and policies, and has the purpose of guiding the planning in an environmentalist sense. Furthermore, the environment can be considered as a cross-cutting and multidisciplinary strand because it includes, in its composition, biotic and abiotic, social,

11 CALDAS, Roberto Correia da Silva Gomes. PPP's – parcerias público-privadas e meio ambiente". **RECHTD - Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito**, v. 3, No. 1, January-June/2011, p. 66-67. Available at: <http://www.revistas.unisinos.br/index.php/RECHTD/article/view/674/ 1760, accessed on: April 9, 2016.

12 CLARO, Priscila Borin de Oliveira; CLARO, Danny Pimentel; AMANCIO, Robson. Entendendo o conceito de sustentabilidade nas organizações. **Revista Administração - RADUSP**, v. 43, No. 4, São Paulo: São Paulo University, October/November/December. 2008, p. 291. Available in: www.rausp.usp.br/download.asp?file= v4304289.pdf, accessed on: April 9, 2016..

13 MACHADO, Paulo Affonso Leme. **Direito Ambiental Brasileiro**. 26th ed., São Paulo: Editora Revista dos Tribunais, 2007.

economic, legal and political-institutional agents[14].

The inclusion of the environmental principle of integration assumes the need to evaluate impacts on the environment when implementing, executing, controlling and supervising public policies, coinciding with the quality management method of the PDCA cycle (or Continuous Improvement), as mentioned above.

In addition, it inaugurates an important step in the fulfillment of these public policies by aggregating the environmental component in the formulation of its efficiency parameters, reaching a new way of governance, as evidenced by Aguilar when establishing that the "... elements of this new governance, would be, together with the principle of integration, and the principles of precaution, coordination, subsidiarity, participation and transparency, and accountability." [15] And the author also affirms that

> *The integration of the environmental component must take place at all stages of the sectoral policy decision-making process: from the agenda formation phase (agenda-setting) to the evaluation phase. The parallelism of this full integration would be found in economic policy, whose basic principles (such as budget balance, inflation control, low interest rates, etc.) justify all decisions taken in the different areas of public management, due to among other things, the rigid tutelage exercised by the Ministries of Finance and Economy and the international consensus on the need for a specific economic orthodoxy. Hypothetically, something similar could happen, for example, with respect to an environmentally basic principle such as the rational use of water, if a strategy with specific goals was applied to meet concrete objectives that*

14 PADILHA, Norma Sueli. **Fundamentos Constitucionais do Direito Ambiental Brasileiro**. Rio de Janeiro: Elsevier, 2010, p. 229; Idem. O equilíbrio do meio ambiente do trabalho: direito fundamental do trabalhador e de espaço interdisciplinar entre o direito do trabalho e o direito ambiental. **Revista do Tribunal Superior do Trabalho**. Brasília: Lex Magister, vol. 77, n. 4, October/December 2011, p. 240-243.

15 Originally: elementos integrantes de esta nueva governance serían, junto al principio de integración, los de precaución, coordinación, subsidiariedad, participación y transparencia, y rendimiento de cuentas (accountability).AGUILAR FERNÁNDEZ, Susana. El principio de integración medioambiental dentro de la Unión Europea: la imbricación entre integración y desarrollo sostenible. **Papers**, vol. 71, 2003, p. 82. Available at: http://www.raco.cat/index.php/papers/article/viewFile/25756/25590, accessed on: November 20, 2012.

> *must be fulfilled within deadlines determined by different instances.* [16]

The integration of environmental policies, in turn, implies in a continuous process. In order for the environment to be taken into account in all areas of normative action, changes in political, organizational and procedural activities are necessary so that the incorporation of environmental issues occur as soon as possible.

An example is the European Union, where the principle of integration is definitively consolidated in the environmental regulatory framework and is considered as a general principle of European policy on the environment[17].

In the case of the European Union, its transversality nature is considered significant and decisive for the Community's environmental future, and even before the SEA - Single European Act, the integration of environmental policy into the Community guidelines already implicitly appeared in attempts to harmonize common market.

However, it was from 1987 onwards, with the approval of the SEA - Single European Act (coinciding with the Brundtland Report in the same year), that the environmental policy was finally institutionalized

16 Originally: La integración del componente medioambiental debe producirse en todas las fases del proceso decisorio de las políticas sectoriales: desde la fase de formación de la agenda *(agenda-setting)* hasta la encargada de la evaluación. El paralelismo de esta integración total se encontraría en la política económica, cuyos principios básicos (tales como el equilibrio presupuestario, el control de la inflación, las bajas tasas de interés, etc.) informan actualmente todas las decisiones tomadas en las distintas áreas de gestión pública, debido, entre otras cosas, a la férrea tutela que ejercen los ministerios de Hacienda y de Economía y al consenso internacional acerca de la necesidad de aplicar una determinada ortodoxia económica. Hipotéticamente, algo parecido podría ocurrir, por ejemplo, con respecto a un principio medioambiental tan básico como es el del ahorro de agua, si se aplicara una estrategia que estableciera objetivos concretos a cumplir en plazos determinados por distintas instancias. Ibid., p. 86.

17 " (…) principio general inspirador de cada actuación de la Unión, así como la horizontalidad que necesariamente caracteriza a la política ambiental" (…), además, dada su actual posición como principio general del Derecho de la Unión – y no solo como principio de la política y el Derecho ambiental – debe de ser tomado en consideración en la interpretación de cualquier norma de Derecho comunitario, tal y como ha quedado dispuesto en diversas decisiones del Tribunal de Justicia de las Comunidades Europeas (…); hay que señalar que este principio tiene especial importancia en cuanto ha de ser respetado por los Estados miembros al ejecutar todas y cada una de las normas adoptadas en el marco de cualquier acción o política comunitaria." PLAZA MARTIN, Carmen. Medio ambiente en la Unión Europea. In: **Tratado de derecho ambiental**. Alvarez, Luis Ortega; GARCÍA, Consuelo A (Coord.). Valencia: Tirant lo Blanch, 2013, p. 125-126.

as one of the community policies and where the principles and the component that the environment possesses are expressed, creating a general guideline to influence and guide not only all community policies, but also national policies.

The solution to apply this transversality comes through a legal-administrative harmonization of the member States of the European Union, with the affirmation of the guidelines that the community policy on the environment determines, always based on the decision-making procedures adopted by the normative instruments, which underpin in the concept of the *triple bottom line*, or "tripod of sustainability".

Created in 1994 by Elkington[18], the term means that all entities, governmental or not, on the performance of their activities, need to observe a bias not merely social or economic, but also environmental for a sustainable development.

The concept was criticized for lack of clarity when considering and applying the respective variables, but the importance of the *triple bottom line* is undeniable for the maintenance of the defense of sustainable development in several areas, and increasingly it becomes clear the need of a legal system consistent with the highest level of environmental protection.[19]

Consequently, in the European Union, the principle of integration has a significate impact, while one of the most relevant environmental mandates among those adopted in the European system, and, is therefore a priority, as has been observed since the SEA - Single European Act (1987), by inspiring political actions to protect the environment to be promoted by the member States (thus, in an integrated manner with other sectors), so that these sectoral policies are shown to be harmonized with ecologically balanced parameters.

Given that possible imbalances and ecological degradation do not respect national or regional boundaries, this primacy has been clearly defined in the former Article 6th of the Treaty on the European Community, now Article 11th of the Treaty on the Functioning of the European Union, whose wording entails the need to integrate

18 ELKINGTON, John. Enter the Triple Bottom Line. In: HENRIQUES, Adrian; RICHARDSON, Julie. The Triple Bottom Line, Does It All Add Up?: Assessing the Sustainability of Business and CSR. London; Earthscan Publications Ltd., 2004, chapter. 1, p. 1-16. Available at: http://kmhassociates.ca/ resources/1/Triple%20Bottom%20Line%20a%20history%201961-2001.pdf, accessed on: April 9, 2016.

19 MATA DIZ, Jamile Bergamaschini; GOULART, Rayelle Caldas Campos. A aplicação do princípio da integração ambiental nas políticas setoriais europeias. In: SANCHES, Samyra Haydëe Dal Farra Naspolini; BIMFELD, Carlos André; ARAUJO, Luiz Ernani Bonesso de (Coord.). **Direito e sustentabilidade**. 1st ed., Florianópolis: CONPEDI, 2013, p. 37-66. Available at: http://www.publicadireito.com.br/publicacao /unicuritiba/livro.php?gt=13, accessed on: April 9, 2016.

environmental protection requirements in accordance with the definition and implementation of the Union's policies and actions in order to promote sustainable development.

Still as an instrument for the implementation of a public policy focused on sustainability in its different aspects, the principle of integration therefore requires that the environmental variable be taken into account in the plans, programs, projects, contracts, acts and actions formulated by the Public Administration, at the same time called concerted, whatever the object or foundation for its elaboration and execution, applying this directive to the administrative contracts signed within the scope of the three Powers of the Republic (as administrative acts in the broad sense and as a result of a process), especially since its bidding procedures (internal and external, including popular participation and social control), as will be analyzed below.

3. MECHANISMS FOR THE ACHIEVEMENT OF SUSTAINABILITY IN THE PUBLIC CONTRACTS

3.1. Sustainable Bids

The insertion of the socioenvironmental criteria in the public contracts by public authorities is currently in its planning phase, *i.e.*, when the auction notices are drafted, thus considered as sustainable, aiming to achieve the highest degree of efficiency in the sale and purchase of goods, works and services rendered by the State, implying maximum optimization of its aggregate values, including in terms of satisfaction, *e.g.*, of the user's needs as utility, comfort and certainty in the enjoyment of public services, as well as the concomitant minimization of costs and harmful repercussions of environmental and social spheres.

The legally prioritization provided for the sale and acquisition of goods, works and service rendering considered to be socially and environmentally sustainable implies innovation of the forms of production by the suppliers and service providers to the State, which obviously will seek to observe such criteria and requirements established by the Public Administration, under penalty of being removed from the biding.

Therefore, the qualification and quantification of the object to be contracted and the profit to be earned by the particular shall be conformed to the yearnings of maintenance and sustainable preservation of social and environmental values, complying, for example, with the Brazilian Federal Law No. 8,666/93, article 3, *caput* and article 15, §7, item II.

In this hypothesis, the acquisition of products such as for hygiene and cleaning, paper, furniture and food shall be directed to be recycle and/or organic products, as a form of the Public Administration to influence and encourage a conscious consumption and the well-known reverse logistic (having at its instruments the direct regulation, Sector Agreement or Terms of Commitment made by the Public Administration). This reflects in the medium and long term in an increment of a national sustainable development and maintenance of the socioenvironmental balance.

Along these lines, the State presents itself not only as a mere maker of socioenvironmental public policies, but also as a fomenter of the so-called conscious consumption, aimed at acquiring products with the *green stamp*, whose origin is from companies committed to social and ecological values.

Furthermore, the adoption of such socioenvironmental parameters in the disposals, acquisitions and rendering services in the public contracting carried out by the Public Administration demonstrates the necessity to verify the process in which the method of quality management of Continuous Improvement, known as PDCA Cycle, is as a suitable mechanism for to reconcile the socioenvironmental effects of the conduct of the State with a public policy of prevention and mitigation of negative impacts and ecological imbalances.

Consequently, the State is the protagonist of an action directed at the rational conservation of resources and protection against degradation, imbalance or violation of socioenvironmental principles (including integration principle) to be followed and pursued through the establishment of Sustainable Public Procurement Programs compatible with public policies and guidelines for sustainable development.

Due to this context, taking the example of the State of São Paulo, there is the adoption of some specific measures since 1997 in the contracting procedures with the purpose to meet the socioenvironmental requirements, evidencing, among them: State Decree No. 41,629/1997, which provides for the prohibition of acquisition by state bodies of products and equipment containing substances that destroy the ozone layer (ODS) controlled by the Montreal Protocol; State Decree No. 50.170/2005, which established the Socio-Environmental Seal; State Decree No 53.047/2008, which created the CADMADEIRA, a tool that aims to guarantee the consumption of native wood of legal origin by state bodies; State Decree No. 53,336/2008, which established the State Program for Sustainable Public Procurement and; the State Law No. 12,300/2006 - State Policy on Solid Waste - and No 13.798/2009 - State Policy on Climate Change -, in addition to State Decree No. 58.107/2012, which established the Strategy for Sustainable Development of the State of São Paulo.

3.2. The public contractual procedures and the techniques or methods of sustainable management and control that they contain: the application of the PDCA cycle

The phases of the process, in which the administrative contracts are revealed, are defined and divided into (internal and external) pre-negotiation and development, and in recent times, their conceptions do not prescind of the institutes of sustainability, solidarity, popular participation and of social control, acting as a way of reinforcement of the ancient spirit of collaboration that must also permeate public adjustments, as seen in the legal relationship of Public Administration and the principle of objective administrative good faith, inserted in the primacy of administrative morality, as highlighted by Caldas:

> *According to this world social reality of the present day, the classic form of mere hiring of private individuals for the execution of works and provision of public services gradually gives way to the already known concessions and privatizations, as well as to the most diverse flexible forms, understood as more current legal formulas of cooperation in the operationalization of state action, of financial and administrative collaboration, to be carried out by the private sector, the population, through the so-called sectoral instruments of participatory planning and social control, to the auxiliary public policies involved, since, on the one hand, the Public Power does not give more account of so much demand in proportion to its resources, on the other, private initiative sees the possibility of participation in the "production" of the city, with a consequently greater profitability.*[20]

It is in the pre-negotiation phase of the public pact that the most concrete and contemporaneous sector planning is considered for the implementation of the best and most pertinent public policy, which is clearly and progressively more participative and based on sustainability, culminating in the auction notice and subsequent

20 CALDAS, Roberto (Correia da Silva Gomes). **Parcerias público-privadas e suas garantias inovadoras nos contratos administrativos e concessões de serviços públicos**. Belo Horizonte: Ed. Fórum, 2011, p. 61-64.

execution and subscription of the contract, which provides a forecast of how it should develop, with the management of the implementation of a concrete public policy until its exhaustion (management which, it must be pointed out that it shows itself to be equipped not only with an institutional control, but also with social control, that is, exercised directly by the population).

When it is mentioned the actual management of administrative contract as a synonym for a concrete implementation of public policies during its execution phase, there is as a related theme the emergence of new techniques or methods for its selection, evaluation and control, through control actions of efficiency (sought in its maximum level) and quality of this process, according to values of regulatory corporate governance (or simply regulatory governance[21]).

These new techniques or methods of selection, evaluation and control of the administrative contract, as well as of the corresponding public policy (ies) provided under this contract, have been thought, developed and improved with more emphasis from standards brought from Management and Economic sciences, precisely from the New Public Management[22], with the necessary adaptations to the Public Administration and, subsequently, to the Administrative Law[23], within

21 With the so-called regulatory corporate governance, we seek to go beyond the principle and, in the diction and conception developed by Juarez Freitas, of the fundamental right to good public administration (although one of its facets is the constitutional primacy of efficiency - Article 37, caput, of the Federal Constitution of 1988), so that a level of adaptation to the world-wide movements and trends of an economic and social nature for administrative regulation, being required of the poles of performance in the public pacts measures that guarantee satisfactory benefits to users, with less risky profits under a dialogue and harmonious control. FREITAS, Juarez. **Discricionariedade administrativa e o direito fundamental à boa administração pública**. São Paulo: Malheiros Editores, 2007.

22 This expression refers to the pragmatic innovations incorporated from the varied and multiple ideas produced since the second half of the 1980s, in the scope of the American and English public administration, in the sense of promoting an improvement of continuous and constant quality, in the case of public services, through its decentralization, which may occur in partnership with the private sector.

23 Calha explained that Hely Lopes Meirelles, since the 1970s, emphasized the desirability of setting up an advanced quality management system, the PERT-CPM network, in large enterprises, enabling the verification of development, than planned and designed in all its phases. In fact, he explained that PERT stands for Program Evaluation and Review Technique, and CPM stands for Critical Path Method, the first one based on probabilistic methods and the second on deterministic calculations, both of which, starting in 1962, combined in the so-called PERT-COM network. MEIRELLES, Hely Lopes. **Licitação e contrato administrativo**. São Paulo: Editora Revista dos Tribunais, 4th ed., 1979, p. 243-244. Nowadays, the most avant-garde techniques of project quality management, even applicable to administrative contracts in their dynamic sense, are compiled in the PMBOK Project Management Body of

the most current meanings of the principle of good governance and global governance.

Among these techniques or methods, it is import to identify the PDCA Cycle (also known as the Continuous Improvement Cycle, Shewhart Cycle, Deming Cycle or Basic Quality Management Method). The PDCA Cycle was idealized since the 1930s and its use was fostered in the 1950s, in postwar Japan. In addition, the respective terms (Planning, Execution, Control and Evaluation), increased by the current techniques which are based on the PMBOK guideline - Project Management Body of Knowledge[24], with the stages of the realization of public policies in the administrative contracts to be observed by the supervisor (Regulatory granting authority, autonomous and institutional regulators and the population in social control) and by the said "Agent 67", manager chosen by the Public Administration during the whole administrative process in which the contract is configured and develops[25].

Knowledge - **Um guia do conhecimento em gerenciamento de projetos (guia PMBOK)**. São Paulo: Saraiva, 4th ed., 2012.

24 **Um guia do conhecimento em gerenciamento de projetos (guia PMBOK).** São Paulo: Saraiva, 4th ed., 2012. The PMBOK is a set of best practices in project management, published since 1983 by the Project Management Institute (PMI) as a world benchmark and the basis of its industry knowledge, presented as a compilation in the form of a guide that based on processes and sub-processes (grouped, classified in initiation, planning, execution, monitoring and control, as well as closure) that, in addition to relating and interacting in their *iter*, describe in a systematic way the element to be undertaken throughout the project, according to nine areas of knowledge under its management (integration, scope, time, costs, quality, human resources, communications, risks and acquisitions). Thus, its approach is similar to that used by other standards such as ISO 9000 and Software Engineering Institute's CMMI (Capability Maturity Model Integration), which is under its three models, namely CMMI for Development (CMMI-DEV) - focused on product and service development processes -, CMMI for Acquisition (CMMI-ACQ) – focused on the processes of procurement and outsourcing of goods and services - and CMMI for Services (CMMI-SVC) - related to company processes service providers.

25 It should be noted that the "Agent 67" may be held administratively, civilly and criminally responsible for what he practices in disagreement with its attributions formally established, by action or omission, including in the light of the provided under art. 66, of Law No. 8.666 / 93, which also requires the contracting authority to be held responsible for acts of contractual enforcement and its right of return in relation to its public agents, in accordance with the provisions of art. 37, § 6, of the Federal Constitution of 1988. Specifically regarding its monitoring acts, there is, in front of the foreseen in art. 67, § 1, of Law 8,666 / 93, which include the recording, in own register, of all occurrences related to the contractual development, determining what is necessary to regularize the faults or defects observed, being certain that any decisions and measures that exceed their competence should be requested from their superiors, in a timely manner for the adoption of the appropriate measures (§

It is important to point out that the PDCA Cycle is the current official technique or method in national scope and chosen to achieve high quality in the implementation and management of governmental programs, with their respective projects, in organizations of the Brazilian public sector. Its choice is mentioned in the previous Program of Quality and Participation in Public Administration (QPAP), instituted by the former MARE - Ministry of Administration and State Reform (now MPOG - Ministry of Planning, Budget and Management), as one of its strategic guidelines for adherence, focused on the guidance of public bodies or entities in the implementation of actions to improve the quality and efficiency of its services[26].

Moreover, in terms of management and also of management of the total project quality (among which the administrative contract fits in under the influence of good public administration – from which, once again, the efficiency principle is presented as a facet of its), in association with the technique to the Continuous Improvement Cycle method[27], the

2 of article 67 of Law 8.666 / 93). In fact, its attributions concern the covenants to supervise, guide, interdict, intervene and apply penalties. On the follow-up of administrative contract enforcement activities see: MEIRELLES, Hely Lopes. **Direito administrativo brasileiro**. São Paulo: Malheiros Editores, 32th ed., 2006, p. 228-230.

26 BRAZIL. **Programa da qualidade e participação na Administração Pública – Caderno 4.** Brasília: MARE – Ministério da Administração Federal e Reforma do Estado (Ministry of Federal Administration and State Reform), 1997, p. 34. It is important to remember that the contemporary National Program for Public Management and Decontamination (GESPÚBLICA), which was created by Decree No. 5,378 / 05, is conducted by SEGEP - Secretaria de Gestão Pública (Secretariat of Public Management) (created by Decree No. 7.675 / 12) and results from of other national programs for the promotion of public management of excellence, starting with the Brazilian Quality and Productivity Program (PBQP), launched in 1990, followed by the Program for Quality and Participation in Public Administration (QPAP) in 1996, Quality in Public Service - QPSP.

27 According to the Project Management Institute - PMI, "Modern quality management complements project management. The two disciplines recognize the importance of: Customer satisfaction; Prevention rather than inspection; Continuous improvement; Responsibility of management ..." **Um guia do conhecimento em gerenciamento de projetos**..., aforementioned guide, p. 190-191. And specifically on Continuous Improvement, it states that "The PDCA cycle (plan-make-check-act) is the basis for quality improvement as defined by Shewhart and modified by Deming. In addition, quality improvement initiatives undertaken by the executing organization, such as GQT and Seis Sigma, should improve the quality of project management as well as product quality of the project..." (ibid., P.191). Hence, it should be mentioned that the aforementioned Continuous Improvement management technique is derived from the philosophy enclosed by the Japanese word kaizen, meaning etymologically good change, or, more precisely in the area of Administration, a management process involving constant negotiation behavior and gradual improvement, through the organizational commitment of all involved as to what is done and the way it is. In turn,

objective is always obtaining the routines by the interested parties that are oriented to optimize their planning and execution process until the closure, with evaluation (monitoring) and concomitant and constant control[28].

The abovementioned theory affects the administrative activity, specifically on the said duties-powers of the State in the planning and monitoring of the execution of the contract[29], whose exercise during the pre-negotiation phase and the development of the administrative contract is carried out by one or more representatives of the Public Administration, being admitted a third party to assist that representative, as provided under Article 67 of Law No. 8666/93 (as known as "Agent 67"on account of this, among other names)[30].

In this sense, with the application to administrative contracts of such a PDCA Cycle (whose results-led management techniques or

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the Total Quality Management (TQM) is a derivation of Continuous Improvement, based on teams of specialists to obtain a quality that, in the Deming Cycle ("PDCA"), is aimed at to the needs of the users, with their consequent downsizing of the centers of quality control, outsourcing of the operations and empowerment of the people involved, besides, of course, the reduction of the time of realization of the projects. In both cases (Continuous Improvement and Total Quality) there is a process composed of the following steps: choosing an area to increase improvement, establishing the team responsible for its implementation and the benchmark standard of excellence, passing for the analysis of contemporary methodology to be optimized, including a pilot study, culminating in the implementation of this improvement.

28 On this subject, check: CARVALHO, Marly Monteiro de *et all*. **Gestão da qualidade: teoria e casos.** Rio de Janeiro: Editora Campus, 2006; LEAVITT, Jeffrey S.; NUNN, Philip C. **Total quality through project management**. New York: McGraw Hill, 1994; e BARKLEY, Bruce; SAYLOR, James H. **Customer driven project management**: a new paradigm in total quality implementation. New York: McGraw Hill, 1994.

29 The total quality goes beyond the purely operational scope of Continuous Improvement, covering the whole organization, or, in terms of administrative contracts, all phases (pre-negotiation and development).

30 Among other denominations, the representative of the Public Administration during the execution of the administrative contracts is called fiscal, inspector, manager, executor, enforcement agency or executor of the contract, besides AR (Administration Representative) and SA (Supervisory Agent). Already among its attributions there are the presentation of reports with the record of the events pertinent to the development of the administrative contract by the person in charge, and the adoption of the imperious determinations to the most reliable fulfillment of its object, including in suppression of the absences, defects or errors found, taking into account the invoices and corresponding to the respective covenants, verifying if effectively executed, subsequent to the verification of the conformity of the services for the purpose of realization of the payment, observing, if appropriate, the receiving commission (e.g., the purchases recommended in Paragraph 8 of Article 15 of Law No. 8.666/93).

methods serve both the public sector[31] and the private sector), including in conjunction with the good project management practices descried in PMBOK Guide - Project Management Body of Knowledge, allows a better and more precise identification of the defects by default of these public agents (responsible for the auction notice, "Agent 67"and the respective supervisor), seeking a much greater speed to prevent and bypass its failures and thus mitigate the harmful effects of the agreement, with the increase of more creative solutions (and *pari passu* integrated to the execution) of models that have been managed privately (both contracts and products).

Once these weights have been put in place, an analysis will be made of the good management practices of the first phase of this PDCA Cycle applied to the administrative contract, that is, the Planning stage, which nowadays permeates the relevant internal pre-negotiation phase (even before the auction notice to be launched) and is designed, each time to a greater degree of intensity and extension, in its participative modality, in other words, with the company in partnership with the later contracting Administration. One of its main instruments is the public hearings, which were imperative before the auction notice in the contracts signed as of great and immense size (article 39, caput, of Law 8.666 / 93).

In this phase of Planning of the PDCA Cycle, in which occur the implementation of the internal quality program and participation in the Public Administration, when it is applied to the administrative contracts, it is necessary as a commitment by of the public agents involved, with the improvement of public services and, moreover, a spirit of cooperation with contracted individuals, so as to satisfy users, which is fully applicable to them[32].

31 Regarding the specific application of the PDCA cycle to the public sector, check: BRAZIL. Program of quality and participation in Public Administration. Brasília: MARE – Ministry of Federal Administration and State Reform (*Ministério da Administração Federal e Reforma do Estado*), 1997, p. 34-38.

32 There is, "mutatis mutandis, that the emphasis on participation is the involvement of all employees, regardless of level, position or function, with the improvement of the public service, and the commitment of cooperation between managers and the people which are managed with the search for solution of problems, continuous improvement and with satisfaction of internal and external customers of the organization. The quality has in the process its practical center of action and includes the clear definition of the clients - users of the public service - and the expected results; the generation of performance indicators; the constant concern with doing right what is right the first time, involving all the servers with the commitment to satisfy the user of the public service. Working with processes, in turn, involves identifying sets of tasks that independently of the functions, generate products and services that add value to the client. The process is characterized by a relative autonomy in the decision, by the stimulus to the creativity and by the participatory style of its management". BRAZIL.

In relation to the environmental matter, the Public Administration should use the instruments established in the Brazilian legislation for its planned management, specifically regarding the prior environmental licensing and installation, with evaluations and studies of environmental impact, especially of a strategic nature, analyzing with before the adoption of any initiatives, programs, plans, projects, actions and contracts, including the adoption of a possible decentralized environmental management at the local level, thus strengthened and stimulated[33].

It should be mentioned that Strategic Environmental Assessment (SEA), although not embodied in an express standard of the Brazilian system, allows due treatment and management of risks and environmental quality, in a clear anticipatory conception, combining with the current precautionary premise concretized by the principle source of Brazilian Environmental Law, through the triad prevention, precaution and accountability.

The subsequent phase, that is, the Execution phase, should be understood as linking to the external pre-negotiation phase and to the subsequent development stage, that is, from the publication of the auction notice until the award of the administrative contract and its execution, to characterize the bidding stage and the whole process in which it takes place, unfolding itself to the execution of the contract until its exhaustion and post-exhaustion, involving all its multidirectional and multi-procedural relations.

In this turn, this phase mentioned brings the implementation and the initiation of the planned state actions, as set forth in the Internal Program of Sharing Program of the Quality and Participation, in concomitance with the identification of which public agents will be responsible for the improvement of services in the public adjustments, with the respective implementation of the Public Servants Training Plan, identifying the leadership and improvement teams that will be involved in the initial projects of the respective Program. Likewise, in this stage, the action plans for each improvement project established in the Management Improvement Plan are prepared and implemented, as well as the actions of the Public Servants' Training Plan are also realized, defining a system of advice and monitoring of the improvement teams

Programa da qualidade e participação na Administração Pública – Caderno 4. Brasília: MARE – Ministry of Federal Administration and State Reform (*Ministério da Administração Federal e Reforma do Estado*) 1997, p. 14.

33 CALDAS, Roberto Correia da Silva Gomes. PPP's – parcerias público-privadas e meio ambiente". **RECHTD - Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito**, v. 3, No. 1, January-June/2011, p. 68-69. Available at: http://www.revistas.unisinos.br/index.php/RECHTD/article/view/ 674/1760. Accessed on: April 9, 2016.

instituted.

At this state, the environmental dimension may be observed through the environmental operating license, a pillar of its management that allows the beginning of the public activities contracted with the installation and elaboration of criteria destined to the fulfillment of the environmental norms, as determined from the bidding procedure, as well as the inclusion of relevant aspects aimed at proving sustainable practices by the legal entities, now participating in the development of the administrative contract, such as the incorporation of certified eco-efficiency standards (ISO 140001), creation environmental management system (EMS), participation in carbon credit markets, proof of production processes for the treatment of solid waste and reverse logistics, among other aspects concerning the implementation of mechanisms directly linked to sustainability, the acquisition of products, the sale of goods, or the performance of works and the provision of public services.

In addition, the concomitant phases of Control and Evaluation are identified with the internal and external pre-negotiation contractual phases, besides the Execution phase. Such control and evaluation of performance, it is necessary to inform, occur in an aprioristic way, *pari passu* and also a *posteriori*, maintaining the advances of the due process with the inclusion of an analysis of the public covenants administration from the actual results devised, planned and expected , even after the finalization of the public adjustment[34].

34 These phases of Control and Evaluation generally involve the following activities: "Check the results of the Program. Steps: 1. *CHECK*. Partial: • To monitor the progress of the action plans of the improvement projects, assessing the partial fulfillment of the established goals; • Evaluate the partial results of the Program Sharing Plan, comparing them with the expected results; • Monitor the development of the actions established in the Server Training Plan, assessing the partial fulfillment of the established goals; • Communicate to the QPAP Executive Coordination the partial results of the Quality Program of the entity; 2. CHECK. Annual: • Assess the fulfillment of the goals established in the Management Improvement Plan; • Reapply the Management Assessment Tool and check for new opportunities for improvement; • Analyze the results of meeting the goals of improvement and evaluation of the Management; • Evaluate the improvement in the institutional results of the organization; • Evaluate the impact of the improvements introduced in the degree of customer satisfaction of the organization; • Compare the results with benchmarks of excellence; • Evaluate the factors that contributed to the success of the Quality Program. Act (Action); • Standardize or Act Correctly; • Introduce corrective actions and realignments or continue projects that are achieving positive results; • Standardize procedures, if the analysis of results signals in the direction of continuation of the process (maintenance of the line of action); • Run the PDCA whenever the results obtained in the verification phase (Check) indicate the need to realign the actions of the Quality and Participation Program". BRAZIL. **Programa da qualidade e participação na Administração Pública – Caderno 4**. Brasília: MARE – MARE – Ministry of Federal Administration

Full and complete verification of environmental conditions must be made at the time of evaluation and control, in order to indicate the fulfillment of the guidelines, norms and actions foreseen in the previous stages, in addition to enabling the measurement and monitoring of EMSs - Environmental Management Systems implemented by legal entities directly and indirectly involved in the bidding process, including administrative cooperation agreements entered into during the performance of the administrative contract[35].

One of the relevant aspects can be, for example, the fulfillment of constraints stipulated in the scope of the procedures of prior environmental licensing, installation and operation, as pillars of its management, or the incorporation of eco-efficiency practices in the framework of the productive processes through a critical evaluation of the performance of the Environmental Management System - EMS, with eventual decentralization at the local level, among others.

Lastly, there is the Closure phase of this Continuous Improvement Cycle, which is equal to the development stage of the contract in the post-exhaustion phase, with some processes such as the final receipt of the object, and, in addition, execution of the guarantees, in the hypothesis, likewise, of rescission with the need of compensation of damages, proceeding to the surveys, evaluations and necessary liquidations.

In this phase, the environmental bias emerges essentially by the exercise of control activities, in clear inspection duties, such as surveys, inspection and evaluations in general, seeking for the verification of possible infractions and the consequent applications of related penalties, including upon issuance of notices of inspection and written summons to polluting or potentially polluting entities to provide clarification at a place and date previously established[36].

4. ANALYSIS OF PUBLIC PROCUREMENT IN THE SCOPE OF THE COURT OF JUSTICE OF THE STATE OF SÃO PAULO: FOR AN ACHIEVEMENT OF SUSTAINABILITY

and State Reform (*Ministério da Administração Federal e Reforma do Estado*), 1997, p. 37-38.

35 CALDAS, Roberto Correia da Silva Gomes. PPP's – parcerias público-privadas e meio ambiente". **RECHTD - Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito**, v. 3, No. 1, January-June/2011, p. 68. Available at: http://www.revistas.unisinos.br/index.php/RECHTD/article/view/ 674/1760. Accessed on: April 9, 2016.

36 Ibid. P. 69.

As part of the research and extension activities that must be carried out by higher education institutions, as provided for in the Law on Guidelines and Bases of Education (LGB), the Nove de Julho University (UNINOVE) has developed and is implementing a research project to analyze the Environmental Management Plan at the Court of Justice of the State of São Paulo, seeking to establish in which cases occur the application and incorporation of the environmental principle of integration in the management and organization of the physical, structural and documentary assets (especially with regard to administrative contracts and their development) in this judicial body (Court of Justice of the State of São Paulo).

The project was structured in eight (8) phases, beginning with the diagnosis phase until the evaluation and planning of the environmental management policy, besides providing for the monitoring and follow-up of new targets to be established by the Court of Justice of the State of São Paulo.

The first phase related to the diagnosis was duly carried out and was intended to collect the data necessary to verify the environmental management policy, as will be mentioned later, through documentary analysis and *in loco* visits, as well as interviews with the employees of the Court of Justice of the State of São Paulo.

4.1. Brief description of the purpose and stages of the project

As the main objective of the project is to evaluate the environmental management plan adopted by the Court of Justice of the State of São Paulo and, as already pointed out, is structured in eight (8) execution phases, the diagnostic phase which was already carried out resulted in the collection of important data for the identification of the environmental targets proposed in the management plan.

According to a report presented by the work team37, the specific objectives of the diagnosis can be summarized as follows:

> *(i) identify current operational practices on key project topics such as water, energy and paper*

37 Report – Step 1: Diagnosis - Environmental Management Plan at the Court of Justice presented by UNINOVE on December 17, 2015.Team: Prof. Dr. Alexandre de Oliveira e Aguiar; Prof. Dr. Tatiana Tucunduva Philippi Cortese; Prof. Dr. Claudia Terezinha Kniess; Prof. Dr. Monica Bonetti Couto; Prof. Dr. Roberto Correia da Silva Gomes Caldas; Prof. Me. Wilson Levy; Prof. Dr. Emerson Antonio Maccari; Prof. Dr. Vladimir Oliveira da Silveira; Publ. Patricia Storopoli Tzortzis; Eng. João Henrique Storopoli; Adv. Kelly Corrêa de Moraes and Eng. Antonio Luiz Ferrador Filho.

> *consumption, generation and disposal of waste, service contract management procedures, and mainly maintenance; (ii) opportunities for improvement and savings in these areas; (iii) management structures, mainly facilitators and barriers; and (iv) to provide strategic direction for the next steps towards the implementation of environmental management practices and the goals of the Sustainable Logistics Plan.*

The second phase of this stage of the project was aimed at identifying and mapping the units (buildings) which were the physical objects of the research, as well as defining the requirements to be observed for the establishment of the variables to be applied for its execution (of the project).

This phase was carried out from the identification of what would be the physical spaces that would serve as pilot for the implementation of the project. The selection was made by the Socioenvironmental Nucleus based on criteria suggested by the UNINOVE team, from requirements based, in particular, on the size and age of the building, the type of property (owned or rented/assigned) and the characteristics of the activities carried out.

The buildings selected from the mentioned requirements were: Courthouse (*Fórum*) João Mendes; Regional Courthouse (*Fórum Regional*) Pinheiros; Regional Courthouse (*Fórum Regional*) Ipiranga; and Administrative Building (*Prédio Administrativo*) Glória. As per table below (Table 1), the buildings were analyzed with the consequent application of the following variables:

TABLE 1

Building	Property	People		Public Daily	Energy	Water
João Mendes	Owned	Mário and Cezar	2500	1500		1.428
Ipiranga	Rented		172	600		188
	Owned	Márcia	240	700		159
Glória	Rented	Rone Alves	387	100	7,600 Kwh	226

Source: UNINOVE Report, 2015.

The other steps foreseen in the project and which are still in the execution phase refer to:

- Training phase: in this phase, the team must carry out training and qualification for the employees of the Court of Justice of the State of São Paulo, responsible for the elaboration and execution of the Environmental Management Plan;
- Development phase of the plan: it is intended to carry out a detailed analysis of each of the pilot units, as already pointed out, as well as *benchmarking* visits made by researchers;
- Model definition phase: refers to the need, from the execution of the project with the pilot-units to establish a model that can be replicated in all other units of the Court of Justice of the State of São Paulo, in order to optimize the application of the Environmental Management Plan, with operational efficiency and lower cost, without, however, resulting in a rigid system, since the Plan should take into account the particularities of each unit;
- Application of the model phase: implementation of the Management Plan in all units of Court of Justice of the State of São Paulo;
- Evaluation and planning phase: as previously pointed out, for the correct application of an environmental management plan, the evaluation stage (through internal quality programs) represents a crucial moment for the evaluation of the strategies and actions adopted and for the revision of the goals;
- Advanced studies phase: refers to the identification of new goals and demands related to the continuous improvement of the Environmental Management Plan of the Court of Justice of the State of São Paulo.

Once the project is completed, it is intended, through technical and academic cooperation agreements, to extend its actions to other higher education institutions of São Paulo and Minas Gerais, seeking to carry out a mapping of the environmental management strategy adopted by the national Courts, in order to verify if there is the effective incorporation of environmental issues in these judicial bodies.

4.2. The management of administrative contracts by the Court of Justice of the State of São Paulo and the incorporation of the environmental dimension

The contracts represent an important part of the environmental management of the Court of Justice of São Paulo, although, in several cases, its environmental requirements are not adequately represented,

since in some maintenance contracts, for example, it is determined that the waste should be owned by the service provider, with its responsibility for the final disposal, in clear oblivion to the pertinent legislation, namely, the National Environmental Policy Law (Law 6,938/81), Environmental Crimes Law (Law 9,605/98) and of National Policy on Solid Waste (Law 12,235/2010), which imposes on the generator such responsibility.

At the same time, good practices that could result in energy savings, such as the monitoring of the electric performance of motors, are included in some contracts (*e. g.*, maintenance of air conditioning), and not in others (*v. g.*, elevators), without, however, its observance be concretely verified in none of the cases, due to an inadequate execution of the contracts, in turn, due to total absence of requirement of compliance or even penalty for default.

On the other hand, it is worth pointing out, that the dynamics of information and innovations on environmental technologies and practices, which are now faster than the renewal of administrative contracts in general, imply the need for more flexible covenants, such as the situation lived with the contract of printers of the Court of Justice of the State of São Paulo, more contemporary methods and techniques that bring environmental benefits, as the case of the above verified PDCA Cycle.

Likewise, it should not be forgotten that, in a general way, the acquisition of government products and services, in itself, has entailed significant costs, representing a significant percentage in GDP - Gross Domestic Product, thus justifying the relevance of including, in such public contracts, objective criteria of sustainability to be observed (such as proof of origin and destination tracking of all directly and indirectly related products and services) as a socio-environmental commitment of all of those involved.

Consequently, this orientation is part of the A3P Program - Environmental Agenda in Public Administration, which, embodied as an integral part of the Federal Environmental Education Program for Sustainable Societies, included in the last PPAs - Plurianual Plans aimed at building a new institutional culture in bodies and public entities, have as its main objective the

> *(...) to encourage public managers to incorporate principles and criteria of social and socio-environmental management into their routine activities, leading to the saving of natural resources and the reduction of institutional expenses through the rational use of public goods, proper waste management, sustainable bidding and the promotion*

> *of awareness raising, training and quality of life in the work environment.*[38]

As for waste, there is no evidence of proper disposal, nor the requirement of environmental certification by a public body or its recognition, to impose that this situation be removed as soon as possible, bypassing this environmental neglect in order to implement an effective culture of commitment to good sustainability practices related to the public contracting of the Court of Justice of the State of São Paulo, which is recommended to be done with the Continuous Improvement Cycle.

In fact, contracted companies can not only informally commit themselves to the proper disposal of solid waste, and must be certified (according to Normative Instruction No. 1, dated of January 19, 2010, from the Secretariat of Logistics and Information Technology of the Ministry of Planning, Budget and Management - SLIT/MPBM) so that the inspection related to reverse logistics, including transportation, is not only the responsibility and competence of the contract auditor (the aforementioned "Agent 67"), but also with other competent bodies[39].

It should be mentioned that the relevance of the requirement of such environmental certification for the supply of goods and services to the Public Authorities, as well as for the collection and disposal of its solid waste, in itself, is reflected in the responsibility and the commitment with the sustainability that public managers must have when incorporating, *e. g.*, objective criteria for forest protection, even if operating in an urban area, the requirement to be certified by CERFLOR (*Programa Brasileiro de Certificação Florestal*, with information managed by INMETRO), by the FSC (Forest Stewardship Council),

38 **A3P - Agenda Ambiental na Administração Pública**. Brasília: Ministério do Meio Ambiente, 5th ed., 2009, p. 7. Available at: http://www.mma.gov.br/estruturas/a3p/_arquivos/cartilha_a3p_36.pdf. Accessed on: April 9, 2016. It can be exemplified with attitudes and actions such as: the use of certified wood; obtaining certification from the National Institute of Metrology, Standardization and Industrial Quality - INMETRO for products, thus considered sustainable or of less environmental impact in relation to their similar; the use of recycled materials and high energy efficiency equipment; and obtainment of a Negative Certificate of Illegal Use of Child and Adolescent Labor, currently envisaged in Bill 5,829/13, in activities such as the acquisition of hydrated ethanol.

39 As an example of environmental sustainability criteria in the acquisition of goods, contracting services or works by the Federal Public Administration, autarchic and foundational, it is noted that, by the contracted company, the separation of recyclable waste discarded in its generating source, its destination must to be given to associations and cooperatives of collectors of recyclable materials, as it happens in the Federal sphere, under the protection of Decree No. 5,940, dated October 25, 2006, the model of which should be followed in light of Article 6, VI, of the Normative Instruction SLTI/MPOG No. 1 of January 19, 2010.

or according to ABNT NBR 14790: 2011, with management practices carried out in a sustainable way, using reforestation techniques[40].

In view of the dynamics of technological development during the execution of the public contracts *under review*, the suggestion was to allow the opening of dialogue with the contracted, as a private partner, so that any progress can be incorporated, with a gain of reduction of costs and possible socio-environmental advantages[41].

Having said these observations, it is worth mentioning that the in-depth analysis of each contract will be made in another stage of the project, using the interdisciplinary with suggestions and examples for the continuous improvement of contracting with a view to achieve the economic, social and environmental dimensions.

5. CONCLUSION

Analyzing the main aspects related to the interrelation of the incorporation of the environmental dimension through the application of the principle of integration by the contracts performed by the Public Administration, and the consequent application of managerial control and evaluation techniques, such as those of the PDCA Cycle in this article examined, it becomes essential to understand the extent to which the State Powers, as well as the respective bodies and entities linked to them, in the exercise of administrative activities, are able to efficiently achieve the effectiveness of sustainable development in the plans, programs, projects, strategic actions and signed contracts .

The inclusion of the environmental component in administrative contracts demands an accurate analysis of the impacts that public policies can cause to the environment, creating a scenario of greater protection and lower cost, in addition to fostering the basic legal security and certainty for the proper functioning of the legal-economic system.

As pointed out in the introduction of the present analysis,

40 In the case of FSC, the standard FSC-STD-40004 V2-1 may be used, in addition to the proof of compliance being made through Chain of Custody Certificate and/or Chain of Custody Seal of FSC and/or CERFLOR. For the example of recyclable paper - ABNT NBR 15755:2009 - EMBRAPA measures that every fifty kilos (50 kg) of recycled, it avoids the cutting of a tree, consumes fifty percent (50%) less water than in the virgin paper process, in addition to avoiding waste and discards (before Law 12,305 of August 2, 2010, which establishes the National Solid Waste Policy (NSWP), according to Article 7, item XI , "a" and "b").

41 Thus, Law 12,187 of December 29, 2009, which instituted the National Policy on Climate Change (NPCC), which implies a preference for proposals that provide greater energy, water and other natural resources, is an example of reduction of the emission of greenhouse gases and waste (Article 6, XII), whose implementation can take place during the execution of the administrative contract, through a dialogue established with the individual contracted (partner), always respecting their object and economic-financial balance.

the scope of the research was to determine the extent to which the administrative contracts signed with the Public Administration - from the exercise of administrative activities by the bodies and entities of the state Powers - effectively take into account the application of environmental directives implemented in the so-called sustainable bids, according to the analysis of planning, execution, evaluation and control instruments (PDCA) that can be used to measure the incorporation of the environmental dimension.

In this sense, the Brazilian system, despite not expressly disposing of specific legislation related to the so-called sustainable contracts, recognizes the importance of sustainable development, considering it as a structuring basis for the realization of the right to an ecologically balanced environment, protected in Article 225, caput, of the Brazilian Federal Constitution.

The adoption of specific legal acts in the area of sustainable bidding can be found in some state laws, such as the Decrees issued by the State of São Paulo, as analyzed, which makes it possible to consolidate mechanisms for the fulfillment and observance of the environmental dimension, regulating the means of execution of the bidding procedures based on environmentally protective criteria, filling a serious gap that still existed in the Brazilian regulatory system.

In the same sense, the adoption of the PDCA cycle allows the establishment of Environmental Management Systems (EMS) based on a dynamic of clear precarious and preventive connotation, since it establishes mechanisms that go from the conception and planning of a plan, program, project or administrative contract, to the later stages of development and closure, encompassing an integral and integrated vision of the economic, social and environmental components, the latter being the main object of this work.

The criticism of the research project for the analysis of the Environmental Management Plan done at the Court of Justice of the State of São Paulo by UNINOVE - Nove de Julho University, represents an important (although not definitive) study that illustrates the need of insertion of this dimension into the administrative contracts carried out by the judicial bodies as an integral part of the Brazilian State, especially in the exercise of tasks and administrative activities.

Finally, it is noted that there is an important gap in the Brazilian legal system regarding the incorporation of the environmental dimension in the execution of administrative activities by the State Powers and the respective bodies and entities, given the absence of a specific rule that explicitly imposes the application of the integration principle in executed administrative contracts by these bodies and signed.

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THE YOUTH IN CONFLICT WITH THE LAW IN RIO DE JANEIRO AND THE ROLE OF THE DEFENSE ON INFRACTIONS[1]

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Abstract: The criminalization of juveniles in conflict with the law is a social problem that perpetuates throughout Brazilian history. Thus, it is necessary to reflect on the stigmatizing discourses that affect teenagers in conflict with the law, mainly in the city of Rio de Janeiro, where the state promotes more confinement policies than programs that accelerate the affirmation process of basic rights. At this point, the article brought up the debate about the defense of these adolescents as a guarantee of their fundamental rights, as well as the doctrinal question about the existent branches on the Statute of the Child and Adolescent (SCA), integral protection *versus* guarantees. The article blends theoretical and empirical methodology. Among the results found, stand out the mitigated participation of the defense throughout the processing.

Key-words: Defense; Juvenile Justice; Rights guarantees; Adolescents in conflict with the Law.

INTRODUCTION

The criminalization of juveniles in conflict with the law is a social problem that perpetuates throughout brazilian history. Since the middle of the 21st century, these teenagers, known as juvenile delinquents or

1 Translated by João Pedro Torres de Abreu Machado Sardinha.

abandoned "minors", mostly from the poorest and vulnerable classes of the population, mostly black people, with little or no access to education, inserted in families categorized as typical of "environments of marginalization", considered places of "bad habit" where drug use, prostitution and small crimes are exercised, being constantly targeted by the police and justice

In the 21st century, this conjuncture still hasn't modified yet, as regards the subjects on whom the current norms are applied upon, the process wherewith this happens constitutes a criminal subjection, as according to Misse (1999):

> *[...] given certain patterns of social construction of criminal subjection, there is a constant connection, in social representation, between certain social variables and attributes of individuals incriminated by certain types of crimes. These variables appear either in the social types in which they would fit, or in the explanatory connection between the social meaning attributed to these variables and the motivation that are attributed to the types (or that they would incorporate) to enter socioeconomic, color, nationality or naturalness, age, gender, indicators of affiliation to a regularity of employment and many other dimensions (dressing, way of walking, way of speaking, social expressions of self-control) that serve socially to stratify, differentiate and build stereotypes of social identities are mobilized by social representation to distinguish suspected individuals." (MISSE, 1999)*

Thus, it's necessary to reflect on the stigmatizing discourses that affect teenagers in conflict, specially in Rio de Janeiro, this arcticles' empirical research *locus*. Also, it must be highlighted the criminal policy that has as its foundation the violent repression by the state on the poorer stratum of the population.

Most adolescents, confined in Rio de Janeiro's judicial district, committed crimes similar to drug trafficking and stealing, according to a National Council of Justice's research (2012)[2]. In the period that corresponds to June 2017, as reported by the GDSEA's Coordination of Socio-Educational Measures, in the state's capital alone the institution keeps 2.279 male adolescents in total, in compliance with custodial measures, such as temporary confinement, confinement or semi-freedom, for the commission of infractions. Of this total, 1310 youngsters comply with socio-educational custody measures on GDSEA units, revealing a

2 Report of the National Council of Justice. National Panorama of Implementation of Socio-Educational Measures of Internment. 2012.

prevalence of the custodial measure as the one being selected to be applied by the Childhood and Youth Courts.

Another revealing data, provided by the GDSEA's Coordination of Socio-educational Measures is that most of the boys that are into the socio-educational system at the Capital, in the period corresponding to 2010 to 2016, haven't finished elementary school. Having that in mind, it is possible to realize the extension of this problem and the true emergency of preventive methods, so that it may be possible to stagnate the criminalization process, showing to this "minors" new possibilities outside the world of "crime".

Hence, one may think, the State promotes more confinement policies than programs that accelerate the process of basic rights affirmation (education, health, professionalization, art, culture and recreation). That suggests characteristics of a system, assisted by the judiciary, that abuses of government's punitive power rather than putting away punishment.

At this point, it's interesting to emphasize the doctrinal debates about the existing branches in the SCA, one that aims to the teenagers' integral protection and a second one, that prioritizes their fundamental guarantees. Are they divergent? Both imply distinct implications to young people in conflict with the law, especially in what concerns the application of socio-educational measures, directly influencing the assurance of their fundamental rights, mainly their liberty?

It's known that the retrenchment of rights perpetuates itself within the confinement centers, due to the unavailability of essential care and support services for reeducation, for example, psychologists, doctors, social workers and, above all, attorneys and public defenders. This happens as a result of the confinement system being over crowded, as it suffers from the lack of state investment during the crisis in the State of Rio de Janeiro. According to a National Council of Justice's research (2012):

> *The availability of technicians of the different areas of activity in each of the units per State, it has been that 91% of the establishments provide some type of individual service to the offenders rendered by specialized professionals. However, the availability of these professionals varies considerably in different regions of Brazil. It is observed that psychologists and social workers are the most commonly available professionals in confinement units in all regions, being present in 92% and 90% of establishments, respectively. On the other hand, lawyers and doctors are present in only 32% and*

> *34% of the units, in that order. Thus, it is observed that the basic rights to health and procedural defense are hardly observed, considering the lack of the provision of these services in establishments. The unavailability of these professionals was more significant in the states of the South and North." (CNJ, 2012)*

In a visit, allowed by the GDSEA[3], in May 2017, it could perceive the reality beyond the statistics. With a capacity to 200 teenagers, nowadays the SES accommodates approximately 500 boys within a penitentiary structure, that rely on two sectors A and B, separated by criminal gangs that command the drug trafficking in the state (Red Command and Third Command, respectively[4]). Although this kind of segregation's forbidden, this form of triage is habitually used, so to avoid that the teenagers are exposed to any risk of death inside the confinement units.

Inside the sectors, there's another subdivision, where the space's divided by "solares"[5], each one with 4 cells, while in there I could observe the precarious physical structure that shelters the adolescents. There is no bed for all and even less mattresses, the place's sanitary conditions is also scary, because it has no condition to host any of the teenagers confined there. The lack of structure forces the teenagers to sleep on the ground, something I witnessed while entering in one of the "cells" – two boys sleeping on the ground hugged, once there weren't enough beds for everyone.

Thus, with the maintenance of the juvenile criminal responsibility system and with the lack of access to justice, the presence of procedural/technical defense it's fundamental to secure guarantees and basic rights standardized by the SCA and the CFRB/88. Another data also informed to me, during the visit to DEGASE, is that, unfortunately, these teenagers' defense is also faulty, since the load of judicial processes held by the Public Defense, responsible for the assistance of most of the boys, is very high in comparison to the number of defendant's lawyers, and this consequently impairs the defense and results in a major permanence of these adolescents at the confinement units; private attorneys are the

3 General Department of Socio-Educational Actions of Rio de Janeiro's State

4 Red Command (Comando Vermelho) – one of Brazil's largest criminal organizations. Created in 1979 in Cândido Mendes prison, on Ilha Grande, Angra dos Reis, Rio de Janeiro, as a joint of common prisoners and political ones, militants of armed groups, being the common prisoners members of the known Red Phalanx (Falange Vermelha). Third Command (Terceiro Comando) – known by the initials TC, was a brazilian criminal faction, based on Rio de Janeiro, created to opposed to Red Command after 1994.

5 Open areas that contain cells within the prisons with some space for sunbathing.

minority.

Studies about the history of the Juvenile Justice in Brazil reveal that the lack of lawyers and public defenders has always been a permanent and usual situation. This will be one of the matters developed in this article.

This paper's methodology's mixed, since it is a research both theoretical – in which I sought to exhaust bibliographical references on the subject, both in the area of law and sociology, and empirical – where I went onto the field to GDSEA/RJ and brought also to this work quantitative researches accomplished by government agencies, for example, the National Council of Justice – CNJ, to illustrate the current reality of young people in conflict with the law that are inserted in the socio-educational system.

1. History of the defense's role on Juvenile Justice

This item's proposal is to reconstitute a brief historical of the defense's role on Juvenile Justice in Brazil, starting from laws that comprehend the first Minors Code of 1927 until the SCA, highlighting on each period the existence or not of a defense, as well as analyzing each period's normative characteristics, for example, if these norms had or not the purpose of securing young people's rights.

Thus, we perceived that the issue of childhood and adolescence in conflict with the law hasn't always been treated the same way, mainly due to the new meaning assigned to them during modern age. Therefore, we could identify that nowadays the childhood and adolescence group has a history and it's the product of a social construction.

According to Aries (1981), the idea of the youth category during middle age wasn't the same as the one we know today on modernity, summing up, there wasn't a notion of social necessity on differentiating adults from children or adolescents. The author adds in his work that, only in the 17th century, works of art started portraying children in childlike attitudes, and no longer as adults.

This perception may send us into a temporal breaking of concepts, *id est*, from that moment on, man as individual, starts perceiving the necessity to protect children as to secure one's individual integrity until his adulthood, declaring this category's incapacity before the society. The idea of children's incapacity brought up the indispensability of their socialization, where two great institutions took the lead to discipline them: the school and the family, as bases of macro power.

However, not all children and adolescents managed to be reached by discipline exercised through school, many hadn't access it, others evaded or were expelled from these institutions, which consequently resulted in their differentiation: those who attended school

environment from those who didn't. From that moment on, it began the new category "minor" composed by "delinquents" and "minors in a state of abandonment" which differentiated itself from the category "youth", as according to Méndez (1996) "The origin of the justification of social control over children and young people lie in the differentiated construction of the child and "minor" categories, in both cases subject to incapacity and imposition".

Thus, the "minors" were submitted to other institutions for the application of discipline and correction, Méndez (1996) says that the history of juvenile criminal responsibility consists of three stages: the first phase, at the beginning of the 20th century, in which the juvenile responsibility did not differentiate age groups, with the exception of people under nine years old considered absolutely incapable; the second phase responsible for the specialization of the minors' rights and, by the third phase marked by a disruption on the irregular situation, as the integral protection doctrine was established. Among these approaches only the last two of them will be the object of this article's analysis.

In regard to 20th century's Brazil, immersed in a critical scenario due to the Liberal Republic's political issues, with the development of capitalism a process of massification of poverty and, consequently the rise of the number of impoverished children with problems to be faced by the State began. Hence, due to the questioning of the State's role on the country's social demands, the first Minors Code[6] or "Mello Mattos' Code" was born, created in 1927, from Judge Mello Mattos'[7] experience.

From this period on, the codification was the material representation of the concern with the juvenile criminality, that had already been in need of an exclusive space to deal with the "interests" of children and adolescents.

According to the 1927's Code, the State had legal responsibility over the orphan or abandoned child's guardianship, adopting, for the first time, characteristics of a guardianship model. This type of intervention, exercised by the state apparatus, was the initial milestone for the thinking of the irregular situation's doctrine, which followed the hygienist orientation and also with eugenic characteristics[8], as it tried to sanitize that one Brazilian population's major problem: the "delinquent minor".

Thus, the pedagogy united with childcare and positive Law, attacked the problem with an "assistencialist" and multidisciplinary

6 Federal Decree no. 17.943, from October 12, 1927.

7 Dr. José Cândido de Albuquerque Mello Mattos, born in march 19, 1864 in Salvador/BA, was Brazil's first Juvenile Court's Judge. Designated on february 02, 1924.

8 *Bio*theory that aims at producing a selection over human collectivities, based on genetical laws; eugenism.

approach, turning to the Courts and Assistance Council, which formed a system attributing duties to parents, imposing obligations to the State and punishments to the minors. This norm's main characteristic was the centralization of the power on the hands of the judge, that hadn't any limitation on its legislation power. It's possible to say that the poverty massification arises as a consequence of the judicialization of childhood troubles.

The barriers that prevented unrestrained punishment, in the Minors Code of 1927 were also surpassed, once there were no more difference between an abandoned minor and a delinquent one. That significantly increased the situations of state intervention, mobilizing mainly the judiciary through the Childhood and Youth Courts, resulting in the minors' institutionalization. Thus, there was no distinction between the measures' enforcement, this was in exclusive charge of the judge of minor's decision, which according to Sposato (2011):

> [...] this is, moreover, the cornerstone of the doctrine of the irregular situation, as Emilio Garcia Mendez preaches: the lack of distinction between abandoned and delinquent minors. Such a doctrine means nothing more than legitimizing a potential indiscriminate legal action on children and adolescents in difficult situation". (SPOSATO, 2001)

This way, the judicial actions applied indiscriminately could only criminally account the "minors" that had 14 to 18 years of age, however, this process, because of its characteristics of special nature, evaluated in detail the minor's condition, according to the article 24, 2nd paragraph:

> *if the minor is abandoned, perverted, or in danger of being so, the competent authority shall promote his placement in an asylum, education house, preservation school, or shall entrust him to the right person for all the time necessary for his education, provided not to exceed the age of 21 years.*

It must be highlighted the expression "in danger of being", that allowed the increase of the list of children and adolescents "framed" as delinquent minors, since, from that moment on, the main characteristics to be evaluated were those that lead to a possible criminal identification, that is: skin color, clothing, financial condition, place where one was arrested etc. so it could be analyzed as what today would be called enemy's biotype, this being subordinated to the Code's rules.

This directed and crimeless intervention (BATISTA, 2003),

beginning at the police's hands[9], enticed a guardianship acting by the state with a selective and lombrosian[10] characteristic, which preemptively anticipated the incrimination process that may result in criminal subjection[11]. Only poor, black, miserable, abandoned minors would be targeted by the intervention and institutionalization, susceptible to processes that would be solved in courts and no longer in social environments, such as schools and families, for example.

This type of situation is what we could name negative citizenship, terminology used by the professor Nilo Batista[12], and according to Batista (2003):

> *[...]refers to the conception of negative citizenship, which is restricted to the knowledge and exercises of the formal limits to the coercive intervention of the State. These vulnerable sectors, yesterday slaves, today urban marginal masses, only know the citizenship by its reverse, in the 'self-defensive trench' of the oppression of our penal system's organisms."(BATISTA, 2003)*

This code's novelty was the appearing of a defensive figure for the "minors", which according to Batista (2003) "represents an indicative of a certain level of inexistent guarantee until then and that will be repealed years later in the period of 1942-1962". However, a lawyer's presence wasn't usual, and only "minors" in better financial condition escaped those current profiling patterns: black, poor, with no schooling, and could afford to use the defense as a resource, as approached by Batista (2003).

The limited presence of lawyers, associated to the system's sluggishness, contributed to the expansion of government intervention

9 The exercise of the police power (*Polizeigewalt*) refers to a government entity or agent's use of executing services turned to registry, fiscalization or expedition of some act.

10 In the middle of 1876, The Criminal Man (*L'Uomo Delinquente*), by the italian Cesare Lombroso, was published. Along with this empirical study's disclosure, spread, worldwide, the so-called Theory of the Born Criminal, in which certain physical characteristics found in some human beings, mainly multiracial individuals, would demonstrate one's predisposition towards criminal life.

11 According to (MISSE, 1999): "If we take structure as power (even in the Weberian amorphous sense), then the experience of subjection (in the sense of subjugation, subordination, assujetissement) would also be the process through which subjectivation - the emergence of the subject - becomes active as a counterpoint to structure, as a negating action. The subject, in this sense, is the effect of being put by the structure (power) and emerging as its opposing and reflective being (power)".

12 BATISTA, Nilo. "Fragmentos de um discurso sedicioso", in discursos Sediciosos – crime, direito e sociedade, nº 1. Rio de Janeiro, Relume – Dumará, 1996, p. 71.

with a selective and inquisitive aspect, once that the Code of Minors of 1927, even if allowed the presence of a public defender/private lawyer, limited it to the quantity of only 1 (one) per process instruction, in conformity to SCA's articles 161 and 148.

Interesting to notice, that in the 1927's Code, the word "guarantee(s)" appears meaning only moral guarantees and not in the fundamental rights and guarantees perspective, just as, the word "right(s)" is directed to the parents' ones – mother, father or relatives, and never referring to the "minors". Another observed issue was that the words "protection" and "assistance" appear on the legislation meaning adolescent surveillance.

So, the punitive guardianship characteristic was particular to the 1927's Code, situation that got worse during the '30s and '40s, marked by the emphasis on the assistance, realized primarily within closed institutions. The critics to the model also began to emerge, fact that boosted changing propositions until the '50s, when it happened an increase in the number of charges of overcrowding and mistreatment against MAS – Minor's Assistance Service, an agency of the Ministry of Justice, that worked as a Penitentiary system for the underage population, with a correctional orientation – repressive, typical of the authoritarian period of New State. The system predicted a different treatment to the adolescent responsible for the infraction and to the impoverished and abandoned minor (RIZZINI, 1997).

The first initiatives where those of asylum assistance also with a preventive and punitive nature, where until the middle of 1935 the "minors" were apprehended and taken to screening shelters. Posteriorly, as the 1940's Criminal Code was established, it declared that the age of criminal imputability was 18 years, also endorsing that those under 18 years old would be strictly under the regime defined on the Code of Minors of 1927. So, in 1942, the sheltering assistance evolved into MAS, Minor's Assistance Service, what, to many authors, is a milestone on the public policies for the childhood and adolescence.

MAS's structure was in the form of reformatories, as well as houses of correction for the lawbreakers, and those became precarious due to overcrowding and the sluggishness of investigative processes which, consequently, worsened the condition of these minors' deprivation of liberty. At that time, MAS was denounced by the press for scandals and tortures that the minors had to suffer (MISSE, 2007).

The 1964 military *coup d'état* generated an intense socio-political impact, in a negative way, as authoritarianism strengthened, what consequently was reproduced on the juvenile justice system, starting with the ending of MAS to the creation of NFWM (National Foundation for the Welfare of Minors) and SFWM (State Foundation for Welfare of Minors) in each state of the federation, influenced by the

National Security Doctrine, which militarized the discipline within the reformatories-prison.

The changes went on, as the legislation was profoundly altered with the Law no. 4513/64, about the national minor well-being policy, and Law no. 6697/79, that created the new Code of Minors of 1979 turned to minors in any irregular situation.

At this time the irregular situation was seen as a wide social pathology, according to Migliari (1996), "irregular situation is a metaphor for the impoverished child/adolescent that needs to be under strict ruling of an array of legal norms".

This way, it's not surprising that the new 1979's code hadn't made any mention to child or adolescent's rights, and strengthened the symbolic power at the hands of the Judiciary. Consequently, as explains Batista (2003), there is no defendant's lawyer on the processes concerning lawbreaking adolescents:

> *"The young person in 'irregular situation' is processed and enters the criminal circuit without the appearance of the figure of the lawyer. One of the axes of the minorist process is the non-recognition of the minor as a person, but as someone to be protected (...) The absence of the defender or lawyer demonstrates the lack of guarantees in the judicial proceedings prior to the ACS." (BATISTA, 2003)*

As seen in this article from the Code of Minors of 1979, the figure of the lawyer has a relative *status*, *id est,* allowed during the regular progress of the process and required only at the appealing phase:

> *Art. 93. The parents or guardian may intervene in the procedures dealt with in this Law, through a lawyer with special powers, which will be summoned for all acts, in person, or by official publication, respecting the secrecy of Justice.*
>
> *Single paragraph. It will be mandatory to set up a lawyer to file an appeal.*

According to Veronese (1994) this relative *status* may be explained as follows:

> *"A historical-doctrinal analysis of the participation of the lawyer in the area of childhood and youth reveals the existence of three positions: the first that considers*

> *obligatory and, therefore, indispensable the presence of the lawyer; the second chain that prohibits the action of the defender in this sphere and, lastly, as an example of these advisors to cite the one that empowers their participation. The revoked Code of Minors of 1979 understood to be optional the presence of the defender in the procedures related to the so-called juveniles in an irregular situation". (VERONESE, 1994)*

The 1979's code's exhaustion happened mainly due to its non glimpsing the integrity of the problem of the "lawbreaker" juvenile, as a result of the system's inability at making the child or adolescent be reinserted on the social context.

In this context, in 1986, non-governmental organizations united themselves in favor of defending child and adolescent's rights, also being influenced by the project of the UN's Convention on the Rights of the Child and began a movement towards the insertion of the United Nations' document's contents in the forthcoming CFRB/88 (PAES, 2013).

This convention prioritized the healthy development of the "minors" both on the social sphere as on their individuality, since they're still in a process of construction of their own personalities. During more than one century, poverty and delinquency were the reasons to intervene via social and punitive control on the so-called "minors", that nowadays, by force of SCA and CFRB/88, are called children and adolescents.

Along with redemocratization the "1988's Citizen Constitution" was promulgated, representing meaningful advances on the guarantees of rights of thousands of children and adolescents in Brazil. In this conjuncture SCA's born, in 1989, starting, consequently the institutional reordering, with an attempt to deinstitutionalize young beings and making them subjects of rights[13].

In this way SCA treats the issue through another lens, that being: the doctrine of "integral protection". This integral protection has its foundation in two very important pillars: the child and the adolescent while "subjects of rights" and their "peculiar condition of person in development" – CFRB/88's article 227, §3º, IV (SPOSATO, 2011).

According to Veronese (1998), the new regulatory Law on constitutional precepts, in its first part, lists the children and adolescents' rights; and, in its second, the way of viabilization of those rights. This is, thus, when it is when the lawyer's figure is inserted and becomes relevant.

13 Subjects of rights are all the subjective centres of right or duty, i. e., all that the law says it's able to be a holder of a right or a debtor of an obligation.

On SCA the lawyer's figure is obligatory, yet it doesn't constitute something truly innovative, as the new legislation follows the precepts of the minimal rules of the United Nations for the administration of justice for minors – "The Beijing Rules" [14], from 1984.

Hence, we can see that all throughout the path of the Brazilian legislation there is a small relevance or even absence of the defense and the rights that would be secured to the young beings in conflict with the law. Only after SCA the defense became a right, an obligatory one, on juvenile defense, along with the appearance of the integral protection doctrine. These characteristics are quite worrisome, having in mind the authoritarian and punitive heritage of the Juvenile Justice in Brazil, which hinders the effectiveness on the implementation of public policies, just as it does to teenager resocialization, keeping in mind the persistence of a vision that conceives him as a social enemy.

2. About the juvenile justice's system on SCA

This work's item has as its objective to analyze how the juvenile justice's system works in Brazil, according to what is fixed on SCA and its variations on each state of the federation, always focusing on the state organization of Rio de Janeiro, which is this work's central *locus*. Juvenile Justice in general isn't declared as a special justice, however it has specific particularities on its judiciary organization; its legal formatting derived from SCA, for many times doesn't follows its configuration, exercising a non formal practice, that for many times opposes itself to the established norm, as the 2005's work "NACADC's vision over its concepts and practices, on a Human Rights perspective"[15] explains:

> *"In this sense, it is important to emphasize that the Brazilian Juvenile Justice System has a legal format - the Statute of the Child and Adolescent - and a non-formal practice that, in reality, is against the legal one, often forcing NACADC and CDRAC to the development of diversified discussions and practices - across the continental reach of the country - that respond effectively to the interests of children and adolescents."*

14 Specifically, the rules number 7.1 and 15.1.

15 Link accessed at June 23, 2017, with the complete report on the realization research: http://www.cedecacasarenascer.org/uploads_arquivos/livros/1705181459000000justica_juvenil_a_visao_da_anced_sobre_seus_conceitos_e_praticas_em_uma_perspectiva_dos_direitos_humanos_2007.PDF

This system's inaugurated with the arresting of the teenager which comes at each state's Civil Police precinct houses so an record of occurrence can be made, due to the infraction committed. As the parents appear at the police station, in accordance with SCA's article 174, the minor must be freed by a police authority under a term of commitment and responsibility saying that he must present himself before a Public Ministry's representative at the same day or the immediate next business day. In case of non existing a specific service unit to the adolescent in conflict with the law in the region, he must be immediately transferred to the nearest locality (SCA's article 185, §1[16]). It is important to emphasize that the ECA does not predict the confinement of teenagers in police stations or prisons, that's why the possibility of his immediate liberation must be examined, in case there isn't a specific unit for him to stay.

After being arrested, the competent authorities must be notified, as, for example, the Public Ministry, the Childhood and Youth's Judge and the teenagers' parents in case there are any. In general, this should ease the search by the teenagers' legal responsible for a lawyer or public defender, so that an attorney may go along with them still at the police station, or administrative phase, fact that for many does not happen due to the overload of the Public Defense that assist most of these teenagers.

Nowadays, there are two possibilities to rout those juveniles that committed infractions, the first one is immediate liberation after the signing of a commitment term by the parents and, the second, sending the minors to provisional confinement units, in case of flagrant crimes, so that they wait for their presentation to Public Ministry, which will make the representation – the document that installs the judicial processes at the Juvenile Justice –, the same day or the subsequent one.

At the Rio de Janeiro's judicial district, for example, the Childhood and Youth Jurisdictions work in a system of specialized jurisdictions, counting with only one Childhood and Youth Jurisdiction relative to infractions and three others that take care of general childhood issues. Today, this unique jurisdiction, according to a statistical data provided by the sector of Statistics of Registries of the Court of Justice Rio de Janeiro, counted with, at May 2017, a general collection of 15.319 processes. This number is very expressive if compared to those jurisdictions that haven't the judgements of infractions, which in the

16 Art. 185. Internment decreed or maintained by the judicial authority may not be fulfilled in a prison institution.
Paragraph 1. Should an entity with the characteristics defined in art. 123 not exist in the judicial district, the adolescent should be immediately transferred to the nearest locality.
Paragraph 2. Should immediate transfer be impossible, the adolescent will await removal at a police office, provided that this be done in a section separate from adults and in appropriate facilities and, subject to the penalty of liability, this period can not surpass five days.

same period had general collections about two to three times smaller than the previous one.

This justice's system's legal milestone was oriented by national and international norms, for example, the Federal Constitution of 1988, the Convention on the Rights of the Child, the Standard Minimum Rules for the Administration of Juvenile Justice – Beijing Rules – and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, respectively. Lastly, brought an enhancement to the integral protection doctrine as well as the appearance of a new set of rights: the Right of the Child and Adolescent, that needs to be effective of the true working of all legal institutes and that them be understood "in a perspective of human rights tranversality, since children are equally entitled to, and with priority, all human rights" (NACADC, 2005).

So, we may see that the SCA resulted in great advances towards the guarantee of juvenile justice's rights, mainly if we consider the history of defense's normative history towards the effectiveness of juveniles in conflict with the law in Brazil as subjects of rights.

These guarantees are also materialized on the juvenile justice system, mostly when it was established, at the Inter-American Court of Human Rights (IACHR Court), Advisory Opinion 17 (OC-17)[17], in which children and adolescents had the right to be heard by a competent Court. In Brazil, it occurred through the operability of a judicial process in the face of the commitment of acts analogous to crimes by children and adolescents, judged by the Childhood and Youth Jurisdictions.

Therefore, these juveniles' procedural guarantees must be verified and respected, mainly having in mind the constitutional principles, for example, the principle of legality, that says that "*nobody shall be obligated to do or not do something unless by virtue of law*". And, for it to be effective, it's required that existence of clear laws in relation to the linguistic part, in a way so that can be legal certainty on the correct application of the law. Even acts that are part of the due process, the broad defense or the contradictory must have effectiveness so that the preservation of juveniles' guarantees and rights may occur.

These guarantees must be initiated even before the representation made by the Public Ministry, after the discovery or flagrant of the infraction by the Police. It's from this path, that the process comes to the

17 "100. Bajo esta misma perspectiva, y específicamente con respecto a determinados procesos judiciales, la Observación General 13 relativa al artículo 14 del Pacto de Derechos Civiles e Políticos de las Naciones Unidas, sobre la igualdad de todas las personas en el derecho a ser oídas públicamente por un tribunal competente, señaló que dicha norma se aplica tanto a tribunales ordinarios como especiales, y determinó que los `menores deben disfrutar por lo menos de las mismas garantías y protección que se reconocen a los adultos en el artículo 14". Condición Jurídica y Derechos Humanos del Niño – Opinión Consultiva OC-17/2002 Corte Interamericana de Derechos Humanos, pág 98.

jurisdictions, places where the processes are sheltered, the responsible judges are allocated and where the offices where the audiences for presentation because of the infraction take place. In accordance to SCA's article 103, it will be evaluated the "conduct described as crime or criminal contravention", *id est,* the facts analogous to the criminal types described on the Brazilian Criminal Code, committed by adolescents of age between 12 to 18 incomplete years, considered unimputable for their acts, as they're still in process of development, according to article 104 of the same statute.

However, that doesn't mean that they aren't responsible for their acts, since they comply with socio-educational measures, sentenced by judgement on merits already in the final stage of the process of first instance's juvenile justice. The statute postulates that the following two binomials should be harmonized: legal-sanctioning and ethical-pedagogical, in a way as to resocialize the adolescents. These measures are presented on SCA's articles 112 and 115, and are chosen by a judge with the help of a technical advice from the *Parquet,* in accordance to the infraction committed.

Among all the measures presented on article 112, the most serious are the ones of semi-freedom and confinement, the latter applied when the infraction committed included a threat or use of violence against a person. It's defined by the deprivation of liberty at the socio-educational institutions, although, as the adolescent is developing himself, this measure must follow the principles of brevity and exceptionality imposed by SCA.

In theory, the judge with the help from state's Public Ministry, via technical advice, inspect the adolescent's conditions and determine the most adequate measure. It's important to say that only in cases of flagrant infraction and, unless there is a strict authority's order, the adolescent could be deprived of his freedom, for no later than 45 days via temporary confinement, until there is a sentence by the judge. The state's Public Defense and Lawyers duly registered in the OAB also aid in this process, providing technical defenses capable of changing the process' course.

However, what is seen, according to what was ascertained during the bibliographical review, is the occurrence of an inadequate tendency on the usage and indication of more severe measures by Judges and Prosecutors, by using measures of deprivation of liberty as a way to take the adolescent out of his environment. This is made, for example, when only the authorship and materiality of the offense are considered, without even justifying the measure's motivation. The insufficient application of the integral protection doctrine, where it occurs the mediation between Defense, Prosecutors and Judiciary, when choosing the best measure, then justifies the movement towards a

Juvenile Criminal Law.

According to Miraglia (2005, p. 96), judges do not use SCA in a homogeneous way, neither it is objective. The variables that condition the measure to be applied are, in fact, linked to the type of offense committed, as recommended by the Statute. However, the presence of the parents of the adolescent in the audience counts as a positive point, besides the bond with the school and the relation level/age also is taken into consideration.

Even though the SCA is objective in relation to its norms, there are gaps that may impair the effectiveness of the fundamental guarantees of children and adolescents, especially when we're talking about the exceptional application of socio-educational measures that are private and restrictive of freedom, that is, confinement and semi-freedom, respectively. This happens due to the vague nature of application of the measures, which in many cases do not have definite deadlines for their application, duration and neither clear criteria, leading to their poor execution and often withdrawing their exceptional character, invoking subjectivities and punitivisms with no reason.

The socio-education of adolescents should have the goal of encouraging their qualities and directing them onto healthy trends, but this is not what seems to happen, since in practice the State only wants to fit them into the models of restriction or deprivation of liberty for the implementation of measures. This fact is directly related to the lack of public policies, consequently causing the loss of the objective of social recovery independent of the infraction.

Social recovery is one of the objectives of the SCA, whose basic principle is the integral protection of children and adolescents, showing that socio-educational measures should have a pedagogical rather than sanctioning character. However, this is not what happens in practice, as will be seen in the development of this work.

In Southeastern Brazil, the socio-educational measure of internment is fulfilled in the so-called socio-educational institutes, for example in Rio de Janeiro, they are under GDSEA's[18] responsibility,

18 Created by the Decretee no. 18.493, from 26/01/93, the General Department of Socio-Educational Actions is a Rio de Janeiro's executive agency, responsible for the execution of socio-educational measures recommended by the Statute of the Child and Adolescent (SCA), applied by the Judiciary on youths in conflict with the law. With the objective being to attend the constitutional precepts and in conformity to what happened to be called Socio-Educational System, during the 1988 Constitution of the Republic, there was a political-administrative decentralization. The creation of the New GDSEA occurred from the interlocution between the state government and the Brazilian Center for Childhood and Adolescence – BCCA (a Federal Government agency from 1991 to 1994), in line with the political-governmental guidelines to promotion, defense and guarantee of rights to legal protection. At this period there was an integral absorption of the teenagers attended by BCCA, the same not occurring with the

created by Decree n. 18.493, of 01/26/93, agency of the Executive Power of the State of Rio de Janeiro, it is responsible for the implementation of socio-educational measures, recommended by the SCA, applied by the Judiciary to juveniles in conflict with the law.

GDSEA currently has eight hospitalization units, for example the Don Bosco and SES unit, responsible for the hospitalization of 1,835[19] boys, as well as fifteen units of CIRAC - Center for Integrated Resources for Adolescent Care, spread throughout the city, which are responsible for the execution of the measures of semi-freedom, imposed by judicial sentence to a total of 444[20] adolescents who at some moment of their lives committed infractions.

These centers, in theory, have the objective of a social education, with reeducation and resocialization and, should provide the adolescents with comprehensive education, activities that propitiate professional qualification as a whole. However, this is not what we see in most of them, who suffer from overcrowding, due to the increase in the adoption of socio-educational measures with sanctions and lack of investment.

During a field visit to one of the GDSEA - ESE detention units, located at the Estrada do Guandú do Sena, in the neighborhood of Bangu, in the city of Rio de Janeiro - RJ, within the complex of adult prisons, I was able to perceive this situation of overcrowding, and consequently the lack of structure capable of meeting the needs of adolescents and their own employees, a situation that directly confronts the human rights of all involved.

3. The problem of SCA's doctrines: protection *versus* guarantees

The new stage of Juvenile Justice was initiated by the doctrine of integral protection, its incorporation elevated children and adolescents to a new paradigm: the condition of subjects of rights, inalienable and specific, and duties (SARAIVA, 2003).

The term integral protection for Fachinetto (2003), means the safeguard to the conditions for the present and future happiness, the integral term is related to the due totality and completeness of the human being, especially in its physical, mental, moral, spiritual and social aspects.

Thus, in order for integrality to be effective, and for its regimental principles to function, doctrine was structured in three systems, according to João Batista Costa Saraiva (2005):

Integral protection in the SCA is structured from

physical installations, which resulted in specific demands on the treatment.

19 Data provided by GDSEA, on June 19, 2017

20 Data provided by GDSEA, on June 19, 2017

> *three guarantee systems: the Primary System, the Secondary System and the Tertiary System. The Primary System deals with public policies for the care of children and adolescents and is foreseen in arts. 4 and 86-88. The Secondary System deals with protection measures directed at children and adolescents in situations of personal or social risk, foreseen in arts. 98 and 101. The Tertiary System addresses the criminal liability of the offending adolescent, through the socio-educational measures provided for in art. 112, which can be applied to adolescents who commit infractions. (SARAIVA, 2005)*

This structure causes the failures to be compensated, that is to say, when the child or adolescent does not benefit from the primary prevention system, the secondary system is activated and the Council of Guardianship is responsible. If the adolescent commits an infraction act, the third prevention system is activated, and socio-educational measures are implemented through the justice system (SARAIVA, 2003). It is in the tertiary system that the discussion between integral protection and juvenile criminal law happens, considering all the implications that surround the application of socio-educational measures.

3.1 The Debate and the Literature Review

The social relevance of the theme of this work stems from the existence since the 19th century from the creation of a law and a specific justice for minors in Brazil and in the world. In Brazil, according to a seminal study that reviews the work on the subject, this specific justice will be created for the control of poor childhood, but not destined to childhood in general. Since then, the "minor" category will be related to poor youth, their color, crime and poverty (ALVIM, VALLADARES, 1986).

Nowadays, these young people are daily prosecuted by the State and led to socio-educational centers due to the commitments of infractions and their processes are governed by the Statute of the Child and Adolescent. Thus, it is necessary to ask: What has been the defense of these adolescents carried out by public defenders or private lawyers, so that one can have legal certainty in the acts carried out in court?

As already mentioned, in the Minors Codes the defense of these young people was totally without strength and even nonexistent. This fact, at least in the new code, changed with the creation of the Statute of the Child and Adolescent (SCA) in 1989, guided by the International

Doctrine of "Integral Protection".

According to Méndez (2006), the treatment and perception of juvenile criminal responsibility in Latin America would have gone through three stages: a) the stage of undifferentiated criminal treatment begins with the emergence of 19th century criminal codes and extends until 1919. This is characterized by treating minors in almost the same way as adults (only with decreasing sentence), with the exception of children under seven years of age considered as absolutely incapable; b) the guardianship phase began with the reformers' movement in the late 19th century in the United States and in 1920 with the approval of specialized legislation (juvenile laws) and the Juvenile Courts in Latin America; c) The third stage would have been marked by the UN's Convention on the Rights of the Child of 1989 and inaugurated in the region by the approval of the SCA.

The SCA is a new and advanced legislation regarding the protection of the rights of children and adolescents in Brazil. However, during the development of this work it was possible to perceive that the Statute has divergent currents that guide the interpretation of the type of response to the infractions. Thus, it was relevant to investigate how the dispute for the most adequate interpretation occurred and its reflexes in the defense activity.

According to Costa (2015), SCA approval represented great advances, especially in relation to the history of childhood legislation in Brazil. Despite the pioneering of legislation, there are inaccuracies in the text of the Law and misunderstandings that allow the broad interpretation and that can mean the absence of instrumentality so that one can apply the spirit of the legislator.

According to Brandão (2002), for the principle of legality to fulfill its function, it is necessary that the legislator formulate clear laws as to its language. In criminal law, the lack of clarity in the formulation of the law means an affront to the guarantees of citizens, who are subject to instability and insecurity. The system of socio-educational measures for the author is clear, but it has gaps and ample space for the discretion in its application and execution, also generating inaccuracy in the guarantee of rights.

According to Méndez (2006), the model inaugurated by the statute would constitute a profound rupture with both the guardianship model and the undifferentiated criminal model. Almeida (2016) emphasizes that the statute would have established the difference in legal treatment based on the age group: children, defined in the law as any human being up to 12 years of age, besides being criminally unimputable, are also criminally irresponsible, only receiving protective measures in cases of acts that violate criminal law. However, adolescents, who are between 12 and 18 years old, are also criminally unimputable, but are criminally

responsible, considering that they are criminally liable (even under special law) for any conduct characterized as crime or offense.

The first interpretation defends the position of Integral Protection of Adolescents in conflict with the law, and the second one approaches the existence of a Juvenile Criminal Law, although the authors position themselves as being the statute an avant-garde legislation when it comes to protection of the adolescents' guarantees in conflict, regardless of their position in the two chains.

According to Almeida (2016), adepts of Juvenile Criminal Law consider it necessary to approach the SCA in the interpretation of its articles of Criminal Law, contributing to the logic of guaranteeism that would have guided the formulation of the SCA. For them, recognizing that the teenager is unpunishable does not mean that he can not be criminally responsible for the practice of criminal acts.

In this way, the Juvenile Criminal Law thesis does not derive from the sense of punishment to juvenile criminality, but rather, as its supporters argue, that this interpretation would lead to a "maximum protection" of guarantees typical of Minimum Penal Law within the SCA, restricting authoritarian punishment from the State, ensuring a fair process, with respect to the principles of legality, presumption of innocence and the right of defense through a lawyer. Besides the right to the double degree of jurisdiction, the right of the adolescent to know the representation made against him by the Public Ministry.

According to Almeida (2016) the "penal guaranteeism", conceives of Criminal Law as a system of guarantees that protects the individual rights of citizens, imposing limits on the State's decisions (MACHADO, 2006; FRASSETO, 2005, 2006; SILVA, 2006; SPOSATO, 2002, 95 2006; MINATEL, 2013, ALMEIDA,2016, COSTA 2005).

According to Frasseto (2006), "in the light of guaranteeism […] the only legitimate function of Criminal Law is the preservation of guarantees. […] The emphasis is less on punishment than on control of punishment". However, for many defenders of juvenile criminal law, the only way to protect the authoritarianism of the state on socio-educational measures, and its disengagement from the minors code, would be to see penalties as "penalties", equal to adult criminal law (MINATEL, 2013, p. 27; SILVA, 2006, p.57; SARAIVA, 2013, p. 9; SARAIVA, 2006, p. 178; BARBOSA, 2009, p.51; SOUZA e BARBOSA, 2010, p. 134; 106 ZAPATA, 2010, p. 45; SPOSATO, 2006, p. 253).

On the other hand, the defenders of integral protection, competing doctrine, criticize the position of juvenile criminal law, since this would detract from the doctrine of integral protection by emphasizing the retributive character of the socioeducative measure (VERONESE, 2008:1, 100, 101, GOMES NETO, s/d: 10; PAULA, 2006:35). This interpretation, which is clearly an opposition to the

Juvenile Criminal Law, is supported by Article 228 of CFRB/88, which states: "Any person under eighteen years of age is criminally unpunishable, being subjected to the rules of special legislation", *id est*, afirms that adolescents won't be submitted to the adult criminal system, but to the SCA (DIGIACOMO, 2006, ROSA, 2006; NICKNISH, 2008; PAULA, 2002).

Veronese (2008) also does not envisage the possibility of the socio-educational measure being seen as a penal sanction:

> *"In this differentiated universe, we understand that Law no. 8.069/90 does not effectively contemplate the socio-educational measure as a penal sanction. It is noteworthy the fact that in art. 100 there is evidence of something innovative: 'In the application of measures, pedagogical needs will be taken into account, preferring those that aim at strengthening family and community ties.' Articles 119, II; 120, § 1; 123, §1, likewise ratify the importance of pedagogical activities, which are obligatory, even in temporary admissions, because what is sought is always the rescue of this human person, criminally unpunishable, who, however, transgressed norms. The Statute believes that the best way to intervene in this adolescent in conflict with the law is to have a positive influence on their education, using the pedagogical process as an effective mechanism to enable the adolescents who are the author of an offense in their community. They therefore aim at such measures, to educate for social life" (VERONESE, 2008, p. 2).*

At this point, we reflect that the juvenile criminal law by these characteristics discussed, makes the figure of the lawyer essential throughout the juvenile justice process. The coercive imposition of reeducation measures demands from the point of view of this guaranteeism, that the respect is privileged, mainly, to the principles: of the contradictory, ample defense and legality.

Constitutional principles that are only guaranteed for the defendant or author of the facts, when their defense is exercised, this usually occurs through lawyers or public defenders, who use the technical defense to guarantee fundamental rights.

For supporters of integral protection, the lawyer, as well as judges and prosecutors appear as mediators, to choose the most appropriate measure for the adolescent, and they do not understand that coercive

measures are imposed, since there is a consensus on the choice of them, summarizing: more specialization and less accountability.

For Veronese (1994), an academic on the subject, the role of the lawyer in the Childhood Court is essential for the administration of justice, especially those who commit themselves politically to the cause of Brazilian childhood and adolescence, adding that, while in Brazil no agency of external control over the Judiciary is established, it seems to be evident that such attribution must be given to lawyers who, as truly social engineers, will be able to act, by themselves and by their class entities, in the supervision of the exercise of the judicial function, mobilizing public opinion and serving as a sounding board for true popular control.

Even though the right to defense is essential to the correct progress of juvenile justice, the procedural reality is different from the norms fixed in the codes, since technical defense is not always effective in responding to the gaps in the law or to the discretion of the operators.

According to Costa (2005), it is frequent to observe the absence of material defense, which ends up corroborating the fact that adolescents are convicted of committing an infraction, in which there is a need to frame their behavior as a typical and culpable act. Costa (2005) also affirms that, even though there is effective defense, the most serious socio-educational measure provided for by statutory law is not being applied, or even it is not common to see a second case annulled for lack of respect for constitutional law defense.

Another important factor addressed by Costa (2005) is the difficulties faced by defense overcoming material issues, revealing what lies behind the tacit acceptance of the absence of defense is the subliminal conception that the active presence of a lawyer would be unnecessary, or even that it would hinder the smooth progress of the process.

FINAL CONSIDERATIONS

This work sought to investigate the role of the defense in Juvenile Justice and its reflexes in the guarantees of the rights of adolescents in conflict with the Law in the city of Rio de Janeiro during the process of incrimination of them.

The study sought to show how, in relation to defense, the difficulties and gaps in childhood and youth legislation go far beyond the legal limits. What we meant by this is that, in Juvenile Justice, there are still obstacles against the understanding of the need for a minor's defense against ministerial representation, and the purpose of it is to, through the obedience to the Law, ensure that the procedural rites are being respected and, therefore, the rights and guarantees are truly being

implemented as the adolescents enter the socio-educational system.

We perceived that Juvenile Justice, even though it is a relatively new legislation, still faces numerous difficulties, not overcome yet. Throughout the article some of these problems have been highlighted, such as: 1-) Gaps in SCA legislation about the need for defense at procedural moments and in specific cases, for example at the moment of remission; 2-) Pre-procedural phase without the effective presence of the defense, the agreements are only made between the adolescent and the Public Prosecutor; 3-) Lack of legal provision in the SCA on what the judge should do if the adolescent appears in court, especially at the presentation hearing, without defense; 4-) Lack of prediction in the SCA of defense in hearing of fact presentation considered of lower gravity; and 5-) Lack of prediction by the SCA of the defense in the regression of measures, due to its non-compliance by adolescents.

So, what we see in practice is still a culturally entrenched justice to the characteristics of the irregular situation, where the role of defense, often for lack of practice or institutional inequality, ends up being manipulated by majoritarian positions imposed as if they were "by mutual consent", over what would be the best for the teenager. In other words, it is often agreed with deprivation of liberty even if there was no technical defense, since there's a popular wisdom within the courts that socio-educational measures of confinement would be better because they would take the teenager off the street or his environment, so that he won't commit anymore "crimes" and thus receive appropriate resocializing treatment.

Unfortunately, this practice adopted by many judges and prosecutors is endowed with a vacuum of knowledge of the current state of the socio-educational system, especially of the part that shelters adolescents who are complying with semi-liberty or confinement.

Characteristics such as these directly affect the work done by the technical defense (advocates and public defenders) of adolescents in conflict with the law in the city of Rio de Janeiro, where I was able to highlight four of the main difficulties encountered in practice, as well as in the quantitative data presented in this work. The first one of greater prominence was the presence of an accusatory guardianship system with strong characteristics of an inquisitorial system, which mitigates the role of defense and its essentiality within the procedural rite, as well as, keeps the thinking of the irregular situation. The second one was related to the great procedural burden of Public Defenders' offices and the performance of a small number of private lawyers specialized in childhood and youth, situations that can lead to deficits in technical defense.

The third was linked to SCA legislation that has gaps in some articles on the obligation to defend at certain moments of the juvenile

justice rite, much seen in the pre-procedural phase and mentioned previously; the fourth was related to the Public Ministry, as well as, and especially to the magistrate himself, as they together hold a leading position, placing the defense in a lower position in relation to the establishment of socio-educational measures, thus revealing the institutional differentiation of defense against the triangular structure of the process.

This institutional differentiation that the defense suffers today, as the analysis of the topic made from the bibliographic revision of item 1 and 4 demonstrates, comes from the Code of Minors of 1927, where it was "common" to exist a mitigation of the professional practice of lawyers and public defenders in the defense of young people in conflict with Law. To this day, even with the creation of the SCA, which made the defense mandatory and part in the process, and with the advent of CFRB/88, which considered children and adolescents as subjects of rights, the situation remains and, still remains, the guardianship position of the judge or its action in block with the Public Prosecutor.

Therefore, we have verified that throughout all trajectory of the Brazilian legislation there is the absence or the little relevance of the defense in juvenile justice, characteristics that justify the trail of punitivism existing in the courts due to the silencing of the defense. As it was possible to perceive, in a general manner, the defense, in the light of its many needs, should seek its equality of action, as well as the technique, through methods provided in the legislation itself, mainly within SCA and CFRB/88, to that will try to establish its institutional parity with the Public Prosecution Service, mainly to preserve the rights and guarantees of young people in conflict with the law.

Thus, the role of the lawyer or public defender that should be primarily technical and essential to the process, preserving the observance of rights and guarantees established in the country's legal system and ratified international conventions, so that those juveniles in conflict with the Law always have their physical, moral and psychological integrity respected, both as subjects of rights and as persons in development, although in practice, it ends differently, since these factors are not respected.

It was also tried to demonstrate that the juvenile justice system brought by the SCA has numerous specific characteristics in its judicial organization, its legal formatting derived from its own statute, which is often not followed by the law's operators, which leads to the realization of informal practices, which often contradict the current norm.

Thus, we see that even with the adoption of an accusatory system where all constitutional and procedural guarantees should be respected, we have an inquisitorial system where the rights of adolescents in conflict are disrespected, starting with their defense.

The defense, in the face of this situation, ends up having its work hampered, since there are still inquisitorial remnants[21], marked by ideals incompatible with a technical defense capable of guaranteeing rights and their effectiveness, for example, when it expands in the pre-procedural phase the powers of the Public Ministry on the deliberations to be taken, without the defense being heard previously on the facts. Here, there is no effective defense.

The inquisitoriality of juvenile justice is confused with the role of the juvenile judge, who at the same time is the one who takes initiative, protagonist in the process, but who is lost in the application of measures that should be protective of the young, that is, adolescents from their "environment" to justify confinement. However, what really lies behind this act is the removal of these young people for having figured as social enemies.

This problem is also related to the distancing of the operators (judge, judge, prosecutor and prosecutor) from the reality faced by these juveniles in conflict with the law. Often, decisions are based on the idea of withdrawing only from the environment in which these young people live and little is heard about their life history, the real situation of their families, facts that could lead to a better application of socio-educational measures, especially those of the open medium [22].

21 According to Kant de Lima, the existence of different systems of production of legal truths (LIMA, 1989). Therefore, the definition of a system as accusatory or inquisitorial also goes through the procedures employed to obtain "truths". The so-called quest for "real truth" is, for example, a key category for measuring the functioning of the arbitrary process dynamics of the Brazilian system. The obsession with truth should not lead to the assumption of a role of investigator on the part of the judge. He must conclude his ambition for truth despite the existence of gaps, which must necessarily imply in the acquittal of the defendant, in accordance with the constitutional principle of presumption of innocence. What often happens, however, is the opposite, as Kant de Lima realized: there are no elements to substantiate the condemnation and the judge distorts the process of incrimination when leaving in search of evidence. Some will say that the judge can also go in search of evidence to save the defendant: this is one of the many illusions that can no longer be sustained. It does not make sense to say that it is necessary to look for elements to absolve: if there is doubt, absolution is an imposition by virtue of in dubio pro reo. (SALAH, 2010)

22 It is in this sense that Kant de Lima›s statement that "in Brazil the defendant must prove in practice his innocence" also awakens other inquiries, because in the Brazilian system, the constitutional provision is an accusatory process, where the ownership of the criminal action belongs exclusively to the Public Prosecutor's Office (except in cases of private initiative); the role of the guarantor of the fundamental rights of the accused in the proceedings is up to the judge - as natural judge. How can there be such a distortion of normativity at the moment of its concrete experience? That is the big question: how to solve the Brazilian problem, which lies in the (in)effectiveness of constitutional forecasts, which tend to be deformed by a set of conservative practices in the preliminary phase and in the procedural phase itself? It is a problem that is clearly beyond any normativity, since it concerns the political and corporate

Another situation raised in this work was the problematic of the doctrines in the SCA, where we did an analysis through the bibliographic review on the integral protection *versus* guarantees, that is, a debate locked in the discussion of the existence or not of a juvenile Criminal Law.

We conclude that from the choice of one of the doctrines this can have a direct influence on the participation of the defense within the processes of juvenile justice infraction, for example, the doctrine of integral protection values by the mediation of argument between the operators of the law, to be the judge, promoter and defense for the choice of the socio-educational measure, being the role of defense without so much emphasis, in the measure that all would seek the protection of the adolescent.

As for juvenile criminal law which values constitutional guarantees, the figure of the lawyer is essential during all stages of the proceedings, the coercive imposition of reeducation measures demands, from the point of view of this guarantor base, that respect for the principles of contradictory, ample defense, and legality, constitutional principles that are only assured for the defendant, when his defense is exercised, this through private lawyers or public defenders, who use technical defense to guarantee fundamental rights.

The difference between the doctrines occurs due to the integral protection understanding that the lawyer as well as judges and prosecutors figure as mediators to choose the most appropriate measure for the adolescent, and not accepting that there is an imposition of measures of coercive form, since there is a consensus on the choice of them, summarizing: more specialization and less accountability.

However, what we see in practice does not apply to integral protection, obtained through mediated understanding, since the judicial decisions of Juvenile Justice are based either on the block action with the Public Prosecutor and without regard to Defense, or on the idea

options of those who work in the penal system. In this sense, Kant de Lima's appreciation can not be considered mistaken. It is not absurd to say that in practice the defendant must prove his innocence. The major problem in this sense arises from the insistence on reading the provisions of the Criminal Procedure Code (dated 1941, in full New State), which has a clear inquisitorial characteristic, without interpreting them in accordance with the constitution. Another great problem is the consideration of the elements of the police inquiry for the purpose of the decision to be taken by the judge in the case, as Kant de Lima himself observed (Kant de Lima, 1989, p. 76). As he points out, "The police justify their 'outlaw' behavior by claiming to be sure that it possesses the testimonial, 'true' knowledge of the facts: it was there. He also claims that on certain occasions it is necessary to 'take justice into his own hands' "(Kant de Lima 1989, 76). Even the very attitude of the police authority in relation to the investigated ones is strong indicative of the precariousness of the "evidence" that is collected in the preliminary stage and, therefore, of the necessity of its disconsideration in the procedural stage. (SALAH, 2010)

of free conviction of the judge, that is, what he thinks about the case. In juvenile court proceedings are not summoned and heard parties, neither are heard in loco the other professionals involved in this process, for example, social workers, psychologists, defense. What we see are guardianship judges uttering sentences based on the processes of incrimination and the construction of social stigmas[23] that result in criminal subjection.

Nonetheless the problem is often not directly related to the choice of one or another doctrine within the SCA, that is, it is not only a problem of the order of the legislative or of the way norms are applied. There is also an issue today in the training of professionals and operators in juvenile justice, since there is no differentiated training for those who will work in juvenile justice. More often than not, what we have today are professionals specialized in the criminal justice of adults who will act in the justice of childhood and youth and who do not have the knowledge and experience necessary to operate in this type of specific area.

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25 YEARS OF CDC'S VALIDITY AND THE INTERNATIONAL CONSUMPTION RELATIONS: CHALLENGES AND PERSPECTIVES[1]

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Abstract: This article examines the CDCs lack of normative prediction regarding the cross-border consumption relationship, which is believed to be one of the great challenges for the next years

Key-words: CDC; Consumption relations; cross-border consumption.

1. INTRODUCTION

Exactly 25 years ago, brazilian law was the stage of a huge legislative transformation operated in order to recognize a vulnerable part of the contractual relations. Theretofore, in this aspect, there was exclusively applicated the Civil Law postulates, in rules of civil obligation, guided by the general principle of hierarchic parity between contractors. There were no rules that, considering the real unbalance

1 Translated by Anna Clara Liberal Couto Cícero

or disparity in the negotiation terms presented by the different parties envolved in the acquisition of a product or service, that would allow the incidence of protection rules, aimed to reestablish the balance, although formal, between contractors.

Fullfiling this aspiration, our country, on September 11 1990, through the sanctin of Law nº 8.078, it has come to count on an independente diploma, destinated,2 consistente and harmonic, composed by its own rules and principles, resulted of an constitucional order imposition, that derives from article 49 of the Act of Constitucional Disposition Transitory, which was given a period of 120 days as deadline to Congress, as Constitution is enacted, to craft the Consumer's Defense Code.

Therefore, the 1988's Carta Magna, for the first time in Brazil's history3, the Consumer's Rights existance was constitutionally conceived, as na autonomous legal discipline, treating it as a legal right and fundamental guarantee, of third generation, linked to the social rights dimension. This projection was inserted in subsection XXXII of article 5th – Individual and Collective Rights Chapter –, which led to the cosumer's identification and recognizement as suject in vulnerability condition, autorizing the incidence of a special protection.

Besides recognizing the cosumer's fragility, the constitutional text, as seen, recommended to edit a special law that would establish a positive protection law,4 elevating this measure to the condition of a public order economic principle,5 in art. 170, subsection V, that requires a positive action of public powers, suggesting, at the same time, that it combines the objective of protecting the cosumer with the country's

2 AMARAL JÚNIOR, Alberto do. *Proteção do Consumidor no Contrato de Compra e Venda.* São Paulo: Editora Revista dos Tribunais, 1993. pp. 215-218.

3 MARQUES, Cláudia Lima. "Brésil". In: FERNÁNDEZ ARROYO, Diego P. (ed.) *Consumer Protection in International Private Relationships. La Protection des Consommateurs dans les Relations Privées Internationales.* Asunción: CEDEP, 2010. p. 49.

4 Ver: COMPARATO, Fábio Konder. "A proteção do consumidor na Constituição brasileira de 1998". In: *Revista de Direito Mercantil, Industrial, Econômico e Financeiro.* Nº 80. 1990. pp. 66-75.

5 According to the doctrine, consumer protection as a principle of economic public order functions as an instrument that imposes a limit to free initiative, specifically with regard to the autonomy of the will of professionals and traders. (TEPEDINO, Gustavo. "Les contrats de consommation au Brésil". In: WALD, Arnold; JAUFFRET-SPINOSI, Camille. (Dirs.) *Le Droit Brésilien: hier, aujourd'hui et demain.* Paris: Société de Législation Comparée, 2005. p. 434.) In the same vein, Miragem adds that the fundamental principle inserted in the Brazilian Constitution, in art. 170, subsection V, considers consumer protection as a principle of public order of direction and coordination. (MIRAGEM, Bruno. *Direito do Consumidor: fundamentos do direito do consumidor; direito material e processual do consumidor; proteção administrativa do consumidor; Direito Penal do consumidor.* São Paulo: Editora Revista dos Tribunais, 2008. p. 32.)

social and economic development.6

Similarly, the Federal Constitution determines the law should adopt measures so the consumers would be well-informed about tributes that are imposed to duties and services, in article 150, paragraph 5th, giving constitutional hierarchy to the transparence principle of consuming relations. Besides that, it was established, in the article 24, section VIII, the rule of reimbursement of damages caused to the consumer, whose subject matter is shared competence between the Union, the States and the Federal District.

In addition, the Constituent Assembly mentioned the need to grant protection to the consumer, even though indirectly, in arts. 175, sole paragraph, when referring to the right to use public services, privatized or not; 220, paragraph 4, by setting limits on advertising involving the consumption of tobacco, alcoholic beverages and pesticide products; and 221, in creating guidelines for the use of television and broadcasting.

However, even though the 1988 constitutional text was largely responsible for approving this set of own and special rules for consumer relations which were established in a contractual, pre-contractual or non-contractual manner and which involve the acquisition and / or the use of products and services, the fact is that both the Magna Carta and the CDC no longer deal with the consumer who develops the relationship of consumption beyond national borders. Although it is a cutting-edge Code, which gives consumer protection policy an autonomous status and gives the consumer one of the highest levels of protection in the world, it is a lack of normative prediction regarding the cross-border consumption relationship, which we will analyze next, which we believe will be one of the great challenges for the next years of the CDC.

2. THE BRAZILIAN PRIVATE INTERNACIONAL LAW AND THE CONSUMER

The private International Law, whose main scope must be linked to the concern with the satisfaction of the postulate of the dignity of the human person, plays a fundamental role for the protection of the consumer. In this sense, Fausto Pocar warned in the 1980s that the protection of the vulnerable part, besides being a function of material law, should also be part of the main objectives of the aforementioned discipline.7

In this way, it is assumed that the function of the postmodern iusprivatista right must go beyond the simple indication of the

6 Read: AMARAL JÚNIOR, Alberto do. *Op. cit.* p. 219.

7 POCAR, Fausto. «La protection de la partie faible en droit international privé». In: *Recueil des Cours de l'Académie de Droit International.* Tomo 188. 1984. p. 357.

applicable law or the competent judge and this is evidenced, mainly, in those international relations that demand for a greater protection to the vulnerable subject.

To corroborate the above, Erik Jayme argues that classic private international law had as its main purpose the guarantee of harmony in the international legal community and in the enforcement of foreign decisions. Thus, it was a formal and objective ideal, derived from the influence of great nineteenth-century authors, such as Savigny. Conflict justice was based on the pure idea of connecting, in this case, with a country that justified the application of the law of that State, regardless of the concrete result derived from the application of the rule.8 This view, nowadays, is superseded by the introduction of the idea of the materialization of Private International Law, in the sense that the best law, that is, the most favorable to the vulnerable subject, should be the one that is applicable, which leads to a real relaxation of the methods of the mentioned discipline.

As we will see, the continuation of Private International Private Consumer Law in Brazil is still a pending regulatory issue, although recently, with the approval of the new Code of Civil Procedure, some progress has been made. In this way, we currently have no current regulations designed to offer international protection to the consumer, a situation that aggravates the latter's vulnerability, when it acts with cross-border projection, and becomes a source of mistrust, lack of legal certainty and low credibility in trade International.

2.1. Qualification

Before entering into discussions on applicable law and the competent court in international consumer contracts, it is necessary first to qualify what is meant by consumer in order to determine who is covered by state protection.

In this sense, the CDC, in art. 2, defines the consumer as being any natural or legal person, who acquires or uses a product or service 9 as the final recipient.

As the most authoritative doctrine warns, the Code opted for a broad definition of consumer, with one objective element (the

8 JAYME, Erik. "O direito internacional privado do novo milênio: a proteção da pessoa humana face à globalização". In: *Cadernos do Programa de Pós-Graduação em Direito PPGDir/ UFRGS. Edição em Homenagem à Entrega do Título de Doutor Honoris Causa/UFRGS ao Jurista Erik Jayme.* Vol. I. Nº 1. Mar./2003. p. 61.

9 Likewise, by virtue of the provisions of art. 175 of the Federal Constitution, cited above, consumers are those who use public services. About the topic, search: SCHMITT, Cristiano Heineck. *Consumidores Hipervulneráveis. A Proteção do Idoso no Mercado de Consumo.* São Paulo: Atlas, 2014. pp. 179-180.

destination) and the other subjective (the use of products and services contracted for personal or family needs).10

Thus, in order for the subject to be considered a consumer, he must withdraw the good from the market by acquiring it or simply using it, putting an end to the production chain, by not using it professionally.11

This interpretation, of finalist order, restricts the figure of the consumer to the one who acquires the product or service for his own use or that of his family,12 and has been used doctrinally and jurisprudentially. Nevertheless, it is interesting to note that since the entry into force of the Civil Code of 2002,13 the Superior Court of Justice (STJ) has been adopting a thorough finalist interpretation of art. 2 of the CDC. For the Court, a small company or a professional who purchase products outside their specialty can enjoy the protection of the law. For this, in addition to the need to prove the final destination of the product or service, the vulnerability of the acquirer in the specific case must also be proven.14

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10 MARQUES, Cláudia Lima. "Brésil". *Op. cit*. p. 55.

11 MARQUES, Cláudia Lima; MIRAGEM, Bruno; BENJAMIM, Antonio Herman. *Comentários ao Código de Defesa do Consumidor.* 2ª ed. São Paulo: Editora Revista dos Tribunais, 2006. p. 83. In this sense, let us consider the following judgment that once again defined the concept of consumer adopted in the country: "the term 'final recipient' contained in art. 2, caput of the CDC must be interpreted in the light of the reason why the said decree was issued, that is, to protect the consumer because it is recognized its vulnerability to the consumer market. Thus, consumers are those who withdraw the product from the market and use it for their own benefit. Under this approach, as a rule, a final recipient for the purpose of the protective law can not be considered as one who, in some way, acquires the product or service with a professional purpose, for the purpose of integrating it in the process of production, transformation or commercialization." (STJ. QUARTA TURMA. Recurso Especial nº 1162649/SP. "Federal Express Corporation c/ Indiana Seguros S/A". Min. Relator Luís Felipe Salomão. Julgado em 13/5/2014. Published in: *DJe*, de 18/8/2014. Available in: https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1309746&num_registro=200902092021&data=20140818&formato=PDF, acesso em 20/7/2015.)

12 ODY, Lisiane Feiten Wingert. "O conceito de consumidor e noção de vulnerabilidade nos países do Mercosul". In: *Revista de Direito do Consumidor*. Nº 64. Out./Dez. 2007. p. 86. On the other hand, the maximalist chain asserts that the concept of consumer also applies to relations in which the good or the service acquired is destined to production, that is, to the satisfaction of professional needs, which greatly amplifies the definition given by the law. Here, it does not matter what use will be made of the good or service purchased. According to the doctrine, maximalists consider as consumers those subjects who are actually recipients of the products or services, regardless of whether they are also economic recipients. They therefore advocate a broader interpretation of the term "final recipient". (CRUZ, Carolina Dias Tavares Guerreiro. *Contratos Internacionais de Consumo. Lei Aplicável.* Rio de Janeiro: Editora Forense, 2006. p. 51.)

13 Lei nº 10.406, de 10/01/2002, publicada no *Diário Oficial da União (D.O.U.)* nº 8, de 11/01/2002.

14 Read: "Civil lawsuit. Conflict of competence. Contract. Election Forum. Consumer

In other words, companies can also be considered as consumers, since the Code does not exclude this possibility, also extending the notion of vulnerability, in certain cases, according to the position of the STJ.15 Não obstante, cabe ao fornecedor Nevertheless, it is for the

relationship. Hiring of credit service by company. Final destination characterized. - Those who exercise business assume the status of consumer of the goods and services that they acquire or use as the final recipient, that is, when the good or service, even if it forms part of the business establishment, does not directly integrate - through transformation, assembly , processing or resale - the product or service that may be offered to third parties. - The entrepreneur or business company whose primary activity is the wholesale or retail distribution of medicines must be considered as the final recipient of the payment service by means of a credit card, since this activity does not directly integrate the object product of your company." (STJ. SEGUNDA SESSÃO. Conflito de Competência nº 41.056/SP. "Farmácia Vital Brasil Ltda c/ Companhia Brasileira de Meios de Pagamento". Min. Relatora Nancy Andrighi. Julgado em 23/06/2004. Published in: *DJ*, de 20/9/2004. Available in: https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=474096&num_registro=200302274186&data=20040920&formato=PDF, acesso em 20/7/2015.) In the same sense: "Civil and Consumer Proceedings. Contract of Purchase and Sale of embroidery machine. Manufacturer. Acquirer. Vulnerability. Consumer relationship. Nullity of elective forum clause. 1. The Second Section of the STJ, in ruling REsp 541.867 / BA (...) opted for the subjective or finalist conception of consumer. 2. The finalist theory, however, should be slowed down by allowing the application of CDC rules to certain professional consumers, provided that technical, legal or economic vulnerability is demonstrated. 3. In the present case, it is the conflict between a machine-manufacturing company and a supplier of software, supplies, parts and accessories for the clothing business and a natural person who acquires an embroidery machine for its survival and their economic vulnerability. 4. In this case, the application of the consumer protection rules, namely the nullity of the elective forum clause, is justified. " (STJ. TERCEIRA TURMA. Recurso Especial nº 1010834/GO. "Sheila de Souza Lima c/ Marbor Máquinas Ltda". Min. Relatora Nancy Andrighi. Julgado em 03/08/2010. Published in: *DJe,* de 13/10/2010. Available in: https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=957385&num_registro=200702835038&data=20101013&formato=PDF, acesso em 23/7/2015.

15 In this way, it is interesting to highlight the interpretation given by the STJ regarding the inclusion of the legal person in the concept of consumer. Thus: "A systematic and teleological interpretation of the CDC points to the existence of a presumed vulnerability of the consumer, including legal entities, since imposing limits on the presumption of vulnerability would imply an excessive restriction incompatible with the very spirit of facilitating consumer protection and of the recognition of their hyposufficiency, a circumstance that is not in line with the constitutional principle of consumer protection, provided for in arts. 5th, XXXII, and 170, V, of the CF. In short, the general rule prevails is that the characterization of the consumer condition requires a factual and economic final destination of the good or service, but the presumption of consumer vulnerability leaves room for the CDC's exceptional incidence on business activities, which will only be deprived of protection of the consumer law when proven by the supplier, the non-vulnerability of the corporate consumer. - By inviting the legal entity to the concept of consumer, the intention of the legislator was to grant protection to the company in cases where, by participating in a legal relationship as a consumer, its ordinary condition as a supplier does not give it an equal position vis- contrary. In other words, the

supplier's onus probandi to exclude the application of the CDC from the legal relationship involving a company which is presumably covered by consumer status.16 Therefore, it is important to emphasize that case law tends to assess case by case the vulnerability of the legal entity that is in the position of "average consumer" to specify the objective criterion of the final destination. The possibility that legal entities have the character of "consumers" is one of the characteristics of Brazilian law, but examples of practical application of art. 2, in favor of legal entities in international contracts.17

Still in relation to the subject, it is important to emphasize that the Code allows an extension of the concept under study, when it refers to the equation of certain subjects to the classic figure of the consumer, in arts. 2, single paragraph, 17 and 29, regardless of the contractual relationship generated in a typical consumption relationship.18

Thus, the group of persons, even if indeterminable, who intervened in consumer relations (Article 2, sole paragraph); all victims of damage caused by defect or insecurity generated by the product (article 17); and persons who may be exposed to commercial practices (Article 29) are considered as consumers by equalization or bystander.19 As it turns out, the system set up by the CDC greatly broadens the concept of consumer, since, by adopting the notion of consumer by assimilation, it refers to

> *"un sin número de personas que eventualmente se enfrenten a todo tipo de 'prácticas comerciales'*

legal person must have the same degree of vulnerability that any ordinary person would meet in celebrating that business, in order to maintain the imbalance of the consumption relation. The 'parity of arms' between the supplying company and the consuming company removes the presumption of its fragility. Such a consideration is extremely relevant, since the same legal entity, as a consumer, may be vulnerable in certain consumer relations and in others not." (STJ. Recurso Ordinário em Mandado de Segurança nº 27512/BA. "Plascalp produtos cirúrgicos Ltda c/ Banco Safra S/A". Min. Relatora Nancy Andrighi. Julgado em 20/08/2009. Published in: DJe, em 23/09/2009. Available in: https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=905277&num_registro=200801579190&data=20090923&formato=PDF, acesso em 22/7/2015.

16 Look for judgment mentioned above and SCHMITT, Cristiano Heineck. *Op. cit.* pp. 172-174.

17 MARQUES, Cláudia Lima. "Brésil". *Op. cit.* p. 58.

18 Read: TINAJEROS ARCE, Érika Patrícia. "La protección del consumidor electrónico en los países del MERCOSUR". In: *Revista de Direito do Consumidor*. Nº 54. Abr./Jun. 2005. p. 178.

19 KLAUSNER, Eduardo Antônio. *Direitos do Consumidor no Mercosul e na União Europeia: acesso e efetividade.* 2ª ed. Curitiba: Juruá, 2007. p. 88. This equation also occurs in the event of an air accident, explosion in the establishment of sale of fireworks or in situations of risk involving the relatives of the consumer. (ODY, Lisiane Feiten Wingert. *Op. cit.* p. 88.)

> *como ofertas, publicidad, etc., despertando enormes posibilidades en cuanto a la aplicación de las normas protectoras del CDC, al permitir que la propia sociedad dictamine en este caso qué sujetos quedarán comprendidos."20*

Nevertheless, as Marco Antônio Zanellato warns, this regulation can not be considered without taking into account the integrality of the system established by the Code itself. Therefore, only the consumer who uses the good or service as a result of exposure to an abusive commercial practice, in the pre-contractual phase, will be considered a consumer equivalent. With this, the objective is the protection of potential consumers, without there being a direct relation with a previously completed consumer contract.21

Finally, it is interesting to note that the bills of the Federal Senate that are currently being processed in the National Congress, designed to modify, update and improve the CDC in relation to electronic commerce,22 collective actions 23 and prevention of over-indebtedness 24 of the weak part of the consumption relationship, they all maintained the current consumer qualification.

2.2 International Jurisdiction

Regarding international jurisdiction, one of the main objects of private international law, it is worth mentioning the current system, and, later, the system that will be in place when the new Code of Civil Procedure comes into force.

Therefore, in the absence of special rules, the general rules set

20 MORALES, Mirta. *Un Estudio Comparativo de la Protección Legislativa del Consumidor en el Ámbito Interno de los Países del MERCOSUR.* Rio de Janeiro: Renovar, 2006. pp. 68-69.

21 ZANELLATO, Marco Antônio. "Considerações sobre o conceito jurídico de consumidor". In: MARQUES, Cláudia Lima; MIRAGEM, Bruno (Orgs.). *Direito do Consumidor: fundamentos do direito do consumidor.* São Paulo: Editora Revista dos Tribunais, 2011. pp. 1035-1037.

22 Projeto de Lei do Senado Federal nº 281, apresentado em 02/08/2012. Dispõe sobre a reforma do Código de Defesa do Consumidor e o Comércio Eletrônico. (Available in: http://www.senado.gov.br/atividade/materia/getPDF.asp?t=112481&tp=1, acesso em 01//08/2015.)

23 Projeto de Lei do Senado Federal nº 282, apresentado em 02/08/2012. Dispõe sobre a reforma do Código de Defesa do Consumidor e Ações Coletivas. (Available in: http://www.senado.gov.br/atividade/materia/getPDF.asp?t=112480&tp=1, acesso em 01/08/2015.)

24 Projeto de Lei do Senado Federal nº 283, apresentado em 02/08/2012. Dispõe sobre a reforma do Código de Defesa do Consumidor e a Prevenção ao Superendividamento. (Available in: http://www.senado.gov.br/atividade/materia/getPDF.asp?t=112479&tp=1, acesso em 01/08/2015.)

forth in art. 88 of the Code of Civil Procedure, Law No. 5,869,25 of January 11, 1973, according to which Brazilian judges are concurrently competent when: the defendant is domiciled in Brazil (item I);26 the obligation is fulfilled in the country (item II); and the action originates from facts or acts occurred in Brazil (item III). In other words, if the supplier is domiciled in Brazil, if the purchase of the product or service has occurred in our country, or if the service is provided in Brazil, the Brazilian judge will have jurisdiction, which restricts the hypotheses of access to justice for the cross-border consumer, especially the tourist consumer, who goes beyond national borders in search of products and services. In the same sense, consumers who enter into an international consumer agreement by electronic means, when they access a US product site and purchase imported goods directly from the foreign supplier, will also be exposed to this situation of restriction to judicial provision, if the abovementioned provisions are applied literally.

Nevertheless, considering the existence of provision in domestic law on jurisdiction for cases of civil liability for the fact of the product, national jurisprudence has accepted the forum of the state of the domicile of the consumer,27 and, thus, the Brazilian jurisdiction, as

25 Law published in *Diário Oficial da União (D.O.U.)* nº 17, em 17/01/1973. Entered into effect on 01/01/1974 (art. 1.220).

26 Under this provision, case-law has shown a strong tendency to protect consumers in international consumer contracts in which the foreign element of the contractual relationship is not obvious, particularly in cases involving a breach of contract, product defect or defect or service. In these matters, the courts are holding the supplier in the distribution chain of the good in the market, since it is domiciled in Brazil. On the subject, see: a) regarding the responsibility of travel agencies for non-execution or poor service provision and damages caused by transporters, hotels and other service providers in the tourist travel course – STJ – Recurso Especial nº 291.384/RJ, judged on 15/05/2001 e Recurso Especial nº 1.102.849/RS, julgado em 17/04/2012; b) com relação à responsabilidade solidária do comerciante encarregado da venda ou manutenção do produto, por vícios do produto importado - TJ/RS – Apelação Civil nº 70.001.577.154, julgada em 22/11/2000 e TJ/RJ – Apelação Civil nº 2005.001.44.994, julgada em 18/07/2006. (KLAUSNER, Eduardo Antônio. "A proteção do consumidor na globalização". In: TRIBUNAL DE JUSTIÇA DO ESTADO DO RIO DE JANEIRO. *Revista Jurídica.* Nº 5. 2013. p. 16. Available in: http://app.tjrj.jus.br/revista-juridica/05/files/assets/downloads/publication.pdf, acesso em 30/06/2014.)

27 STJ. Agravo em Recurso Especial nº 196.780/MS. "Baumer S.A. c/ Unimed Campo Grande MS Cooperativa de Trabalho Médico". Min. Relator Ricardo Villas Bôas Cueva. Julgado em 31/10/2014. Published in: *DJe*, de 11/11/2014. Available in: http://www.stj.jus.br/SCON/decisoes/doc.jsp?livre=foro+e+estrangeiro+e+consumidor&&b=DTXT&p=true&t=JURIDICO&l=10&i=3, acesso em 23/7/2015. In the same understanding, read recent judgment, in which the jurisdiction of the courts of the domicile of the consumer, in Brazil, was recognized for action for compensation for moral damages resulting from an international relation of consumption, with place of fulfillment in Santiago, Chile. (STJ. Agravo em Recurso Especial nº 518.735/MG. "Sheraton Santiago Hotel y Convention Center c/ Robervan Gomes Costa de Faria". Min. Relator Ricardo Villas Bôas Cueva. Julgado em 12/06/2015.

being competent in the international sphere 28 (look for the Panasonic case),29 although, in fact, this rule, foreseen in art. 101, subsection I of the CDC,30 is not intended to regulate the international jurisdiction of Brazilian courts.31

Regarding the choice of forum, in international consumer contracts, it is important to note that the Secretariat of Economic Law of

Published in: *DJe*, de 01/07/2015. Available in: http://www.stj.jus.br/SCON/decisoes/doc.jsp?livre=foro+e+estrangeiro+e+consumidor&&b=DTXT&p=true&t=JURIDICO&l=10&i=1, acesso em 23/07/2015.)

28 Critical to the application of the CDC, which includes rules exclusively for the solution of internal conflicts, to cases which are typically international, can be consulted in: KLAUSNER, Eduardo Antônio. "A globalização e a proteção do consumidor brasileiro". In: *Revista de Direito do Consumidor*. Nº 97. Jan./Fev. 2015. pp. 78-82.

29 The Panasonic case is a leading case of Brazilian law in the field of international consumption. In it, a consumer domiciled in Brazil went to the United States, where he bought a camcorder manufactured and sold by Panasonic of this country, exclusively for its domestic market. Upon arriving in Brazil, the consumer noticed that the camcorder had a defect in its operation. By majority, the STJ condemned the Brazilian Panasonic, a legal entity distinct from Panasonic North American, to respond by the vices of the product, being the same brand of those goods manufactured in the national territory. (STJ. QUARTA TURMA. Recurso Especial nº 63.981-SP. "Plínio Gustavo Prado Garcia c/ Panasonic do Brasil Ltda". Min. Relator Sálvio de Figueiredo Teixeira. Julgado em 11/04/2000. Published in: *DJ*, de 20/11/2000. Available in: https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=IMG&sequencial=69638&num_registro=199500183498&data=20001120&formato=PDF, acesso em 22/07/2015.) Based on this decision, the legitimacy of the consumer domiciled in Brazil was acknowledged to bring suit before the judges of his domicile against any legal entity with headquarters in the national territory that includes the same economic group of the supplier located abroad and producer of the consumer good, or against the company that uses the same trademark to identify its products, seeking the attribution of responsibility for defects and damages arising from the product or service acquired abroad. (KLAUSNER, Eduardo Antônio. "A proteção do consumidor na globalização". *Op. cit*. p. 15.)

30 From another perspective, it is maintained that art. 101, item I of the CDC, read in conjunction with arts. 81 and 90 of the same Code, causes that, in the actions of responsibility of the foreign supplier, whose author has its consumer rights protected under Brazilian law, the jurisdiction of the Brazilian courts is exclusive, excluding any other. (LIMA, Eduardo Martins de. *Proteção do Consumidor Brasileiro no Comércio Eletrônico Internacional.* São Paulo: Atlas, 2006. p. 100.)

31 It is worth mentioning that in Brazil, both jurisprudence and doctrine accept the jurisdiction of the Brazilian courts based on art. 101, item I of the CDC, even if it is not a rule of international jurisdiction, in cases in which the consumer is domiciled in Brazil and the suit is filed before a Brazilian judge, including whether the products were purchased abroad (Panasonic case) , or if the time-sharing contract has a place of fulfillment outside the country (Punta del Este case), but only if the consumer is a natural person. (FERNÁNDEZ ARROYO, Diego P. "Consumer protection in international private relations". In: FERNÁNDEZ ARROYO, Diego P. (ed.) *Consumer Protection in International Private Relationships. La Protection des Consommateurs dans les Relations Privées Internationales.* Asunción: CEDEP, 2010. p. 678.)

the Ministry of Justice, through Administrative Rule no. 4,32 of March 13, 1998, item no. 8, was contrary to this possibility, when determining that the choice of forum in consumer relations is unfair if the forum resulting from the election is different from the one where the consumer resides.33 Although this is a prediction for domestic jurisdiction, the doctrine and jurisprudence have maintained that the same applies to contracts with consumers that show elements of internationality. This is due to the fact that the CDC considers that access to justice (article 6, item VIII) and the facilitation of defense (articles 6, item IV and 51, item IV) are consumer rights, resulting in null and void the choice of forum clauses in the internal contracts of adhesion, and this solution should also be extended to contracts that include elements of internationality..34

The abovementioned doctrinal and jurisprudential construction served as the basis for the drafting of art. 22 of the new Code of Civil Procedure, Law 13,105,35 which will come into force on March 18, 2016. Thereafter, the country will have a specific rule on international jurisdiction to provide protection to cross-border consumers, as it will be facilitated by access to justice.

In this way, art. 22, item II of the new Code establishes that Brazilian judges shall have international jurisdiction when the consumer is domiciled or resident in Brazil. This special rule, in my opinion, will remove the hypotheses of international jurisdiction set forth in art. 21, which, in turn, maintained the rules already covered by the Code of Civil Procedure of 1973, referred to above, applicable to contractual and extra-contractual relations. Nevertheless, it remains to be seen whether the intention of the legislature, when drafting the special jurisdictional hypotheses provided for in art. 22, aimed at conferring protection on vulnerable subjects, would be to attribute to this article the condition of exclusive international jurisdiction - so as to exclude the jurisdiction of the foreign judge - or of competing international jurisdiction - which

32 Norma publicada no *Diário Oficial da União (D.O.U.)* nº 49-E, em 16/3/1998. Available in: http://sistemas.rei.unicamp.br/pdf/portaria-n-4-do-ministerio-da-justica-1998-aditamento-ao-rol-de-clausulas-abusivas-do-cdc-Attach_s437111.pdf, acesso em 25/09/2015.

33 For consumption contracts, the provisions of Supreme Court Order No. 335 of the STF, an instrument designed to standardize national case law, do not apply, which establishes that the forum choice clause is valid for contract cases.

34 MARQUES, Cláudia Lima. "Brésil*". Op. cit.* p. 65. Further, the author emphasizes the nullity of these clauses, maintaining that the jurisprudence has invalidated the clauses of election of forum included in international contracts, notably those of adhesion, concluded by consumers, individuals, domiciled in Brazil, when these lead to the determination of a foreign judge, which represents a difficulty and an abuse (article 51, subsection IV of the CDC) for access to justice for consumers residing in Brazil, a constitutionally protected right (article 5 of CF / 1988). (MARQUES, Cláudia Lima. "Brésil*". Op. cit.* p. 68.)

35 Lei publicada no *Diário Oficial da União (D.O.U.)* nº 51, em 17/03/2015.

would allow the conduct of international actions consumer before foreign jurisdiction, other than that of the consumer's domicile. In any event, I am in favor of the idea that it is a rule of exclusive jurisdiction, which is of a public international character, a measure designed to facilitate access to cross-border consumer access to judicial services.

Following this line of reasoning, art. 25, paragraph 1 of the new Code, by allowing the election of a forum in international contracts, and by excluding the jurisdiction of the foreign authority chosen, when the Brazilian judge has exclusive jurisdiction, must be interpreted on the basis of maximum consumer protection, lack of specific reference to contracts concluded by consumers. In other words, if the intention of the legislator was to facilitate access to justice for the weak juridical, the supplier can not, in an agreement of adhesion, dismiss the application of this postulate, indicating as competent a foreign judge. Therefore, the jurisdiction of the judges of the domicile or residence of the consumer can not be dismissed, and the election of forum in the international consumer contracts, celebrated in Brazil.

2.3. Applicable Law

Regarding the applicable law, it is important to point out that some doctrinal and jurisprudential currents in Brazil are not very receptive to the application of the principle of autonomy of the parties' will, although, given the development of international trade, greater acceptance of the choice of law applicable to international contracts,36 mainly commercial ones.

This division of understanding is due to the inexistence of an express rule regarding it, except in the case of international commercial arbitration. Therefore, as a rule, art. 9 of the Law of Introduction to the Norms of Brazilian Law, which refers to the law of the place of celebration to qualify and govern the contractual obligations between

36 Here, it is interesting to bring to the end a res judicata in 2008, in which the application of the CDC was rejected, as it was not a consumption relationship, in a contract entered into between the VARIG airline and General Electric Company for the purchase of an aircraft engine in which the applicable law was chosen. In analyzing the case, the Court pointed out that once the contract law has been chosen, in a free expression of will, the agreement becomes a compromise that can not be dismissed by allegation of application in an international contract of the CDC, domestic law, under the argument that, to the contrary, would imply an offense against public order. (STJ. Corte Especial. SEC nº 646/US. "VARIG S/A Viação Aérea Rio-Grandense c/ General Electric Company". Min. Relator Luiz Fux. Julgado em 05/11/2008. Published in: *DJe*, de 11/12/2008. Available in: https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=835111&num_registro=200600279049&data=20081211&formato=PDF, acesso em 22/07/2015.)

present.37 As a result of this normative forecast, contracts concluded by consumers in Brazil, whether they are residents or consumers tourists, will, in principle, be governed by Brazilian law. On the other hand, contracts concluded by Brazilian consumers abroad will, in principle, be subject to the foreign law of the place of conclusion of the contract.38

Nevertheless, it is important to note that paragraph 2 of the said article establishes that the obligation resulting from the contract is considered to be constituted in the place where the tenderer resides, for those contracts concluded between absent or remote,39 this may include contracts concluded by electronic means.40 Thus, by transposing the rule to international contracts concluded by consumers, there is an inconsistency 41 contained in current Brazilian law, resulting from the lack of specific rules to protect the vulnerable part of the international consumer relationship. This is because, by virtue of the qualification contained in art. 30 of the CDC, which considers that the tenderer in consumer contracts is the supplier, there is a rule here that, if applied, determines that the law governing the international contract will be that of the State where the supplier's headquarters.42 In other words, the

37 At this point, it is interesting to retake the Panasonic case, to mention that the rules of conflict of the forum, especially art. 9 of the Law of Introduction to the Norms of Brazilian Law, to apply, immediately, the CDC. (Sobre o tema, ver: ZANCHET, Marília. "A proteção dos consumidores no Direito Internacional Privado brasileiro". In: *Revista de Direito do Consumidor.* Nº 62. Abr./Jun. 2007. p. 209.) Comentando o caso e destacando a tendência dos juízes brasileiros de ignorar o caráter internacional da relação jurídica para aplicar somente o CDC, Read: ARAÚJO, Nádia de. *Direito Internacional Privado. Teoria e Prática Brasileira.* 3ª ed. Rio de Janeiro: Renovar, 2006. p. 371.

38 CERQUEIRA, Fernanda Vieira da Costa. "Le régime de détermination de la loi applicable aux contrats conclus par les consommateurs en droit français et en droit brésilien». In: STORCK, Michel; CERQUEIRA, Gustavo Vieira da Costa; COSTA, Thales Morais da (Dir.). *Les Frontières entre Liberté et Interventionnisme en Droit Français et en Droit Brésilien.* Études de Droit Comparé. Paris: L'Harmattan, 2010. p. 417.

39 Valladão already warned that the rule of art. 9, paragraph 2 was a non-intelligent copy of the provisions of art. 185 of the Bustamante Code, which departs from the tradition adopted in Brazilian law and refers to the use of the connection point of the place where the contract was proposed. (VALLADÃO, Haroldo. *Direito Internacional Privado.* Vol I. Rio de Janeiro: Livraria Freitas Bastos, 1980. pp. 373-374.)

40 Regarding the form of international contracts, art. 9, paragraph 1 of the referred Law refers to the rule of locus regit actum.

41 As the doctrine warns, the Brazilian norm contained in art. 9, paragraph 2 is overcome, and it is necessary to choose consumer contracts, which are different from international commercial contracts, for a more consumer friendly connection. (MARQUES, Cláudia Lima. "Por um direito internacional de proteção dos consumidores: sugestões para a nova lei de introdução ao Código Civil brasileiro no que se refere à lei aplicável a alguns contratos e acidentes de consumo". In: *Revista da Faculdade de Direito da UFRGS.* Nº 24. 2004. pp. 113-114.)

42 MARQUES, Cláudia Lima. *Confiança no Comércio Eletrônico e a Proteção do Consumidor (um estudo dos negócios jurídicos de consumo no comércio eletrônico).* São Paulo: Editora

foreign supplier, who directs his commercial activities to the Brazilian market, will have the benefit of seeing applied to the legal relationship - with foreign elements and with a vulnerable part - the right that he knows and uses in the daily .

Finally, as Cláudia Lima Marques maintains, the best solution for Brazilian law would be to adopt a flexible norm that would indicate the law of domicile43 of the consumer as applicable 44 and, in addition, would allow the court to apply the law chosen by the parties in the contract only if it was the most favorable to the consumer.45

3. REFORM DRAFTS

Although in Brazil there have been a series of attempts aimed at modernizing and updating the Law of Introduction to the Norms of Brazilian Law,46 most of them have not even dedicated a specific provision to regulate international contracts with consumers.47

Revista dos Tribunais, 2004. pp. 440-441.

43 Recently, Brazilian legislation was applied to decide international consumption demand, promoted in Brazil, by a consumer domiciled in the country, against a supplier based in Santiago, Chile, for damages resulting from poor service rendering.Read: STJ. Agravo en Recurso Especial nº 518.735/MG. "Sheraton Santiago Hotel y Convention Center c/ Robervan Gomes Costa de Faria". Min. Relator Ricardo Villas Bôas Cueva. Julgado em 12/06/2015. Published in: *DJe*, de 01/07/2015. Available in: http://www.stj.jus.br/SCON/decisoes/doc.jsp?livre=foro+e+estrangeiro+e+consumidor&&b=DTXT&p=true&t=JURIDICO&l=10&i=1, acesso em 23/07/2015.

44 Part of the Brazilian doctrine holds that the law of the domicile or residence of the consumer should be applied when the contract is preceded by an offer or publicity made in Brazil. Thus, if the contract is preceded by an offer or publicity specifically addressed to the consumer and if in Brazil all the acts necessary to conclude the contract have been carried out, the law of the domicile or residence of the consumer is the one that has the closest links with the consumer. established business and therefore should apply. In addition, the risks must be borne by the supplier who directs his activities to the country where the consumer is domiciled using modern technologies for distance marketing. (CERQUEIRA, Fernanda Vieira da Costa. *Op. cit.* p. 418.)

45 MARQUES, Cláudia Lima. *Confiança no Comércio Eletrônico e a Proteção do Consumidor (um estudo dos negócios jurídicos de consumo no comércio eletrônico). Op. cit.* p. 445.

46 For more details, read: RAMOS, André de Carvalho. "Direito Internacional Privado de matriz legal e sua evolução no Brasil". In: *Revista da AJURIS*. Vol. 42. Nº 147. Mar./2015. pp. 106-108.

47 Refers to: a) ao Anteprojeto de Lei Geral de Aplicação das Normas Jurídicas, de 1964 by Professor Haroldo Valladão (Available in: VALLADÃO, Haroldo. *Lei Geral de Aplicação das Normas Jurídicas: anteprojeto oficial (Decretos 51.005, de 1961 e 1490, de 1962)*. Rio de Janeiro: [s/ed.], 1964); b) ao Projeto de Lei nº 4.905/1995, do Poder Executivo Nacional, originado da Comissão dirigida pelos Professores Jacob Dolinger e João Grandino Rodas, que dispõe sobre a aplicação das normas jurídicas (Available in: http://hmjo.tripod.com/Dipr/95projetolei.html, acesso em 01/08/2015); c) ao Projeto de Lei do Senado Federal

It is only from 2010 onwards that the previously mentioned stance has lost its strength, taking place the need to discipline international consumer relations. In this sense, on December 22 of this year, the Senate Bill No. 166/2010 was presented to the Chamber of Deputies, which gave rise to the new Code of Civil Procedure,48 previously commented.

Corroborating the terms of the recently adopted Code, based on the work of the Temporary Committee of Jurists 49 specially constituted to take part in the CDC modernization project, normative proposals were introduced that provide for complementary rules regarding international jurisdiction and law applicable to international consumer contracts, which were condensed into a single instrument, designed to reform the Consumer Code.

In this sense, Bill 281 on electronic commerce, presented on March 14, 2012, contemplates in the matter of international jurisdiction for the actions of contractual and extracontractual civil liability, a new wording attributed to art. 101, which opens the jurisdiction of the judge of the domicile of the consumer for the international actions in which he is the plaintiff or defendant, following, with respect to the first

nº 243/2002, de autoria do Senador Moreira Mendes, que dispõe sobre a reforma da Lei de Introdução ao Código Civil brasileiro (Available in: http://www.senado.gov.br/atividade/Materia/getPDF.asp?t=41601&tp=1, acesso em 01/08/2015); d) ao Projeto de Lei do Senado Federal nº 269/2004, de autoria do Senador Pedro Simon, que dispõe sobre a aplicação das normas jurídicas (Available in: http://www.senado.gov.br/atividade/materia/getPDF.asp?t=42614&tp=1, acesso em 01/08/2015); e) ao Projeto de Lei da Câmara Federal nº 1.782/2011, de autoria do Deputado Federal Carlos Bezerra, that disposes about art. 9º, parágrafo 2º da Lei de Introdução ao Código Civil (Available in: http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=DFBD62645919FCC76F7CAD32FFC35839.proposicoesWeb1?codteor=896907&filename=PL+1782/2011, acesso em 01/08/2015). For the first projects mentioned, see: VIEIRA, Luciane Klein. "La codificación del derecho internacional privado en Brasil: los principales instrumentos legislativos y el contexto histórico". In: *Revista Electrónica ElDial. Suplemento de Derecho Internacional Privado y de la Integración*. Nº 33. Nov./2007. Especificamente sobre o Projeto nº 4.905/1995, ver: FIORATI, Jete Jane. "As inovações no direito internacional privado brasileiro presentes no projeto de lei de aplicação das normas jurídicas". In: *Revista dos Tribunais. Cadernos de Direito Tributário e Finanças Públicas.* Nº 17. Out./Dez. 1996. pp. 22-39.

48 O Projeto de Lei, finalmente aprovado em 16/03/2015, incrementa a regulação referente à cooperação judicial internacional. (Available in: http://www.senado.gov.br/atividade/materia/getPDF.asp?t=79547&tp=1, acesso em 01/08/2015.) About the theme read: FELDSTEIN DE CÁRDENAS, Sara L.; VIEIRA, Luciane Klein. "El derecho procesal internacional brasileño de fuente interna: análisis de la nueva propuesta de Código de Proceso Civil". In: *Revista Electrónica ElDial. Suplemento de Derecho Internacional Privado y de la Integración*. Nº 55. Sept./2010.

49 This Committee was constituted by: BENJAMIN, Antônio Herman; MARQUES, Cláudia Lima; GRINOVER, Ada Pellegrini; WATANABE, Kazuo; BESSA, Leonardo Roscoe; PFEIFFER, Roberto.

option, the criterion adopted by the new Procedural Code. In addition, it allows the consumer residing in Brazil50 other available forums, such as the courts of the place where the contract is concluded or carried out, and the courts of the supplier. Likewise, at the end of the article, the Project inserts the possibility that the consumer may bring suit before the court judge most closely connected to the case, introducing the principle of proximity in the country. Furthermore, the normative proposal, expressly, determines that the clauses of election of forum, whether judicial or arbitral, inserted in international consumer contracts will be null and void.51

Thus, the projected standard, in the sole paragraph of art. 101, adds a rule on the law applicable to claims intended to establish the civil liability of the supplier, resulting from consumer relations, providing that disputes arising from international distance supply, the law of the domicile of the consumer or the state rule chosen by the parties, provided that it is the most consumer-friendly.52

On the other hand, it is important to mention that the Project was the object of more than 31 amendments, in total, presented in the scope of the Federal Senate. Regarding the proposed changes, the need to amend the Law of Introduction to Brazilian Law Norms was introduced to insert art. 9th,53 which specifically refers to the law applicable to

50 The determination that the consumer should be resident in Brazil was inserted by the Federal Senate into the text prepared by the Temporary Committee, with the justification of clarifying the privilege of the forum of consumers resident in the country, in order to avoid incongruities. (Read: FERRAÇO, Ricardo. *Parecer da Comissão Temporária de Modernização do Código de Defesa do Consumidor.* Available in: http://www12.senado.gov.br/noticias/Arquivos/2013/12/17/integra-do-relatorio-final, acesso em 26/06/2014.)

51 Read: "Article 101. In the action of contractual and extracontractual liability of the supplier of products and services, including in the domestic and international distance supply, without prejudice to the provisions of Chapters I and II of this Title: I - jurisdiction of the domicile of the consumer, in the demands in which the consumer residing in Brazil is defendant and that deal with consumer relations; II - the consumer residing in Brazil, in the demands in which he is the author, may choose, in addition to the forum indicated in item I, the domicile of the supplier of products or services, the place of conclusion or execution of the contract or another connected to the case; III - the clauses of election of forum and arbitration concluded by the consumer are null and void. Single paragraph. Conflicts arising from international distance supply shall be governed by the law of the domicile of the consumer, or the State rule chosen by the parties, provided that it is more favorable to the consumer, and also ensures access to justice. "

52 Notwithstanding the importance of the wording given to art. 101, at the end of 2013, Senator Valdir Raupp's Amendment No. 31 was presented, aiming to suppress the modification proposed by the article. Finally, the main amendment was rejected by other senators in early 2014.

53 In the report on the suggested modifications to the bill in question, Senator Ricardo Ferraço, as justification for the insertion of art. 9º A to the text originally presented by the Temporary Committee, maintained that the Report updates the norms governing international

international consumer contracts.

Thus, the amendment inserted on November 26, 2013, which finally added art. 9a, determines the use of the point of connection relating to the law of the State of domicile of the consumer to govern contractual relations of consumption. However, it limits the notion of consumer by restricting the scope of the article to individuals only, excluding the legal entity. As far as international supply at a distance is concerned, it provides for the application of the law of the domicile of the consumer or also allows the use of the autonomy of the parties' will to choose the applicable law, provided that the state standard chosen is the most favorable to the consumer, clearly excluding the possibility of choosing a soft law instrument to regulate the contract because of the presence of a vulnerable party. In addition, it highlights the application of the mandatory rules in force in the country, as a way to offer a minimum of protection to the cross-border consumer, when the contract has been concluded in Brazil or in the country has to be fulfilled, or if the contracting was preceded by any marketing activity directed to the Brazilian territory. Innovating in the matter of international protection of the consumer, it brings measures to govern the contracts celebrated by the tourist, qualifying the term and determining that the law of the place of celebration of the pact should be applied to the contract. Likewise, in this case, it is possible to choose the applicable law, conditioned it to select the law of the place of execution of the contract or the law of the domicile of the consumer. Finally, the amendment determines that contracts with tourism agencies or operators, concluded in Brazil, regarding international travel packages or combined with accommodation and tourism services, which are fulfilled outside the country, are governed by Brazilian law.

On March 19, 2014, the referred amendment suffered some adjustments when it was put to a vote in the Federal Senate. From then on, the normative proposal tending to insert art. 9a A to the Introductory Law referred to above reads as follows:

> *International consumer contracts, understood as those carried out between a consumer, natural person, whose domicile is located in a country other than that in which the establishment of the supplier of products and services involved in the*

trade, foreseen in art. 9 of the Law of Introduction to the Norms of Brazilian Law, especially when it is carried out by electronic means. Therefore, according to the Senator, there is no way to disregard, in the substitutive proposal to Senate Bill No. 281, the new international dimension of consumption, otherwise the CDC and Brazilian legislation will not be prepared for the coming years and for the big sporting events that will result in the increase of the tourism in Brazil. (FERRAÇO, Ricardo. *Op. cit*.)

> *contracting is governed by the law of the place of celebration or, if executed in Brazil, by Brazilian law, provided that it is more favorable to the consumer. § 1 If the contracting is preceded by any business or marketing activity, the supplier or its representatives addressed to or performed in Brazil, in particular sending advertising, correspondence, e-mails, commercial messages, invitations, prizes or offers, the provisions of Brazilian law shall apply, as long as they are more favorable to the consumer. § 2 The contracts of international travel packages or combined travel, with tourist groups or in conjunction with hotel and tourism services, with fulfillment outside Brazil, contracted with tourism agencies and operators located in Brazil, are governed by Brazilian law.54*

As can be seen, the changes recently made have a more territorialist connotation, in that the substitution of the law of the domicile of the consumer to govern the international contract by the imposition of the criterion of the law of the place of celebration, adopted by Private International Law Brazilian, if the contract is fulfilled in Brazil, provided that Brazilian material law is more favorable to the consumer. Likewise, the provision concerning the law applicable to international distance supply was deleted, as it had already been inserted in the sole paragraph of art. 101, as well as the reference to the contracts concluded by the tourist. However, the provisions regarding the application of Brazilian mandatory rules were maintained for cases in which supply and marketing were carried out in Brazil or in Portuguese, indicating that they were addressed to the consumers domiciled therein and the forecast for package contracts of international travel or combined with accommodation and tourism services, which are met outside the country, to which lex fori55 should be applicated because it is the law

54 Available in: http://www.senado.gov.br/atividade/materia/getTexto.asp?t=173020, acesso em 26/9/2015.

55 To illustrate the normative provision, the decision of the Special Civil Court of Rio de Janeiro, which acknowledged the purchase of a tourist package to accompany the World Cup held abroad as an international contract, can be brought to the fore, to which it must be applied the Brazilian law.

(JUIZADO ESPECIAL CÍVEL DO ESTADO DO RIO DE JANEIRO. Recurso Inominado nº 1999.700.003064-2. "Exceler Agência de Viagens, Turismo e Câmbio Ltda c/ Luiz Augusto de Souza Pires". Rel. Myriam Medeiros da Fonseca Costa. Julgado em 31/08/1999. Available in: http://www4.tjrj.jus.br/ejud/ConsultaProcesso.aspx?N=1999.700.003064-2, acesso em

of the place of conclusion of the contract. Moreover, as can be seen from the simple reading of the new version of the projected article, the possibility of the parties choosing the law applicable to the international consumer contract was suppressed, thereby banning the autonomy of the conflicting will.

Finally, it is important to mention that the Project, besides strengthening the principle of the application of the law more favorable to the consumer, contemplates this postulate, expressly, in the first articles destined to update the CDC, when inserts the paragraph 2º to the current art. 7 of the aforementioned norm, which imposes the application to the consumer of the norm more favorable to the exercise of his rights and claims.56

On March 26, 2014, the final opinion of the Temporary Committee on Modernization of the CDC,57 which contemplates the amendments suggested by the parliamentarians for the referred Project. Currently, the project is in process 58 in the National Congress, having been approved, on September 30, 2015, within the scope of the Federal Senate.59

4. CONCLUSION. PROSPECTS FOR THE FUTURE

As we have seen, the CDC, as it does not have normative provisions regarding the international relation of consumption, urgently needs to be reformed in this sense, as a way to offer more legal security and consumer confidence.

Although national case law has been seeking to fill existing gaps with rules that are intended to protect the vulnerable part of the contractual relationship, it is inconceivable that we do not yet have explicit rules in this regard, despite the fact that , recently the new Code of Civil Procedure provided for the international jurisdiction of the judge of the domicile of the consumer for the demands promoted by the

20/07/2015.)

56 About the theme, read: AZEVEDO, Fernando Costa de; KLEE, Antônia Espíndola Longoni. "Considerações sobre a proteção dos consumidores no comércio eletrônico e o atual processo de atualização do Código de Defesa do Consumidor". In: *Revista de Direito do Consumidor.* Nº 85. Jan./Fev. 2013. pp. 235-236.

57 See the Final Report of the Temporary Committee for Modernization of the CDC, approved by the Federal Senate. Available in: http://www.senado.gov.br/atividade/materia/getPDF.asp?t=147360&tp=1, acesso em 31/03/2014.

58 The follow-up of the project can be done in: http://www25.senado.leg.br/web/atividade/materias/-/materia/106768, acesso em 30/09/2015.

59 The proposal should be voted in turn in the Federal Senate to be later sent to the Chamber of Deputies.

vulnerable party.

It is hoped that Bill No. 281/2012 can be approved, and that we will soon have express rules regarding the law applicable to international consumer contracts and international legal relationships derived from contractual and non-contractual civil liability, from the point of view of maximum consumer protection. This objective can be perfectly achieved by applying the criterion that determines the application of the law of the State of the domicile of the consumer as a minimum standard of protection and the most favorable law60 to the latter, in the cases of election of the state law that will govern the international contract.

Ideally, the rules pertaining to international jurisdiction and applicable law could be part of the CDC, in order not to disperse the protective content contained in the diploma in question.

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60 About the theme, read: INTERNATIONAL PROTECTION OF CONSUMERS COMMITTEE. *Final Report Sofia Conference (2012)*. Available in: http://www.ila-hq.org/en/committees/index.cfm/cid/1030, acesso em 24/09/2015. p. 2.

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PUBLIC PRIVATE PARTNERSHIPS IN BRICS COUNTRIES: A BROAD UNDERSTANDING OF INITIATIVES BETWEEN PUBLIC AND PRIVATE PARTNERS

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Abstract: The aim of this work is to present the evolution of the understanding of public-private partnership as result of the de-nationalization process and the reduction of the role of States in economy

since the 1980s and 1990s, until the recent Brazilian Law of Investment Partnership Program – IPP. In addition, this work dedicates to present the Brazilian experience in PPPs and in other countries, focusing on the PPP programs in BRICS countries, which the infrastructure sector has been seen as relevant contributor to China's and India's economic growth.
Key-words: Public-Private partnership; BRICS.

INTRODUCTION

According to the Annual Update Report of Private Participation in Infrastructure – PPI –, in 2016, from the World Bank Group, the private sector investments in infrastructure in emerging markets suffered a considerable fall in that year. It was 37% less than compared in 2015. The global downturn followed the fall of three big markets for private investment in the Emerging Markets and Developing Economies – EMDEs: Turkey, India and Brazil.[12]

In the other hand, Latin America and Caribbean projects attracted US$ 33.2 billion in 2016, corresponding to 47% of the total private investment in infrastructure. From the 96 projects in final stage of negotiation, 62 correspond to energy sector, 27 on transportation, and 7 on water infrastructure. According to this total, only Brazil was responsible for 47 projects.

The evolution of the concept of public-private partnership – PPP – has acquired a broad understanding, comparing with the initial debates in the 1980s and 1990s.

Even in Brazil, which its legal system adopted a restricted concept of PPP in 2004. The PPP Brazilian concept is applied only in special cases of public concessions. A broader concept of PPP according to the Brazilian Law has been adopting along with the recognition of recent mechanisms of public and private interaction. As an example, the Brazilian Federal Law, which created the Investment Partnership Program – IPP (or PPI in Portuguese), uses the concept of "partnership contract" ("contratos de parceria"), involving the PPP legal framework designed in 2004 and a wide types of public concessions and privatizations programs.

1 2016 Annual Update Private Participation in Infrastructure (PPI) of World Bank Group.. Accessed in October 13, 2017. Available at: www.worldbank.org.

2 The energy sector of the EMDEs is the most attractive for private investment, summing up US$ 43.9 billion in 162 projects, which consist in 61,4% of the total, followed by projects in transportation and water infrastructure. It can be infer, thus, the relevance of private investments in infrastructure projects in emerging countries, mainly in energy sector (2016 Annual Update Private Participation in Infrastructure (PPI) of World Bank).

Albeit the Brazilian Law of PPPs is restricted to only a few cases, the international arena presents a broader concept, which legitimates the recent Brazilian efforts to wider their understanding about PPPs.

The enlargement of the use of the concept of PPP is notorious in the international understanding, due to the proximity of the idea to other principles and practices of good governance and public management: partnership executions, shared knowledge and responsibilities, efficiency-risk analysis and long-term planning.

International Organizations and many countries, which adopted long-term contracts for infrastructure projects, using different legal approaches, financial alternatives and mechanisms for private sector participation, all that included to the PPPs.

The aim of this work is to present the evolution of the understanding of public-private partnership as result of the de-nationalization process and the reduction of the role of States in economy since the 1980s and 1990s, until the recent Brazilian Law of Investment Partnership Program – IPP. In addition, this work dedicates to present the Brazilian experience in PPPs and in other countries, focusing on the PPP programs in BRICS countries, which the infrastructure sector has been seen as relevant contributor to China's and India's economic growth.

Finally, this paper´s objective contributes with the academic debate about the different forms of interaction between public and private sectors.

2. UNDERSTANDING THE CONCEPT OF PUBLIC-PRIVATE PARTNERSHIP

According to the World Bank's Public Private Partnership Infrastructure Resource Center – PPPIR there is a fundamental concept of PPP:

> *"Public-private partnerships (PPPs) are a mechanism for government to procure and implement public infrastructure and/or services using the resources and expertise of the private sector. Where governments are facing aging or lack of infrastructure and require more efficient services, a partnership with the private sector can help foster new solutions and bring finance.*
>
> *PPPs combine the skills and resources of both the public and private sectors through sharing of risks and responsibilities. This enables governments to*

> *benefit from the expertise of the private sector, and allows them to focus instead on policy, planning and regulation by delegating day-to- day operations.*
>
> *In order to achieve a successful PPP, a careful analysis of the long-term development objectives and risk allocation is essential. The legal and institutional framework in the country also needs to support this new model of service delivery and provide effective governance and monitoring mechanisms for PPPs. A well-drafted PPP agreement for the project should clearly allocate risks and responsibilities."*[3]

It is possible to infer that the World Bank embrace a broader concept of PPP, explaining the partnership as a governmental mechanism to implement public infrastructure and services by using private resources and experience. The concept regards to every public contract in which the Government uses the private expertise to apply in projects for better infrastructure, efficiency and bring new alternatives for financing the public sector.

The World Bank qualifies the PPP as a combination of abilities and resources of both sides, which conjunction obeys a specific framework of risk and responsibility division.

Considering that PPP contracts involves long-term infrastructure and services, the project's risk analysis is a crucial element to preserve efficiency on public services and avoid economic and financial imbalances on private or public side.

Therefore, is possible to affirm that PPP contracts ought to describe the risk and responsibility division. This is, in the end, the core characteristic of a PPP. The responsibility shall be allocated to the partner with better conditions to act, which means, with more capacity and efficiency to implement a specific command. The task is related to a risk, which should be supported by the partner better qualified to the work. As an example, it is commonly considered that the private partner is more efficient in build an infrastructure, due to its flexibility to hire suppliers and workers, and commitment to the schedule initially proposed. Consequently, the risks of building should be allocated to the private partner. In case of project failure, mismanagement or other building disaster, the construction risks will be absorbed only by the private partner, considered a priori as the most efficient partner to this

3 World Bank Group. PPPIRC. About Public-Private Partnerships. Accessed in October 14, 2017. Available at: www.ppp.worldbank.org/public-private-partnership/about-public-private-partnerships.

specific field.

Other risks, on the contrary, could be better allocated to the public partner, like regulations and controlling services, political risks and relationship with the society, which in those the public interest prevails above the private one. In addition, risks and responsibilities could be allocated to both partners, which is necessary to define precisely the responsibilities to each partner.

According to that, a PPP contract should be flexible enough to proportionate an efficient risk matrix, allocating to a partner more efficient to manage a specific risk. Moreover, the flexibility of the PPP contract and its risk matrix should be observed in the adherence to the local situation. The set of risks and allocation determine the risk matrix, which could be general understood in this hypothetical scheme:

Chart 1: Risk Matrix

Risks	Public Partner	Private Partner
Politics (changing of power)	X	
Environment (environment licenses)	X	X
Labor (labor accidents and social charges)		X
Operation (executing and managing the service)		X
Building (building the infrastructure)		X
Public Relations (relationship with the society)	X	
Finance (financial schemes and guarantees)	X	X

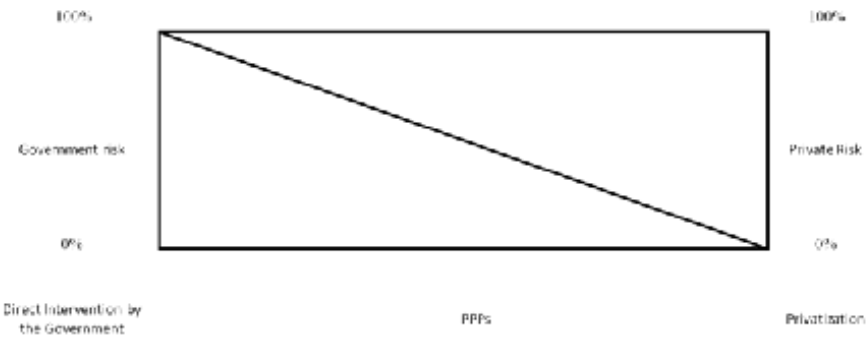
According to the Chart 1, it showed a small set of risks allocated to each partner in a PPP contract. In a PPP project, the risk matrix ought to describe as many as possible future risks in order to avoid contractual rebalancing, when one partner takes on the material and financial damages in a level superior than determined by the contract, and the other partner has to accomplish financial compensations.

Moreover, it is possible to infer that each risk involves a

cost. From each risk determined to a private partner, it is measurable in financial terms, and will impact on the total value of the project. Therefore, the risk matrix and the business plan of a PPP project are the key items to determine if is possible to establish a partnership between public and private sectors.

Following that understanding, there are numerous possibilities to establish a partnership between public and private sectors. According to the Organization for Economic Cooperation and Development – OECD[4] –, the PPP contract is situated between two axes: direct intervention by the Government and privatization.

Picture 1: Risk allocation between public and private sectors



(OECD)

Therefore, the PPP arrangement stays in the middle region, not well defined. The axis are the paradigms to decide how much of the public service will be transferred to the private side. In addition, there are common types of PPP arrangements according with which element would be transferred to the private partner.

> *"A plethora of different kinds of contractual PPPs exist and new variations emerge continuously as each PPP contract responds to very precise needs. Some of the most frequent labels are BOT (build,*

4 OECD. Dedicated Public-Private Partnership Units: A Survey of Institutional and Governance Structures. 10 March 2000, p. 21. Accessed in October 14, 2000. Available at: www.oecd.org/gov/budgeting/dedicatedpublic-privatepartnershipunitsasurveyofinstitutionalandgovernancestructures.htm

> *operate and transfer); that is, the private partner builds and operates the infrastructure, transferring it for the public partner at the end of the contract. BOOT (build, own, operate, and transfer) is the organizational form when infrastructure ownership is also private during the contract term; DBOT or DBOOT would be the acronyms if arrangements further include the responsibility for the design of the infrastructure project as well. The concession model is also, sometimes, separated into public works and public service concessions, depending on the business (contract) value of the infrastructure or service provision, respectively. In fact, many concessions are of mixed type: there is a balance between both activities"*[5].

The PPP concept, in an international basis, does not aim to delimited the PPP scope. In the contrary, the terminology is broad enough to grand contractual flexibility, better risk allocations, quality in execution, and to elaborate legal and managing alternatives to many PPP projects.

3. THE EVOLUTION OF THE PPP CONCEPT IN BRAZIL

According to the international understanding of PPP, which is a contract based on efficient allocation of risks and activities, the Brazilian Law assimilated the movement of approximation between public and private sectors and develop legal standards for the PPP concept in the country.

Since the 1930s, the State was responsible for implement most of the economic activities, mainly after the liberalism crisis in 1919-1939 and the crash of the New York Stock Market in 1929. In Latin America, the United Nations established the Economic Commission for Latin America and the Caribbean – CEPAL –, a regional commission responsible to promote studies and policies for regional development and cooperation amongst nations[6]. The CEPAL was initially coordinated by the argentine Raul Prebisch, who defended the existence of the deterioration of terms of trade between manufactured

5 BODY OF KNOWLEDGE ON INFRASTRUCTURE REGULATION. What are the different types of PPP arrangements? Accessed in November 18, 2017. Available at: http://regulationbodyofknowledge.org/faq/private-public- partnerships-contracts-and-risks/what-are-the-different-types-of-ppp-arrangements/

6 United Nations in Brazil. Accessed in October 14, 2017. Available at: www.nacoesunidas.org/agencia/cepal/

goods and commodities exporters. The manufactured goods constantly get market value more than the commodities. In a scenario of export reduction, it would cause a deficit in commercial balance of developing countries. The solution to correct this deficit would be foreign loans and currency devaluation. In order to avoid those drastic solutions, CEPAL advocated that the Latin America should change its production structure, abandoning their historic characteristics as commodity exporters.

Therefore, Latin America should adopt the Importation Substitution Model. Rather than import manufactured goods, the Latin-America countries would establish a national industrial complex in their own territories. This model was followed by many Latin-American countries, like Mexico, Argentina, and in Brazil, which that model lasted from 1930s to 1990s[7]. The Brazilian Industrial Complex was implanted in phases:

Chart 2: Brazilian Industrialization in Fases

Brazilian Industrialization in Fases:			
1st Phase	1930s and 1940s	Base Industry of non-durable goods (clothing, processed food and footwear industries)	Exchanges came from mostly by coffee exportation
2nd Phase	1950s and 1960s	Durable-Goods Industry (electro-domestics and automobiles)	Exchanges came from mostly by coffee exportation and Foreign Direct Investments (FDI)
3rd Phase	1970s and 1980s (in this last decade, the model colapsed)	Capital-Goods and Technology Industry	Exchange came from mostly by coffee exportation, FDI and foreign debt

According to that, the State was the main actor to promote Brazilian industrialization and development. During 1930s to 1980s, the government presented systematic economic plans for the development of the Brazilian industrialization, beginning with the heavy industry, in Vargas Administration; industry of durable goods, like electro domestics and automobiles, in 1950s and 1960s (democratic government of

7 Celso Furtado, when he was the Minister of Planning in the João Goulart Government (1961-1964), implemented its theories about development guided by the State: "Even the development strategy proposed by Furtado matched (as expected) in the CEPAL's tradition. This tradition emphasized the deepening of the industrialization process by Importation Substitution as a way to confront bottleneck constrains in the Brazilian economy. For Furtado, the economic crisis which the country was passing, was, before all, a development model crisis, and only will be overcome "with the deepening of the own model", which means, with the enlargement of the domestic market by land reform, and by other policies regarding income redistribution" (GIAMBIAGI et al, 2011, p. 42)"

JK); and the implementation of the industry of capital goods, with robust incentive by the National Plan for Development II (PND II in Portuguese), in the military government of Geisel[8].

However, the development model or the State executor model went in progressive collapse during 1970s and 1980s, since the oil shocks in 1973 and 1979, the consequent restriction of dollars and the increase of interests in foreign debts, which were the fundamental financing source to promote the Brazilian industrialization.

The Brazilian economic growth was sustained by external investment, due to the high external liquidity during 1950s and 1960s, which proportionated dollars with low interests. This foreign dependence produced drastic domestic consequences as soon as the international scenery became restrictive for foreign investment. Aligned with the restrictive international reality in that period, Brazil had maintained relatively high inflation rates and indexation mechanisms on national currency. Furthermore, Brazil were responsible for high disbursement in public expenditure to promote its development plan. (GIAMBIAGI et al, 2011, p. 135).

The successive failures to control the inflation, by many economic plans (Planos Cruzado, Bresser, Verão, Collor I e Collor II) worsened the Brazilian economic situation, characterizing the 1980s as "the lost decade".

The Brazilian economic instability and the foreign resources restriction drastically reduced the investment capacity to the country, interrupting the national industrialization process and abandoning the Importation Substitution Model.

8 GIAMBIAGI (2011) relates that the Brazilian development model showed high rates of growth and was a result of the CEPAL's theories: "During the period of 1950-1980, Brazil grew in rate of 7.4% by year, in average, and in only four occasions grew below the mark of 4%. This growth was associated with a policy of importation substitution, but also with some episodes of exportation promotion, like, for an example, along the [Economic] Miracle period (1968-1973). In short, we could say that the three main characteristics of the Brazilian industrialization model of the post war were: (1) the State direct participation in supply the economic infrastructure (energy and transportation) and in some sectors considered strategic (steel industry, mining, petrochemical); (2) high protection to the national industry, through taxes and many kinds of non- tariff barriers; and (3) favorable conditions in financing to implement new projects. The Importation Substitution Model (ISM), described by the Cepal, was the way to backward countries to promote their industrialization. In summary, it is possible to affirm that the CEPAL questioned the conventional economic theory in many points, mainly about the free trade capacity to promote efficiency in resources allocation (in domestic and external level) or 'natural' development in the economy. Therefore, the ISM defended three fundamental roles for the State: the inductor of industrialization through credit concession and intensive use of exchange mechanisms, quantitative restrictions and tariffs; the entrepreneur in order to eliminate the main economic bottleneck points; and the manager of the scarce exchange resources, as to avoid the overlap of demand peaks by currencies and recurrent exchange crisis"

Due to the international and domestic scenario of financial restriction, in the United States was established an understanding that countries should adopt a specific model of self-sustainable growth, known as the "Washington Consensus", in 1989. Aligned with this, at the same year, the Brady Plan was announced, which brought as the main characteristic the restructuring of sovereign debt of 32 countries, by swapping debt for government emission bonds, and reducing debt burden. Brazil only applied to the Brady plan in 1992 (GIAMBIAGI et al, 2011, p. 135-136).

The international community, therefore, encouraged countries to adopt other practices of economic development. According with that, Latin-American countries assimilated successive measures of economic openness and privatization. In Brazil, those measures were implemented during the administrations of Collor (1990-1992), Itamar (1992-1995) e Fernando Henrique Cardoso (1995- 2003).

Those measures were implemented with the Industrial and Foreign Trade Policy (PICE in Portuguese), during Collor administration, followed by the National Plan of Destatization. According to GIAMBIAGI (et al, 2011, 137-138), the Brazilian experience, compared with other Latin-American and Asian countries, showed a moderate rhythm and extension, due to the difficulties of low investment and economic crisis of the national industry.

Hence, in the late 1980s and the beginning of 1990s was held a substantial change in the national investment and development model by the reduction of State participation in economy as the conductor of development, promotion of commercial openness, and reduction of the Public Administration.

The National Plan for Destatization was created by the Brazilian Federal Law nº 8.031, in 1990, altered by the Law nº 9.491, in 1997. This law defines as general goals the reorientation of the State strategic position in the economy, transferring to the private sector activities prior exploited by the public sector; the return of private investment, and the definition of activities destined exclusively to Administration[9].

Therefore, the destatization movement in Brazil during 1990s occurred in enterprises and financial institutions directly or indirectly controlled by the Federal Government; enterprises prior created by the private sector and later assumed by the State; public services executed

9 Bresser-Pereira (1997, p. 14), underlined the influence of the globalization of communication and transport, pressing the Administration for reforms. The reduction of communication and transport costs, the increase of international trade and the foreign investments from multinationals elevated the level of international competition, reorganizing the production and the market, breaking the national frontiers. The countries suffered high reduction of the capacity to elaborate and execute macroeconomic policies and deepened the income concentration among countries and between citizens in the same nation.

by concessions and authorizations; subnational financial institutions; and properties of the State, according to the article 2º of the National Plan for Destatization.

Aligned with the reduction of the State, were created Regulatory Agencies, with independent budget, aimed to regulate the execution of public service by the private sector. During 1990s and 2000s, many agencies were created in different economic sectors, like oil and natural gas, electric energy, health, transport (fluvial, aero and terrestrial modals), communication, civil aviation and cinema[10].

The articles 174 and 175 of the 1988' Brazilian Constitution determined the role of the State as regulator of the economy by controlling, planning, and creating incentives. The State also has the obligation to execute public services directly or by concession after a procurement process.

The Brazilian constitution of 1988 was altered by the Constitutional Amendment nº 19, in 1998, in which was introduced the principal of efficiency to oriented the activities of the Administration.

The efforts of destatization promoted reduction of the State, opening to a broad participation of the private sector. This orientation, with great effort since 1990s, was determinant to the definition of new strategies of implementing infrastructure and executing public services, creating new legal institutions in the Administrative Law[11], and, in consequence, new approaches of participation of the private sector in public services.

In accordance with the evolution of the Public Administration in Brazil, aligned with the new conceptions of destatization and execution of public services by the private sector, the country adopted in 1990s a specific law to regulate public concessions.

The Brazilian Federal Laws nº 8.987 and 9.047, both of 1995, established the regime of concession and permission of public services.

10 During 2000s and 2010s, the model of regulatory agencies has been carried on in Brazil, but new agencies have not been created. It is possible to infer that have been a reduction of the incentives in this model to control the public service, however, the agencies still maintain their competences.

11 In addition, the Brazilian Federal Law nº 9.307, of 1996, established the regulation and permission of the arbitration in Brazil. In 2005, the Law nº 13.129 widened its dispositions. The law permits the Administration to use arbitration to resolve conflicts related to properties and other patrimonial rights (article 1º). The arbitration rules allows the celebration of an arbitral convention (article 3º), by an arbitration clause (written clause in the same contract or in a document annexed) or an arbitral agreement (a contract that regulates the arbitration to a specific matter). In addition, is possible to argue preventive measures to the Judiciary only before the arbitration court is settled (article 22-A). Once the arbitration is settled, preventive measures only can be argued directly by the arbitrators (single paragraph of article 22-B). The arbitration consists in jurisdictional mechanism for pacific solution apart from the Judiciary, in order to produce more celerity in the sentences.

The concept of concession is a delegation of an execution of public service to a private sector, which demonstrates the capacity to do the service by your own risk and cost in a specific period. The concessionaire is remunerated by the citizens that uses the services. The concessionaire's remuneration is essential to maintain the public service and the financial equilibrium of a contract. Concessions are long-term contracts that the private sector execute public services, after procurement, and regulated by the public sector. Examples of concessions are: water distribution, street lighting services, waste management, highways, railways, ports, airports, public transportation, oil and natural gas exploitation, among others.

After that, the Brazilian Federal Law nº 11.079, of 2004, defined the general rules of procurement and contraction of public-private partnerships – PPP. This is a general rule to coordinate PPP contracts.

It is important to observe that the PPPs contracts permits to execute public services with or not a previous implementation of infrastructure. Therefore, PPPs are related to complex projects, which is necessary huge sums of investment in the beginning of the contract. The investment budget in a PPP is not commonly supported by the public sector and, the service is incapable to generate income by itself, which demands a supplementary payment by the State.

According to the article 2º of the Brazilian PPP law, public-private partnership is an administrative contract of concession, characterized by two modalities:

- Sponsored Concession: a contract which involves a tariff from users and a direct remuneration from the State to the concessionaire. For example: tolls in highways, tariffs in airports and ports;
- Administrative Concession: a contract which involves only remuneration from the State, because the Administration is the direct or indirect user; For example: national parks, public hospitals and schools, waste solid management and penitentiaries.

Therefore, the Brazilian law system restricts the concept of PPP to only two special forms of concessions of public services, which differs from the broader international approach. Moreover, PPPs in Brazil is vetted for:

- Contract value inferior of BRL 20 million (or US$ 6 million);
- Contract term inferior of 5 years and superior of 35 years;
- Contract aimed only to supply with labor force, equipment or implementation of infrastructure.

The maximum contractual term should obey the projected amortization of investments and not surpass the limit of 35 years[12].

The main relevant characteristic of a PPP contract is its remuneration. The payment to the private sector only can be made when the infrastructure is built and in conditions to execute public services. This aspect is relevant to force the concessionaire to build the infrastructure on time, avoiding delays on execute public services.

If delays in building occur, the concessionaire will assume the risk and the additional costs. In addition, the public sector will not pay the private sector until it finishes. Therefore, it is an incentive to the private sector to be committed with efficiency.

Moreover, the PPP Law innovates in linking the remuneration to private sector with quality indicators. The law established the possibility to pay the concessionaire according with its performance. The remuneration will be total only if the quality of services are complete according to performance indicators.

The linking between payment and performance consists in a private sector incentive to maintain the quality of public services. This mechanism is an automatic penalty to the private sector if the service is below the indicators defined in contract.

The Federal Law nº 12.766, in 2012, created a new form of remuneration in PPP contracts: "the resources amount" ("Aporte de Recursos" in Portuguese).

The resources amount allows the reduction of the project value, advancing payments of capital expenditure (capex) during the infrastructure-building phase. This permits the reduction of capital cost through the concession period.

In the ordinary PPP payment structure, all the high infrastructure costs are amortized and paid through the years of the contract with a considerable interest tax. With the resources amount, there is a reduction of the total value of the contract. However, it is necessary to analyze carefully the amount of payment designated to the infrastructure-building phase and the service-execution phase, to assure incentives to maintain the quality of the service.

Finally, it is possible to summarize the advantages to contract PPPs for both sides. For the public sector there are:

-Lesser necessity for immediate investments by the public sector, human and other financial resources;
-Better quality of public services;
-Respect of contractual schedules;
-Reduction of cost by analyzing the value of money of the PPP

12 On the contrary of the Brazilian Federal Law of Concessions (Law nº 8.987/1995), which there is not a limit term in contracts, the PPP Law restricts the contracts until the 35 years.

project
- Better risk allocation;
- Reduction of contract financial rebalance,

In the other hand, the advantages for the private sector are:

-Stable revenues through the contract;
-Solid guarantees made by the public sector;
-Better conditions to access financing resources in the market and development banks;
-Risk allocation with the public sector;
-Possibility to use new sources of investment and revenues.

GIAMBIAGI (2011) affirms that the macroeconomic stability, conquered through the 1990s, was maintained during the Lula Administration in the 2010s and recent social achievements were implemented. However, the author underlines that historical hurdles still obliterates the Brazilian development[13].

Since the beginning of the current Brazilian President (Temer Administration), in 2016 the Federal Law number 13.334 was voted, which created the Investment Partnership Program – IPP (or PPI, in

13 According with the innovation in the Brazilian legal system, promoting more private sector involvement in the public services, GIAMBIAGI (2011) summarizes the Brazilian overview through the 2000s at Lula Administration: "In general, the beginning of the 2000, Brazil was situated in the same ground of Spain or Portugal in the 1980s, when these countries were starting to confront the costs of integration to the European Economic Community, and the advantages are not well understood. From the beginning of the 1990s, Brazil went through important changes in its economy: the rate of commercial and financial openness increased; enterprises became more competitive; it was a broad process of privatization; the inflation control became priority from 1994; and severe measures of fiscal adjustment were made. In general, these measures are steps to a process of economic transformation towards to a situation of more competition with the foreign sector and involves the goal of solid fiscal indicators, low inflation and relatively stable rules of the economic policy. (…) In the end of the second turn of Lula Administration, in 2010, this history was only written only in a half. The eight years in his government are truly characterized by macroeconomic stability and the Brazilian strategy was rewarded with the investment rate by rating agencies. However, by a destiny irony – even more with the qualification of liquid creditor, in financial terms, this impact was very different than in 10 o r15 years before – Brazil, in the final years of 2010s, was again with expressive – and growing – external deficits in its account, besides maintaining a high interest tax in international terms. (…) In summary, what is possible to say about the 2003-2010 period is that years were characterized by the consolidation of the stabilization process and by important social advances. On the other side, Brazil in 2010 still maintain, after 15 years of the Real Plan, with some similar problems of the 1995, such as an insufficient investment level, a low domestic savings, and a deficient competitiveness in economy, aspects that were behind again of the resurgence of high deficits in public accounts (GIAMBIAGI et al, 2011, p. 232-233).

Portuguese). The IPP objectives are: extend opportunities for investment and employment in Brazil; expand the public infrastructure, assuring moderate tariffs; guarantee the legal environment with minimal State intervention in business and investments; and strength the State role of regulator along with the public agencies of control[14].

It is interesting to observe that the IPP brought back the fundamental directives of the National Destatization Program of the 1990s, which reinforces the role of the private sector as the engine for investment and employment, and underline the role of the State as a regulator.

The objective of the IPP, in accordance with the article 1rst, is to work on public infrastructure and services by executing directly by the private sector (privatization) or via partnership contracts with the State and other subnational entities.

The IPP law established a new concept apart from the current theory of the Administrative Law in Brazil: the "partnership contract". Along with this bill, the partnership contract involves common concessions, the two models of PPP in Brazil (sponsored and administrative concessions), concessions specifically defined by sector legislation, permissions and authorizations for executing public services, alienation of public properties and other public-private business that, in accordance with its strategic character and its complexity in investment volume, long-term of execution, risks and other uncertainties, which adopts a similar legal structure.

The concept of partnership contracts is not completed delimited and involves a non-specific terminology: other public-private business.

It could be inferred that the IPP law uses the term of "partnership" and public-private business" as an attempt to approach the international concept of PPP, described before in this work. The PPP concept in the international basis allows different ways of public-private approach

14 The IPP, in synthesis, aims to define which projects and sectors are strategic to the Federal Government, creating an administrative structure tied directly to the Presidency. IPPlaw establishes a Council to discuss and define what projects are strategic before the President's decision. In addition the IPP involves an executive secretary to develop orientation norms and supervise the execution. Moreover, the IPP authorizes the National Bank for Social and Economic Development (BNDES in Portuguese) to manage the Support Fund to Structure Partnerships (FAEP in Portuguese). The fund's objectives are develop specialized studies and technical services for new projects in partnerships and in destatization. The BNDES is also responsible for analyze the financial feasibility and for offer financing structure to projects in the IPP. In addition, the BNDES is responsible for the National Fund for Destatization and the procedures for privatization. Finally, the Caixa Econômica Federal (a national public bank for housing loans) is also authorized to offer loans for projects of the IPP. The IPP law was change in 2017, by the Federal Law number 13.448, which established general rules for extension in contracts and the possibility to do again procurement process of current partnerships. These permissions are allowed only in projects of the IPP.

according with the risk matrix and cost-efficiency in a project. On the other side, the enlargement of the term "partnership" in Brazilian law system could raise questions about what is the legal fundaments of "strategic public-private business", because each concession model in Brazil is based on a specific law.

Therefore, the lawmakers in Brazil did not present a new concept of PPP, in order to approach to international standards. On the contrary, they linked a non-legal concept to a list of existing models of contracts and created another type of contract (public-private business), without legal grounds, which could harm the principles of Administrative Law and Public Administration, assured by the Brazilian constitution.

4. NATIONAL AND INTERNATIONAL EXPERIENCES IN PUBLIC-PRIVATE PARTNERSHIPS

According to the Brazilian Federal Government, its Federal PPP Program shows 37% of its projects concluded, since the beginning in 2016, and a sum of US$ 10 billion (BRL 33 billion). There are 54 projects concluded from a total of 146 projects modeled.

The State of Minas Gerais, one of the 27 Brazilian Subnational governments, was the first Administration in the country to start to model and study PPP projects. The Minas Gerais law of PPP was set in 2003, one year before the Brazilian Federal Law of PPP. Recently, the Minas Gerais Law number 22.606, of 2017, established two specific funds for PPP in that State: The PPP Fund for Payments and the PPP Fund for Guarantees.

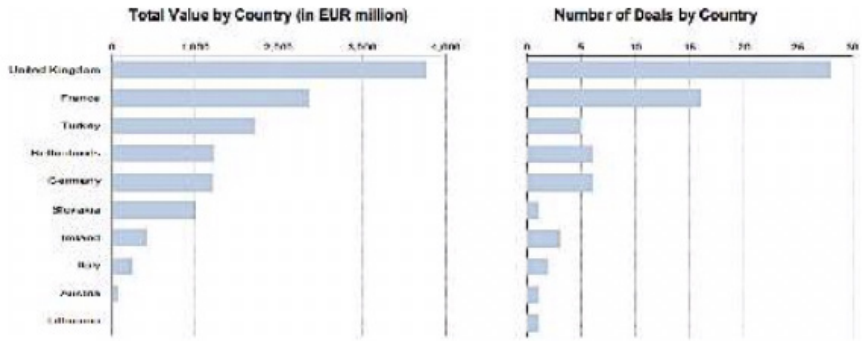
In the State of São Paulo, the PPP Program sums a total of US$ 33 billion in investments (BRL 95 billion). In 1996, São Paulo Administration started its State Program of Concession and, only in 2004, the State created the PPP Program, which are eleven projects signed in main four public sectors: transportation, water and sanitation, health and housing.

In the European Union, there are the European PP Expertise Centre – EPEC –, an initiative financed by the European Investment Bank – EIB –, European Commission and member-States of the UE and candidate-States, like Turkey, Serbia and Albania. The EPEC mission is the reinforce the public sector ability in doing PPPs by sharing knowledge, experiences and good practices.

In 2016, the total expenditure in PPP (considering only the EPEC members) was €12 billion. This sum suffered a reduction in 2015, which was €15 billion. However, 2016 saw an increase of projects concluded, 66 in total, compared with 49 in 2015[15].

15 European PPP Expertise Centre – EPEC. Market Update – Review of the European PPP Market in 2016. Acesso em 16 de outubro de 2017. Disponível em: www.eib.org/epec/

Chart 4: Expenditure and Number of Projects of PPP in EPEC Countries

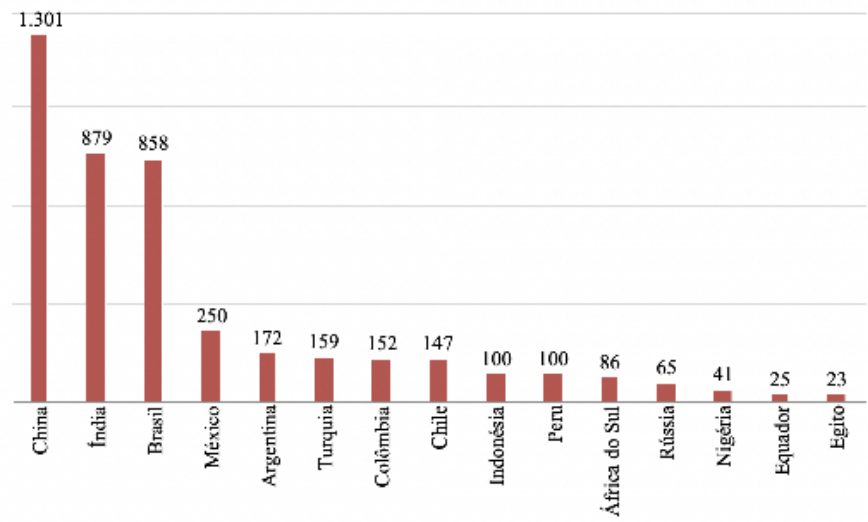


(EPEC, 2017)

In Europe, the United Kingdom is the major PPP market, in terms of value and number of projects. There are €3.8 billion and 28 projects. France is the second largest PPP market in Europe, with €2.4 billion and 16 projects. Since the last five years, United Kingdom and France have been leading the PPP market in Europe.

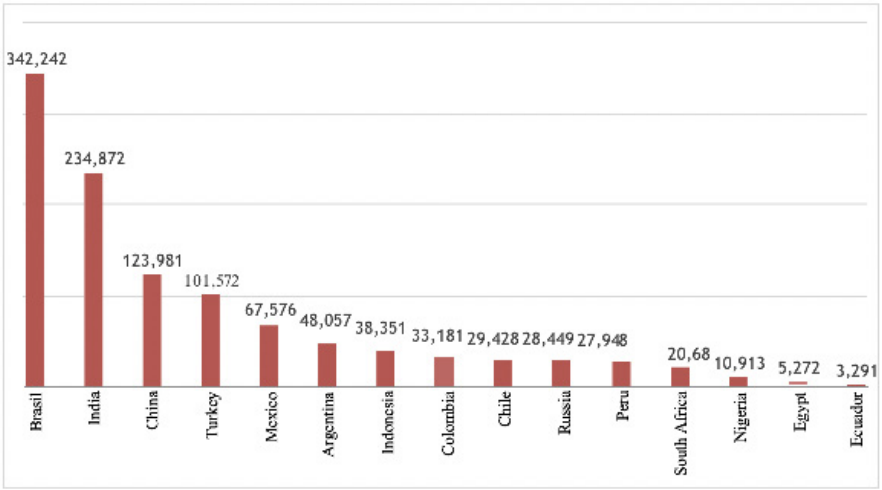
Analyzing only the emergent markets, China, India and Brazil are the largest ones with high number of projects and high investments in PPP.

Chart 5: Total of PPP Projects in the Developing Countries



resources/publications/epec_market_update_2016_en

Chart 6: Total of PPP Investments in the Developing Countries (in US$ million)



Brazil is the leader of the investments in PPP with a sum of US$ 342 billion, followed by India, with US$ 234 billion, and China, with US$ 123 billion. About the number of PPP projects, China is the leader of emerging markets, with 1.301 projects, the second position is India with 879 projects, and Brazil with 858 projects.[16]

When PPPs involves BRICS, there is a significant relation between these two aspects. The BRICS countries and other emerging markets are investing heavily in infrastructure, due its rapid urbanization, income and better life conditions' increase. According to The Economist: "emerging economies are likely to spend an estimated $1.2 trillion on roads, railways, electricity, telecommunications and other projects this year, equivalent to 6% of their combined GDPs—twice the average infrastructure-investment ratio in developed economies"[17].

Moreover, in accordance with the PPP KnowledgeLab data[18], China, India and Brazil are the leaders of the emerging markets in projects and investment in PPPs. There is a huge demand for investment in infrastructure and public services. However, China is the principal investor in infrastructure, not only made by PPP.

"Between 2003 and 2007 global annual GDP grew by an average of five percent with China

16 Accessed in November 13 2017. Available at: www.pppknowledgelab.org/countries

17 The Economist. Building BRICs of growth. Accessed in November 13 2017. Available at: www.economist.com/ node/11488749

18 PPP KNOWLEDGE LAB. PPP Framework by country. Accessed in November 13, 2017. Available at: www.pppknowledgelab.org/countries

> *consistently breaking the ten percent mark. But not all of the BRICs were as adept at reinvesting and developing their infrastructure. Internal investment in infrastructure is a huge part of China's growth model; between 2003 and 2007 the country built over 1500 skyscrapers reaching over 30 storeys. Shanghai, a city without a subway system until 1995 now has 454km of underground railways, compared to 402km in London, which has been developing it's network for a century. São Paulo, Latin America's largest city, by contrast, still only boasts 74km"*[19].

The infrastructure gap in BRICS countries is not only a hurdle for further development, but also an asset to bring more investments to them. In order to boost investment and financial alternatives in all BRICS countries, PPP is a relevant mechanism.

In specific, China launched in 2017 a new project in infrastructure: "The Belt and Road Initiative", or called, "One Belt, One Road – OBOR". The OBOR project is the new Silk Road route, involving now investment and commerce. The project will involve maritime and land-base routes throughout Asia, Africa and Europe, connecting many countries and boosting investment in transport, infrastructure and energy.

> *Belt and Road, formerly known as One Belt, One Road or more properly as the Silk Road Economic Belt and 21st Century Maritime Silk Road initiative, is a development strategy that focuses on land and sea based connectivity from China to major markets in Europe, Asia and the Middle East. The 'belt' refers to land-based routes, with several 'transport corridors' identified to reach key markets in 64 countries, while the 'road' refers to a maritime route through the South China Sea, South Pacific Ocean and Indian Ocean*[20].

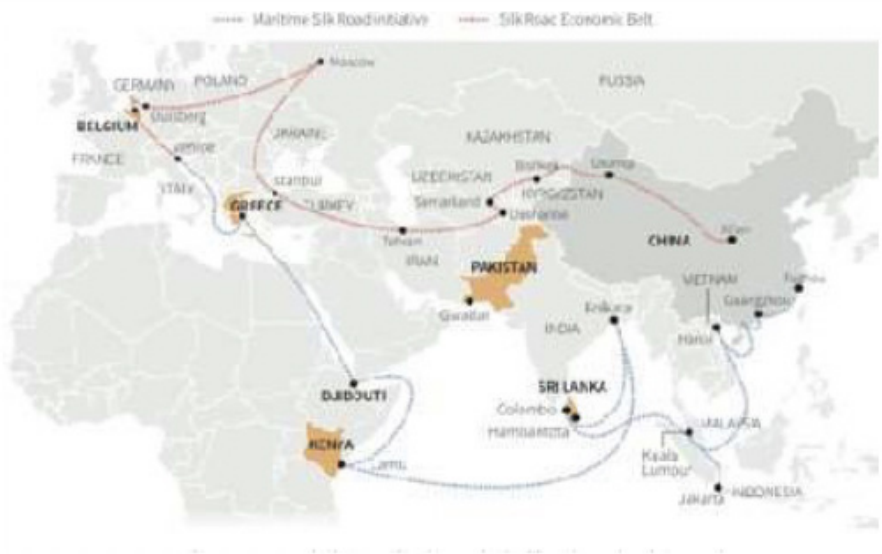
In order to promote this project, China will promote the use of PPP in the OBOR project and reinforces other countries and international

19 World Finance. Investment in infrastructure: a few BRICS short. Accessed in November 13 2017. Available at: www.worldfinance.com/contributors/investment-in-infrastructure-a-few-brics-short

20 OUT-LAW. China to promote use of PPP in Belt and Road projects. Accessed in November 18, 2017. Available at: www.out-law.com/en/articles/2017/january/china-to-promote-use-of-ppp-in-belt-and-road-projects/

organizations for engagement and financial cooperation

Chart 7 – China's One Belt One Road Project



(qz.com[21])

The project is still in the beginning and is too early to describe which partnerships could be feasible in the future. However, PPP could be applied as a reliable mechanism for long-term projects, like the OBOR's.

In addition, alongside with the One Belt One Road Initiative, China has announced a PPP Fund of US$ 28 billion to increase the country's PPP program. The shareholders include the Industrial and Commercial Bank of China, China Construction Bank (CCB), Postal Savings Bank of China (PSBC), Bank of China, China Life Insurance, CITIC Group and the National Council for Social Security Fund. The Fund's manager will be the Ministry of Finance[22].

CONCLUSION

The concept of PPP is not entire unique. Each country or research institution determine the boundaries of which ones could be considered PPP. Albeit the concept varies, there is a fundamental characteristic of

21 QUARTZ. One Belt, One Road. Your guide to understanding OBOR, China's new Silk Road plan. Accessed in November 18, 2017.Available at: www.qz.com/1131428/if-the-entire-us-went-vegan-itd-be-a-public-health-disaster/

22 OUT-LAW. China launches $28 billion PPP fund. Accessed in November 18, 2017. Available at: www.out-law.com/ en/articles/2016/march/china-launches-28-billion-ppp-fund/

PPP: the joint participation of public and private sectors to provide a specific infrastructure or a public service.

In order to succeed in modeling PPPs, there is necessary to establish an accurately risk matrix and the contract to determine the risks, responsibilities and obligations for each partner. Another important aspect is the PPP financial structure, which governments should offer sustainable and reliable guarantees that will pay the private partner and give suitable compensations in case of contractual imbalance or discontinuance of the concession.

Therefore, many divergences in the execution of the contract could be avoided in the modeling phase, when risks and costs are quantified. Although PPPs involve a sensible relation of public and private partners, governments and international organizations still rely on this kind of contract as the best way to increase public infrastructure and quality of public services.

As an example, the World Bank Group helps countries design public-private partnerships and create a balanced regulatory environment in order to ensure more efficient and sustainable provision of public services and infrastructure. In addition, the World Bank believes that PPPs is the best way to delivery infrastructure and achieve its goals: eliminating extreme poverty and boosting shared prosperity.

Analyzing the Brazilian law system, PPP is a part of the government policies and has a minimal regulatory environment, created during the 1990s and 2000s. Now, Brazilian lawmakers need to advance the model by bringing financial alternatives, a robust guarantee structure, transparency, accountability and suitable controlling procedures. The major aspect is the financing structure in long-term contracts and the economy stability. When the economy is more reliable and robust, the interest rates can reduce and PPP contracts bring more concurrence and attractiveness to the market.

The recent Brazilian laws about PPPs and other forms of partnerships between public and private sector ought to be more consistent, transparent and attractive to the market, also considering a long- term view of how to invest in infrastructure and public services in Brazil for the next decades.

The long-term financing in Brazil relies almost exclusively on the BNDES. Private banks did not participate or demonstrate desire in invest in infrastructure. This is a fragile reality for long-term investments in Brazil and the necessity to reduce the infrastructure gap. Thus, more funds and financial architectures, which involves local, national and international actors to share knowledge, experiences and confidence in contracts.

National development banks and international finance organizations are essential to sustain credibility to the market and

are the leading actors to bring innovative structures of financing with private companies, pension funds and other investors.

Considering every country has its own unique challenges and financial constraints, PPPs can provide benefit by leveraging the management capacity, innovation and expertise of the private sector. However, is necessary to underline that, in some cases, a traditional public sector approach could be more appropriate.

About the BRICS, since 2000s, its economic relevance to the international market and world growth are well recognized. The recent scenario of emerging markets as major economies, like China and India, takes the study of PPP as an important issue to increase world's growth.

This work aimed to highlight the PPP general aspects and show examples of projects in the world. Further studies are necessary to contribute to the concept of PPPs and deeper analysis for development and financial cooperation in emerging markets.

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THE NORMATIVE HIERARCHY OF TREATIES IN BRAZILIAN LEGAL SYSTEM

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Abstract: Through the Federal Supreme Court appeals' analysis (appeal 80.004/SE and appeal 466.343/SP) regarding treaties' hierarchical position and enforcement in the Brazilian legal system, this paper indicates, from a historical and deductive method, how Brazilian doctrinal and jurisprudential contributions have caused more issues than solutions to determine where treaties belong in Brazilian system order (especially regarding the relationship between international law and domestic law). A particular topic about human rights treaties have been written to show the logical flaws in terms of hermeneutic perspective whether is considered human rights treaties as a constitutional block or a supralegality (supralegalidade) hierarchical position. In the last topic, it is discussed how 1969 Vienna Convention on the Law of Treaties has undeniably influenced Brazilian treaties' hermeneutics.

Keyword : International Law; Treaties; 1988 Federal Constitution; 1969 Vienna Convention on the Law of Treaties; Human Rights.

INTRODUCTION

From the appeals 80.004/SE and 466.343/SP, it will be shown the current jurisprudential understanding of where treaties belongs in Brazilian legal system. This work has structured the evolution of the hierarchy of those treaties in Brazilian legal order by an historic method through the deep analysis of these appeals.

The discussion virtually surpassed between monism and dualism is brought back in the merits of these judgements especially as a matter of whether Brazil has adopted the former or the later when targeting the incorporation of treaties in Brazilian legal system in the view of the Supreme Federal Court.

Following the forehead, this article also aims to deal with the specific case of human rights treaties in a manner to typify the hermeneutic problems originated by the Constitution's special treatment given to those treaties.[1] As one direct consequence, two different perspectives of where they should be normative and hierarchically understood coexist: one as supralegality (its value is below the Constitution and above infraconstitutional law) and another as a constitutional block (art. 60, §4º of the 1988 Brazil's Federal Constitution).

Given the considerations regarding the human rights treaties in the Brazilian legal order, it will be possible to identify serious problems about the conception itself of human rights in Brazil. This occurs precisely due to several hermeneutic positions adopted for its hierarchical interpretation.

Beyond the description of hermeneutic problems, in a third step, this work will develop the possibility or not to face the monism and dualism dichotomy discussed in the first topic when the incorporation of 1969 Vienna Convention on the Law of Treaties in Brazil arises in the debate field. For this reason, this article supports the existence of a real chance of an unavoidable change in Brazilian understanding (principally of judges in the Supreme Federal Court) about the place of treaties in the Brazilian legal system after 1969 Vienna Convention's incorporation.

The interpretation of 1969 Vienna Convention in conjunction with constitutional text (arts. 2º and 5º of Brazil Federal Constitution of 1988) lead to affirm the prevalence, positively speaking, to an international hermeneutic. If that is not true, a logical problem in the normative hierarchy structure can be easily verified such an *infraconstitutional* norm (1969 Vienna Convention) ruling hermeneutically norms "above"

1 In the same manner, Juan Antonio Travieso states, in verbis, "Los tratados modernos sobre derechos humanos en general, y, en particular la Convención Americana no son tratados multilaterales del tipo tradicional concluidos en función de un intercambio reciproco de derechos para el beneficio mutuo de los Estados contratantes. Su objeto y fin son la protección de los derechos fundamentales de los seres humanos independientemente de su nacionalidad, tanto frente a su propio Estado como frente a los otros Estados contratantes. Al aprobar estos tratados sobre derechos humanos, los Estados se someten a un orden legal dentro del cual ellos, por el bién común, asumen varias obligaciones, no en relación con otros Estados, sino hacia los individuos bajo su jurisdicción. Por tanto, la Convención no sólo vincula a los Estados partes, sino que otorga garantias a las personas. Por ese motivo, justificadamente, no puede interpretarse como cualquier otro tratado." (Derechos humanos y derecho internacional, Buenos Aires, Editorial Heliasta, 1990, p. 90). Compartilhando do mesmo entendimento, leciona Jorge Reinaldo Vanossi: "La declaración de la Constitución argentina es concordante con as Declaraciones que han adoptado los organismos internacionales, y se refuerza con la ratificación argentina a las convenciones o pactos internacionales de derechos humanos destinados a hacerlos efectivos y brindar protección concreta a las personas a través de instituciones internacionales." (La constitución nacional y los derechos humanos, 3. ed. Buenos Aires, Eudeba, 1988, p. 35).

her (for example, human rights treaties incorporated with constitutional standard).

1. THE CURRENT HERMENEUTIC SCENARIO OF WHERE TREATIES BELONGS IN BRAZILIAN LEGAL SYSTEM

The starting point of this discussion recalls the polemic decision that decided the conflict between domestic law and treaties.[2] The controversy was about a collision between Act 427 (22.01.1969), which has required the registration of promissory note in tax public institution under penalty of invalidity with basis in the Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes (Geneva, 1930) into force in Brazil as recognized by the Supreme Federal Court.

This dispute lied in the claim of unconstitutionality of the requirement for the registration of promissory notes in tax public institutions since it had not any normative provisions in 1930 Geneva Convention about this matter. Therefore, the Act 427 should be considered unconstitutional as it caused the breach of the referred treaty.

The Court left precedents and doctrinal manifestations of Brazilian authors in the line of an act could not modify treaty in force. It has been preferred to sustain the argument that there was no constitutional hierarchy between treaty and act. In such way, one revokes the other. The fact that treaty obliges State in the international order and the correct form of its revocation is the denunciation did not affect the Court.

The criticized rationality behind the judgement was that Brazilian legislative process was described in the Constitution of the Republic in which there was not any mention to treaty nor any indication of eventual hierarchical position of Acts. The only *a priori* exception was the one established in the National Tax Code: treaty is superior to Act and it prevails when it is considered as complementary Act to Constitution. For this reason, if treaty revokes Act as the former is posterior to the latter; Act can also revoke treaty, independently if the State is still obliged to obey in the international sphere because it has not been denunciated.

According to this point of view, the State is obliged to international law, due to the fact that it has incorporated a treaty and, as it has not denunciated by means provided in the treaty itself or, if it is omitted, in the customary form codified in the 1969 Vienna Convention on the Law of Treaties (VCLT).[3]

2 Appeal n. 80.004/SE published in RTJ 83/809. For more, see MAGALHÃES, José Carlos de. O STF e as Relações entre Direito Interno e Direito Internacional, in Revista de Direito Público, vol. 51/52 (jul-dez., 1979), pages 122-125.

3 VCLT – "Article 54. TERMINATION OF OR WITHDRAWAL FROM A TREATY UNDER

It must be remarked that VCLT was only incorporated in Brazil twenty-nine years after it has into force in 1980. In that event, in the appeal 80.004/SE, Brazil has not ratified VCLT. Notwithstanding the absence of ratification, the Legal and Consular Department of Foreign Affairs, in 1989, managed its activities about the negotiation of treaties rendering what was concerned in the VCLT.[4]

In the understanding of the Supreme Federal Court, the absence of denunciation of a treaty does not represent an obstacle to the State, in the internal scenario, to withdraw its effects and in doing so not entering into force. It does not matter, in this conception, the emergence of international responsibility by the breach committed.

Concerning the incompatibility between treaty and Federal Constitution, Franscisco Rezek states: "confronting de constitution`s primacy with the norm *pacta sund servanda*, it is acceptable to sustain the authority of the fundamental State law even if it signifies that an unlawful act is made for which, in the international scenario, must be accountable".[5]

Otherwise, Vicente Marotta Rangel highlights this incompatibility must be clear and unambiguous. Consequently, the State may argue the nullity of treaties that manifestly violate constitutional norm about competency to incorporate them.[6] In fact, this is the subject of the article 46 of VCLT. Furthermore, incompetency to approve treaty, which justifies the nullification as mentioned by Marotta Rangel, cannot be mistaken with the approval of treaty by competent authority, whereas

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ITS PROVISIONS OR BY CONSENT OF THE PARTIES

The termination of a treaty or the withdrawal of a party may take place:

In conformity with the provisions of the treaty; or

At any time by consent of all the parties after consultation with the other contracting States"

Article 56. DENUNCIATION OF OR WITHDRAWAL FROM A TREATY CONTAINING NO PROVISION REGARDING TERMINATION, DENUNCIATION OR WITHDRAWAL

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) A right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1"(Available in: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf, accessed in 24.04.2018).

4 MEDEIROS, Antonio Paulo Cachapuz de. O poder de celebrar tratados. Doctoral thesis presented in the Law School of the University of São Paulo, 1995, page 440.

5 REZEK, José Francisco. Direito dos Tratados. Forense, Rio de Janeiro, 1984, pages 462/463.

6 RANGEL, Vicente Marotta. Os conflitos entre o direito internacional e os tratados internacionais, in Boletim da sociedade brasileira de Direito internacional, Rio de Janeiro, n. 63, dec. 1967, pages 45/46.

regularly ratified; it may be afterwards considered unconstitutional. Those are different hypothesis. In the first case, treaty is null because who has ratified did not have constitutional competency as result he or she could not internationally compromise the State. In the second case, treaty is valid once who have signed and ratified were competent authorities to do it as provided by the country's Constitution. On that occasion, consequences are distinct. In the case of nullity, the State will not be accountable for breach, exactly because of this nullity; the same will not happen if treaty is validly signed and ratified. This leads to what Francisco Rezek defended: an idea of Constitution's primacy over *pacta sund servanda* that can characterize an unlawful act in international scenario for which the State is accountable.

Under these circumstances, the observation made by Amilcar de Castro about the legal nature of treaty[7], and on which Minister Cunha Peixoto has based himself, should not be taken into consideration. This view reveals a government detached from the nation and not identifying itself with the latter. The Amilcar de Castro's understanding cannot explain how a treaty obliges people considered as a block and why this obligation took as a block does not worth in domestic order. Moreover, this rationality does not take into account, since the Constitution of the Empire in 1824, the Brazilian State powers have authority derived from nation – and not from itself.

On the opposite of a king in remote ages, the republic president does not have jurisdiction by divine right, but by election and people's delegation. Article 1, §1º of the Constitution expresses "all power emerges from the people that exercises it through elected representatives or directly in the terms of this Constitution".

The same applies to other powers inasmuch as judicial power is included in that logic. In such manner, when the executive power compromises the State in a treaty ratified by the legislative power understood as delegated authorities to nation, the former immediately compromises the nation. In this degree, the idea of people compromise itself through government in the international order but not in the domestic order has no foundation. The government compromises the nation as a whole once the former represents the latter to the extent which its authority or right is not based on itself.[8]

It is important to stress the fact that Brazilian Constitution known as a State organization tool and to possess the capacity to declare the Law did not make any difference between domestic order

7 "Treaty is not Act; it is an international act that obliges a considered people in block; which obliges the government in the international order but not the people in domestic order" (CASTRO, Amilcar de. Direito Internacional privado, Forense, vol. II.

8 MAGALHÃES, José Carlos de. O Supremo Tribunal Federal e o Direito Internacional. Editora Livraria do Advogado, Porto Alegre, 2000.

and international order. In fact, it has limited only the competency of the republic president to celebrate treaties *ad referendum* of National Congress and maintain relationships to foreign States (Article 84, VII and VIII). It also has limited the competency of National Congress to definitely solve matters of treaties, agreements or international acts that implies burdens or excessive commitments to national patrimony (Article 49, I).

To this purpose, Judge Sir Hersch Lauterpacht in his separate opinion at the Permanente Court of International Justice in the case *Certain Norwegian Loans* (1957) has stated that:

> *"It may be admitted, in order to simplify a problem which is not at al1 simple, that an "international" contract must be subject to some national law; this was the view of the Permanent Court of International Justice in the case of the Serbian and Brazilian Loans. However, this does not mean that that national law is a matter which is wholly outside the orbit of international law. National legislation - including currency legislation-may he contrary, in its intention or effects, to the international obligations of the State. The question of conformity of national legislation with international law, is a matter of international law. The notion that if a matter is governed by national law it is for that reason at the same time outside the sphere of international law is both novel and, if accepted, subversive of international law. It is not enough for a State to bring a matter under the protective umbrella of its legislation, possibly of a predatory character, in order to shelter it effectively from any control by international law".*[9]

In the same way, the Court through an advisory opinion, in 1930, settled this understanding when it asserted that "it is a well-known recognized principle of international law in the relationships of contracting States that normative provisions of their domestic law cannot prevail over the treaty".[10]

Overall, the Appeal 80.004/SE consisted in the declaration of the equivalence, in terms of hierarchy, between treaties and Acts. In 2004,

9 INTERNATIONAL COURT OF JUSTICE – Available in: http://www.icj-cij.org/files/case-related/29/029-19570706-JUD-01-03-EN.pdf, p. 37, accessed in 25.04.2018.

10 ACCIOLY, Hildebrando; SILVA, Geraldo Eulálio Nascimento. Manual de Direito Internacional Público. 2ª Edição, São Paulo: Saraiva, 1996, p. 60.

in the judicial reform through the constitutional amendment 45/2004, human rights treaties could have *status* of constitutional amendment if they follow the procedure established in Article 5º, §3º (three-fifths vote, two shifts in each legislative house).

Two years later, in 2006, the Appeal 466.343-1/SP concerning the civil imprisonment of unfaithful depositary (which regardless of the modality of the deposit it was considered unlawful by the Supreme Federal Court) discussed the interpretation of Article 5º, LXVII and §§1º, 2º and 3º in the light of Article 7º, §7º of American Convention on Human Rights. This case led to a new comprehension about the hierarchical place of treaties, particularly human rights treaties, in Brazilian legal system that will be explained in the next topic.

2. THE SPECIFIC CASE OF HUMAN RIGHTS TREATIES

In the Appeal 466.343-1/SP, the Minister Gilmar Mendes argued there were four different positions about the normative *status* of human rights treaties in a legal order: (i) the supraconstitutional nature of human rights treaties[11]; (ii) the constitutional character of theses international diplomas[12]; (iii) the trend that recognizes the *status* of Act to this kind of international document[13]; (iv) the supralegal interpretation given to human rights treaties and conventions.[14]

In the first position, human rights treaties would be superior to the Constitution because of the concern of the effectiveness of these rights in domestic law associated to the guarantees of human person.[15] In this sense, constitutional norms would not have the power to revoke international human rights norms. In other words, not even constitutional amendments would have the power to suppress international human rights law subscribed by the State.

The Minister Gilmar Mendes stands out the difficulty of application of this theory in Brazil since the formal and material

11 MELLO, Celso Duvivier de Albuquerque. O §2º do art. 5º da Constituição Federal. In: Torres, Ricardo Lobo (Org.). Teoria dos Direitos Fundamentais. Rio de Janeiro: Renovar, 1999, pp. 25-26.

12 CANÇADO TRINDADE, Antônio Augusto. Memorial em prol de uma nova mentalidade quanto à proteção dos direitos humanos nos planos internacional e nacional. Boletim da Sociedade Brasileira de Direito Internacional, Brasília, n° 113-118, 1998. pp. 88-89; e PIOVESAN, Flávia. Direitos humanos e o Direito Constitucional Internacional. São Paulo: Max Limonad, 1996. p. 83.

13 Appeal n° 80.004/SE, Rel. Min. Xavier de Albuquerque, DJ 29.12.1977.

14 Article 25 of Germany's Constitution; Article 55 of France's Constitution; Article 28 of Greece's Constitution.

15 BIDART CAMPOS, German J. Teoría General de los Derechos Humanos. Buenos Aires: Astrea; 1991, 353.

Constitution supremacy principle organizes the whole Brazilian legal order. Different view would unable the constitutionality control of international diplomas.

In the second theory, assuming that Article 5º, § 2º of Brazilian Constitution is an opening reception clause for other rights contemplated in human rights treaties incorporated by Brazil, it is understood that Brazilian Constitution would impute constitutional hierarchy to international documents. Furthermore, Article 5º, §1º of Brazilian Constitution would guarantee to those treaties immediate applicability both in international and national orders since the ratification act regardless any legislative intermediation.

The constitutional hierarchy *status* would be applied only to human rights treaties taking into account their special character when compared to commons treaties[16] which would have infraconstitutional statute. To this thesis, eventual conflicts between treaty and Constitution should be settled by the application of the most favorable norm to the victim[17], the right holder. This hermeneutic task would be exercised by national tribunals and other law applicant organs.[18]

In Brazil, this thesis is defended by Antônio Augusto Cançado Trindade[19] and Flávia Piovesan who assert that Article 5º, §§1º e 2º of Brazilian Constitution characterizes, respectively, as holders of the direct applicability and the constitutional spirit of human rights treaties signed by Brazil.[20]

16 Article 102, III, "b" of 1988 Federal Constitution admits the culmination of appeal proceedings against decision that declares treaty's unconstitutionality.

17 CANÇADO TRINDADE, Antônio Augusto. A proteção dos direitos humanos nos planos nacional e internacional: perspectivas brasileiras. San José de Costa Rica/Brasília, Inter-American Institute of Human Rights, 1992, p. 317-318. In the same sense, Arnaldo Sussekind says: "In the field of labor law and Social Security, however, the solution of conflicts between international norms is facilitated by the application of the principle of the norm more favorable to workers. It is true that multilateral treaties, whether universal (e.g. International Covenant on Economic, Social and Cultural Rights, and ILO Conventions), or regional (e.g. European Social Charter), have the same conception of legal institutes especially in the field of human rights, which facilitates the application of the principle of the most favorable norm" (Direito internacional do Trabalho, São Paulo, LTR, 1983, p. 57).

18 PIOVESAN, Flavia. A Constituição Brasileira de l988 e os Tratados Internacionais de Proteção dos Direitos Humanos. In: Temas da Direitos Humanos. 2a Ed. São Paulo: Max Limonad; 2003, pp. 44-56

19 CANÇADO TRINDADE, Antônio Augusto. Tratado de Direito Internacional dos Direitos Humanos. Porto Alegre: Sergio Antônio Fabris Editor; 2003

20 Cançado Trindade was responsible for the proposal of §2º into Article 5º to National Constitutional Assembly in 1987: "the aim of paragraphs 2 and 1, Article 5º of Constitution was not but assure the direct applicability of international law of protection by Judicial Power in a constitutional level (…)" (CANÇADO TRINDADE, Antônio Augusto. Memorial em prol de uma nova mentalidade quanto à proteção dos direitos humanos nos planos internacional e

The constitutional hierarchy of human rights treaties is found, for example, in Argentine's Constitution which limits the list of international diplomas with differentiated normative *status* if compared to other treaties with common character.[21] Similarly, Venezuela's Constitution, apart from the constitutional hierarchy, establishes the immediate and direct applicability of treaties in domestic legal order. In addition, it fixes the interpretation of the application of the most favorable norm to the victim.[22]

After the Judicial Reform (Constitutional Amendment 45/04), it turned almost impossible to defend the third position sustained into the hierarchical equivalence between treaty and infraconstitutional law. As seen, in this thesis, agreements would not have legitimacy to confront neither to complement constitutional norms in terms of human rights.

Before the arguments mentioned, Minister Gilmar Mendes was in favor of supralegality thesis which human rights treaties and conventions are *infraconstitutional*, but, because of its special character when compared to other international normative acts, they have the supralegal character (they are above Acts but inferior to Constitution).

Given that supralegal character of international normative documents, the posterior infraconstitutional legislation with which may exist a conflict that will have its efficacy paralyzed. It is what happens to article 652 of the new civil code (Act n. 10.4062002) which reproduces identical provision of the article 1.287 of the 1916 civil code.

In other terms, in Gilmar Mendes's view, human rights treaties could not be above Constitution's supremacy, but they deserve a special place in Brazilian legal order. Match them to ordinary Acts would

nacional. Boletim da Sociedade Brasileira de Direito Internacional, Brasília, n° 113-118, 1998, pp. 88-89.).

21 Article 75 (22) Argentine's Constitution. In verbis: "La Declaración Americana de los Derechos y Deberes del Hombre; la Declaración Universal de Derechos Humanos; la Convención Americana sobre Derechos Humanos; el Pacto Internacional de Derechos Económicos, Sociales y Culturales; el Pacto Internacional de Derechos Civiles y Políticos y su Protocolo Facultativo; la Convención sobre la Prevención y la Sanción del Delito de Genocidio; la Convención Internacional sobre la Eliminación de todas las Formas de Discriminacion Racial; la Convención sobre la Eliminación de todas las Formas de Discriminación contra la Mujer; la Convención contra la Tortura y otros Tratos o Penas Crueles, Inhumanos o Degradantes; la Convención sobre los Derechos del Niño: en las condiciones de su vigencia, tienen jerarquía constitucional, no derogan artículo alguno de la primera parte de esta Constitución y deben entenderse complementarios de los derechos y garantías por ella reconocidos".

22 Venezuela's Constitution of 2000, Article 23. In verbis: "Los tratados, pactos y convenciones relativos a derechos humanos, suscritos y ratificados por Venezuela, tienen jerarquia constitucional y prevalecen en el orden interno, en la medida en que contengan normas sobre su goce y ejercicio más favorables a las establecidas por esta Constitución y en las leyes de la República, y son de aplicación inmediata y directa por los tribunales y demás órganos del Poder Público".

represent an underestimation of their special value in the context of human rights protection system.

This thesis was the one adopted in Brazil until now by the Supreme Federal Court. The same rationality can be found in Germany's Constitution[23], France's Constitution of 1958[24] and Greece's Constitution of 1975[25].

However this idea has prevailed, in some doctrinal opinions[26], the 1988 Federal Constitution strengthens the interaction and combination of international and domestic law, which fortifies the system of fundamental rights protection with its own principles and logic based on the principle of the primacy of human rights and not of the Constitution once the principle of the most favorable rule to the victim has its occurrence in Brazilian legal order and it has its independence from domestic or international law. The Charter of 1988 launches a democratizing and humanist project, and it is incumbent upon the law operators to introject, to incorporate and to propagate their innovative values. Legal agents will become agents that propagate the democratic order of 1988, preventing the perpetuation of the old values of the authoritarian regime, legally repudiated and abolished.

Summarily, it can be noticed from the historical Supreme Federal Court's decision of the Appeal 466.343-1/SP that: (i) human rights treaties approved under non-qualified quorum have supralegal hierarchical value; (ii) human rights treaties approved under qualified quorum by National Congress have constitutional amendment

23 Article 25: "the general norms of international public law are part of federal law. They prevail over Acts and their rights and obligations arises directly to the habitants of the national territory".

24 Article 55. In verbis: «Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de san application par l'autre partie.»

25 Article 28: "The generally recognized rules of international law and the international conventions after their ratification by law and their having been put into effect in accordance with their respective terms, shall constitute an integral part of Greek law and override any law provision to the contrary."

26 PIOVESAN, Flávia. A CONSTITUIÇÃO DE 1988 E OS TRATADOS INTERNACIONAIS DE PROTEÇÃO DOS DIREITOS HUMANOS. This article is based on a lecture delivered in May 16 of 1996 in the General Attorney of São Paulo State. Available in: http://www.pge.sp.gov.br/centrodeestudos/revistaspge/revista3/rev6.htm, accessed in 14.04.2018. "We break away from the chains of the old and idle polemic between monists and dualists; in this field of protection, it is not a matter of the primacy of international law or of domestic law, here in constant interaction: primacy is, in the present domain, the rule that best protects, in each case, the consecrated rights of the human person, whether is a rule of international law or of domestic law" (CANÇADO TRINDADE, Antônio Augusto. A proteção dos direitos humanos nos planos nacional e internacional: perspectivas brasileiras, San José de Costa Rica/Brasília, Instituto Interamericano de Derechos Humanos, 1992, p. 317-318).

hierarchical value[27]; (iii) non-human-rights treaties have ordinary legal hierarchical value (equivalence thesis); (iv) to some authors there is an exception to this last rule which is the eventual tax law treaty (as an interpretational consequence of article 98 of National Tax Code that it would establish supralegal hierarchical value to this specific type of treaty).

3. HERMENEUTIC CONSEQUENCES AFTER 1969 VIENNA CONVENTION ON THE LAW OF TREATIES' INCORPORATION IN BRAZILIAN LEGAL ORDER

Brazil enacted and incorporated 1969 Vienna Convention on the Law of Treaties in the year of 2009. For this Convention's purposes, in its preamble, in case of disputes under international or treaty law "they must be settled by peaceful means and in accordance with the principles of Justice and International Law" as well as "a party cannot invoke provisions of its domestic law as justification for non-compliance with the treaty" (good faith's principle). In addition, it is deduced from Article 3, §1º of the 1969 Vienna Convention that "a treaty shall be interpreted in good faith and in accordance with the meaning of its terms in its context, in the light of its object and purposes".

Firstly, by meeting to this normative that manages the legal hermeneutics concerning treaties, a schizophrenic hermeneutic treatment given to an object that is protected by both Human Rights International Law and the Brazilian Constitutional Law emerges: is this interpretation internationalist or nationalistic? If the latter sets the response, there will be a secondary constitutionality control (and not control of national conventionality, since the nature of the control of conventionality should be limited to jurisdictions' sponsors for the interpretation of international law) and the effectiveness of the 1969 Vienna Convention would be deflated.

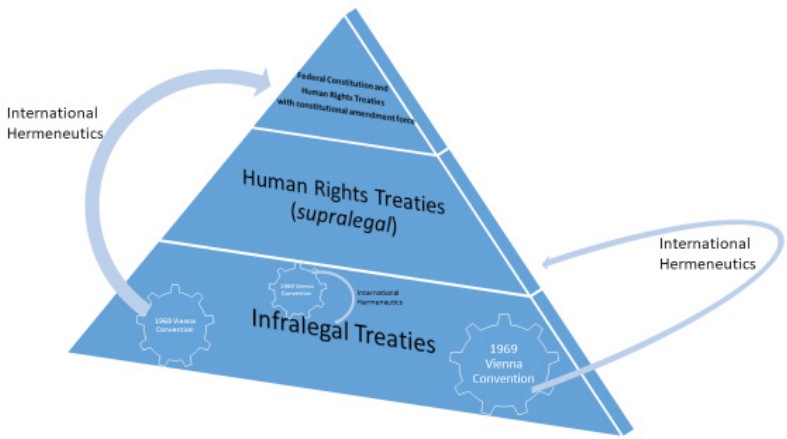
Secondly, there are the hierarchical and normative forces given

27 PIOVESAN declares that the procedure of article 5º, §3º 1988 Federal Constitution (CF/88) brought by the Constitutional Amendment of 45/2004 is an endorsement of the constitutionality present in the materiality of human rights treaties, and there can be no abolition of these rights and guarantees due to article 60, §4 of the CF/88 by virtue of the principle of non-retrocession. However, it is questionable the teleological analysis of insertion of paragraph 3 to article 5º of CF/88 understood as only an endorsement: much more resembles a barrier to the recognition of the constitutional status of human rights norms than its mere formalization (PIOVESAN, Flávia. A CONSTITUIÇÃO DE 1988 E OS TRATADOS INTERNACIONAIS DE PROTEÇÃO DOS DIREITOS HUMANOS. This article is based on a lecture delivered in May 16 of 1996 in the General Attorney of São Paulo State. Available in: http://www.pge.sp.gov.br/centrodeestudos/revistaspge/revista3/rev6.htm, accessed in 14.04.2018).

to this norm problems: if it is considered that there are human rights treaties with constitutional amendment or supralegality force or even constitute a block of constitutionality and the 1969 Vienna Convention is understood as a federal ordinary Act, how could this latter then guide the interpretation of treaties whose hierarchical position is superior to it?

Thirdly, if the hierarchy of treaties is reckoned as constituting a constitutional block, as it is in Piovesan's theory, it is the same as to acknowledge an instance of monism with hermeneutic primacy to International Law. André de Carvalho Ramos[28] does the same in his control of conventionality theory except by the fact that, in his theory, he does not admit such possibility of a hermeneutic primacy to International Law: Brazilian legal system would be categorized as dualistic. In the latter perspective, the prevalence of the international conventions' control (international hermeneutic primacy) would be restored. In a certain way, there would be a return to almost a Kelsian's monism[29], complexifying furthermore the Brazilian normative scenario, instead of triggering and even softening it.

To illustrate more properly the hermeneutic consequences which have arisen with 1969 Vienna Convention's incorporation in Brazilian legal order, the following picture shows exactly how illogically and epistemologically controversial has been the interpretation of treaties in Brazil:



28 CARVALHO RAMOS, André de. Control of Conventionality and the struggle to achieve a definitive interpretation of human rights: The Brazilian experience. Revista Instituto Interamericano de derechos humanos, v. 64, p. 11-32.

29 KELSEN, Hans. Les Rapports de Système entre le Droit Interne et le Droit International Public. In RDC, t 14, nº IV, 1926.

Without a defined and limited open constitutional norm that it would conceptualize once and for all the position in which Brazil stands about the hierarchical position of treaties, Brazilian legal order keeps an application of an unreasonable interpretation about law of treaties causing a huge hermeneutic gap for law interpreters and operators.

From an international point of view which is the one which best fits in terms of logical and hermeneutical interpretation of treaties. There is a positive predominance of international interpretation, instead of, what most of Brazilian constitutional authors and domestic jurisprudence wish to believe, a constitutional interpretation. This logic comes precisely from Articles 27, 29, 31, 64 of 1969 Vienna Convention of Law of Treaties in consonance with Articles 2 and 5, §2º of 1988 Federal Constitution.

Among other measures that should be taken so that hermeneutics problem could start being solved, it is the revision of the traditional notion of absolute State`s sovereignty and of constitutional model. For example, the process of sovereignty relativization which undergoes in the admissibility of human rights interventions at the national level for the protection of those particularly rights. Strictly speaking, forms of international monitoring and accountability are permitted when human rights are violated which means a non-applicable absolute conception of non-intervention in Brazil's sovereignty.[30]

Other important point that ought to be considered is the construction of a new modern theory of human rights, especially in Brazil and in Latin America, capable of overcoming the following paradox: the State's role as human rights effector (politics theory) versus

30 In this respect, the Secretary-General of the United Nations affirmed at the end of 1992: "Although respect for the State's sovereignty and integrity is a central issue, it is undeniable that the old doctrine of exclusive and absolute sovereignty is no longer applicable and that sovereignty has never been in fact absolute as it was theorically thought. One of the greatest intellectual demands of our time is to rethink the question of sovereignty (...) Emphasizing the rights of individuals and the rights of peoples is one dimension of universal sovereignty, which resides in the whole of humanity and which enables people to legitimately engage in issues that affect the world as a whole, a movement that increasingly finds expression in the gradual expansion of international law. (BOUTROS-GHALI, **Empowering the United Nations**, Foreign Affairs, v. 89, 1992/1993, p. 98-99, *apud* Henkin et al, International law: cases and materials, p. 18).

an universalist concept of *ius constitutionale commune*[31] (international law theory).

CONCLUSION

Employing the historical and deductive methodology, it is clear that contrary to tending law of treaties' interpretation, Brazilian legal order remains lacking of cohesion due to the absence of determining interpretation norms. It is reflected in several issues arisen in Brazilian jurisprudence (since the Appeal 80.004 until the Appeal 466.343-1/SP) which explicates the indefatigable and non-unison doctrinal contributions of both internationalists and constitutionalists regarding treaties' matters in Brazil.

It is undeniable that not only does an well-defined open normative clause play an essential role to settle this problem, but also important law conceptions must be revised specially to update and adequate its whole system to attend social demands, especially, in terms of human rights. Pursuing an objective and a constructive human rights theory must be remarkable to law operators and researchers in order to deliverer well defined and refined human rights' conceptions to adjust them to the reality of Brazilian legal order.

Moreover, to consider law of treaties in a classical and constitutional manner is to invariably condemn its interpretation to failure. Globalization and international influence in domestic law are two aspects which have changed legal order's State as a whole.[32] National judges must face these challenges in accordance to recent theories for two reasons: (i) search for a theory which better explain how international law and domestic law operates nowadays and (ii) get themselves away from the seductive and simplistic classical law view organized around, e.g., a crystalized conception of sovereignty and State's model which is no more adherent to our social and globalized reality.

Understanding treaties' hierarchy nowadays in Brazil is equivalent to acknowledge that, in this country, monism and dualism have not been overcame unfortunately. This paradigm will keep on haunting Brazilian domestic law operation and interpretation until

31 PIOVESAN, Flávia. Ius Constitutionale Commune en América Latina : Context, Challenges and Perspectives. In Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi and Flávia Piovesan (ed), Transformative Constitutionalism in Latin America: the emergence of a new ius commune, Oxford, Oxford University Press, 2017, p. 49-66.

32 To be in touch with this relationship between international law and domestic law, see: MENEZES, Wagner. Ordem Global e Transnormatividade. Editora Unijui, 2005.

legislative, jurisprudential and doctrinal Brazilian measures are not taken for granted.

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THE TAX TREATMENT OF EMPLOYEE STOCK-OPTIONS: A BRAZILIAN PERSPECTIVE

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Abstract: This article presents an analysis of issues concerning the taxation of employee stock options plans (ESOPs). It examines a detailed study published by the Organization for Economic Co-operation and Development (OECD) regarding the tax treatment of stock options and incentive pay schemes in the OECD countries and compares its conclusions with the tax treatment of ESOPs in Brazil. The aim of this article is to illustrate the main conclusions of the analysis made by OECD based on the tax neutrality principle and to provide a specific description of the tax treatment of ESOPs in Brazil, showing how the discussions pointed out by OECD are being faced in the country. The conclusion, unfortunately, is that all the intricacies that arise when the companies decide to grant ESOPs listed by OECD also arise in Brazil, which combined with the fact that there are no specific regulations regarding the tax treatment of stock options, specially regarding the qualification of the income received by employees as stock options (if salary or only capital gains), introduces even more an undesired level of uncertainties.
Keyword: stock options; OECD; salary; capital gains

1. INTRODUCTION

The practice of granting a company's employee options to purchase the company's stock has spread through the business world. An official document published by the OCDE's Committee on Fiscal Affairs[1] states that, in the 1990s, stock options were a standard feature in most executive pay packages in countries like United States, Canada, Australia and the UK, and, in more recent years, their use has been

1 OECD (2006), The Taxation of Employee Stock Options, OECD Tax Policy Studies, No. 11, OECD Publishing, Paris, available at https://doi.org/10.1787/9789264012493-en, at 10.

extended to a larger set of countries, becoming a more common form of employees' compensation.

But what are stock options and what can we call Employee Stock Options Plans (ESOPs)? A stock option is the right to acquire a share from a given seller at a given moment or during a given period. In other words, stock option is a financial instrument that represents the right to buy a certain asset. The ESOPs, on the other hand, consists of a program that grants employees the right to acquire a determined number of shares of the employer's company at a designated price within a determined timeframe. Traditionally, the intention of these programs is to align employees' and employers' interests by providing a long-term incentive in which the benefits from its success will affect both parties (employees and employers).

Under an ESOP, therefore, stock options are granted to employees, but usually with certain conditions, marked by four different events, such as the granting, the vesting, the exercise and the sale of the shares acquired through the exercise of the options. The time of grant corresponds to the moment when the employee is given options to acquire shares, normally subject to a minimum holding period (vesting period). When the conditions under which the stock options were granted are fulfilled, the option is said to be "vested" and the employee has the right to exercise its options and acquire the share with the price already fixed (strike price). In some programs, after the vesting period, the employee can also sell the options immediately. In others, however, even after the vesting period, the employee is subject to another minimum holding period (called "lock-up").

In general, the popularity of stock options plans is justified by the economic argument already mentioned, that is, the stock options helps to align employee and shareholders interests and help to increase the benefits for the company. However, there is also another important aspect that is really taken into consideration when the company decides to grant the right to employees to acquire its shares at a given moment or during a given period at a fixed price, that is the advantages from a tax perspective, because, in some cases, stock options also enable the companies to compensate executives and employees in a more advantageous way than paying a cash salary.

In this context, this article makes an analysis of issues concerning the taxation of ESOPs. Based on a detailed study published by OECD regarding the treatment of stock options and pay incentive schemes in the OECD's countries, section 2 analyses the main conclusions concerning the special tax treatment of ESOPs and the tax neutrality principle. The analysis of the stock options tax treatment in OECD's perspective is important not only to comprehend how the countries deal with the ESOPs' taxation, but also to understand the existing discussions on the

matter. The conclusions show that there are a number of issues, mainly regarding the type of income (if salary or not), the timing of taxation and the applicable taxes, which remains unclear even after so long.

Section 3 is a retrospective of the ESOPs in Brazil, which, in the recent years, are also becoming a more common instrument of employee' compensation. The aim of this section is to compare the OCDE's conclusions with the tax treatment in Brazil, demonstrating that the same discussions involving the taxation of stock options plans exists in the country, with an extra problem, that is the lack of specific regulations regarding the subject and the fact that the general rules regarding taxation of employee benefits still raises a lot of issues yet unsolved by Brazilian law and jurisprudence. Section 4 will present a conclusion to this article.

2. THE OECD'S VIEW REGARDING THE TAXATION OF STOCK OPTIONS PLANS

The main purpose of this Chapter is to present the conclusions from the detailed study published by the OECD's Committee on Fiscal Affair regarding the possibility of a special tax treatment for employee stock option plans and the application of the tax neutrality principle. Special attention must be given to the referred principle, which was assumed as being violated when the choice of granting stock options became more advantageous for purposes of reducing taxes than the payment of the ordinary salary.

2.1 The OECD's Tax Policy' Studies

As previously mentioned, in the recent years, the use of stock options plans has been extended to several countries, becoming a more common instrument for employee's compensation. However, although commonly used, the taxation of stock options can be complex, as there are a lot of factors that determine how much is taxable and when (i.e., in which moment) it is supposed to be taxed.

In 2006, the OECD published a study presenting an analysis of issues that arise from the taxation of the employee stock option plans. In the beginning of the publication, it is stated that the study represents the output of a project that was initiated by the OECD's Committee on Fiscal Affairs in 2001 and that it is divided into two main parts, related to domestic aspects of the countries members and to international issues[2]. At that time, the discussions involving stock options were already relevant, because the ESOP's were considered a common

2 *Ibid.* at 3.

component of remuneration packages in multinational enterprises. However, more than ten years later, the same issues pointed out by the referred publication still exist and, at least from a Brazilian perspective, will still remain for a long time.

The main challenge according to the OECD was the fact that the benefits from an employee stock options are taxed in different ways in different countries, which makes the discussions even more complex and difficult to define exactly how the ESOPs are and must be taxed[3]. The conclusions show that there are a number of factors that determine how and when an employee stock option will be taxed, but each country has its own way of defining the treatment. The problem is that there's also a number of tax treaty issues arising from employee stock options, mainly concerning to the qualification of the income (if stock options are considered compensation income or capital income), the applicable taxes and charges (income tax, capital gains tax and social security contributions), the timing of taxation (grant, exercise or disposal of shares) and the treatment at corporate level (if the cost of the stock options can be deducted or not from corporate income)[4].

After considering several aspects regarding the taxation in different countries, OECD proposes its conclusion of how stock options must be qualified and taxed based on the tax neutrality principle, averting the two main arguments presented by literature in favour of a special taxation of employee stock options. First, the economic one, that defends that the stock options can mitigate the main problem agent in corporate governance by being an effective mechanism for aligning the interests of managers more closely with those of shareholders. In this sense, OECD states that this argument has been scrutinized by a number of empirical studies, which concluded that stock option, rather than contributing to a solution, are part of the corporate problem. Secondly, the argument based on (i) motivation and productivity of employees, (ii) personnel recruitment and retention and (iii) capital and liquidity-related reasons[5].

According to OECD, stock option can create a stronger sense of involvement in employees, making them more interested in the value of the company and inducing them to increase their productivity, nonetheless, it also happens in others pay incentive schemes. As to the other two points, OECD recognizes that they are consistent, because stock options can be an effective instrument in attracting and retaining personnel specially for young and growing firms, because otherwise employees would prefer to work in larger companies, and also play an important role in the presence of capital and liquidity constraints,

3 *Ibid,* at 12.
4 *Ibid,* at 16-17.
5 *Ibid,* at 11.

allowing companies (specially young firms and start-ups) to compensate their employees without immediate cash payment. In this regard, OECD admits that the conclusions on the appropriate level of taxes to be levied on stock options and on possible preferential tax treatments are difficult to draw, but the simple fact that stock options have desirable characteristics (such as the ones described) is not sufficient to justify special tax treatment[6].

The conclusion, therefore, is that an efficient tax treatment of stock options must respect the principle of tax neutrality, specially concerning the choice of granting stock options and paying ordinary salary. But what can we consider as "tax neutrality"? The question deserves further clarification.

2.2 The Tax Neutrality principle and the OECDs' concept in this regard

In order to have a clear view of the way OECD sees the taxation of ESOPs, is important to provide a detailed definition of the tax neutrality principle. Douglas A. Kahn defends that the term "tax neutrality" has at least two different concepts[7]. In its most common sense, it refers to tax provisions that conform to an ideal tax system. He brings the lessons of Professor Stanley Surrey, who has embellished the tax neutrality concepts and characterized tax provisions that violated the concept of neutrality and that benefit some taxpayers as "tax expenditures"[8]. According to Professor Surrey, a failure to tax someone according to neutral principles characterizes a government expenditure, which is essentially identical to a direct outlay of government funds. In other words, a preferential tax treatment is identical to the Government making a direct payment to a specific group (the beneficiaries of the special tax treatment).

The other concept of the tax neutrality presented by Douglas A. Kahn is that, sometimes, the tax neutrality is used to describe a tax system that does not create a bias that could influence a taxpayer to choose an investment or course of action over another. The example given to illustrate this point reflects the affirmative, i.e., if the tax levied over the income from rental realty is less than the tax levied over the same amount of income from bonds, the tax law will distort the market

6 *Ibid,* at 11.

7 Kahn, Douglas A. "The Two Faces of Tax Neutrality: Do They Interact or Are They Mutually Exclusive?" N. Ky. L. Rev. 18 (1990): 1-19, available at https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1318&context=articles, at 1.

8 *Ibid,* at 4-6.

choice between investing in realty or in bonds[9]. In this sense, a tax neutral provision would be the one that allows the choice of investment or action to be made based on market or personal considerations without influence from tax laws. This approach of tax neutrality, however, would lead to the question whether there is a true violation in providing stock options plans with special tax treatment.

It is important to highlight that Douglas A. Kahn concludes that tax neutrality is not a true principle. He states that the so-called principle of neutrality is merely a recognition that the cost of such a tax influence is sometimes too great because considerations about economic or social policy dictate that some specific choice should be made based on market or personal grounds[10].

Returning to the OECD's view, is possible to say that it rests on the first concept presented by Douglas A. Kahn in said article, since the tax neutrality is used to justify the impossibility of granting special tax treatment to stock options plans. According to OECD, an efficient tax treatment of stock options is the one that provides no tax-related incentive for a company to either increase or decrease the number of employee stock options that it grants, and that is neutral with respect to the choice between granting stock options and paying ordinary salary[11]. The OECD's conclusion is that to ensure neutrality between the taxation of stock options and ordinary salary, the tax system must combine the allowance of stock options costs as a company tax deduction, and the equal treatment of stock options benefits and ordinary salary at the personal level[12].

Despite arguments to the contrary regarding the special tax treatment of ESOPs, the OECD makes a clear statement that the objective of the study was to present a non-perspective analysis based on the principle of neutrality, in order to provide a useful benchmark for policymakers[13]. However, the study just started the arguments, leaving the question of whether any non-neutrality is desirable to the judgment of individual countries.

3. THE BRAZILIAN PERSPECTIVE OF THE EMPLOYEE STOCK OPTIONS TAXATION

This chapter will present the provisions of stock options plans in Brazil. First, it examines the main aspects regarding the national regulation of the subject. Then, it also compares the OECD's conclusion

9 *Ibid,* at 11.
10 *Ibid,* at 15.
11 OECD, *supra* at 12.
12 *Ibid,* at 32.
13 *Ibid,* at 17.

with the tax treatment in Brazil.

3.1 The tax treatment of stock options plans in Brazil

In Brazil, the companies create their stock option plans in accordance with Article 168, Paragraph 3 of Federal Law 6,404 of December 15, 1976, as follows:

"Article 168. The bylaws may authorize capital increases without amendment to the bylaws.

(…)

Paragraph 3. The bylaws may provide that the corporation may grant a share purchase option to its officers or employees, or to individuals rendering services to the corporation or to a corporation under its control, within the limits of its authorized capital and in accordance with a plan approved by a general meeting".

Even though the aforementioned Law exists for more than forty years, the history involving the taxation of ESOPs in Brazil is relatively recent. In fact, when it comes to the qualification of the income for purposes of taxation, there is no specific regulation on this matter. As a consequence, the tax treatment of stock options plans depends basically on a case-by-case analysis. The problem, therefore, arises from a discrepancy between the positions normally taken by Tax Authorities and by Judicial Courts, especially in light of the Labour Courts' jurisprudence.

As a rule, Brazilian legal entities and their employees are required to pay social security contributions over the amount paid by the employer as compensation for the employees' work (remuneration). However, due to the lack of legal provisions, the question whether stock options granted under the companies' plans should be treated as compensation income or investment income remains unclear.

The first decisions regarding stock options in Brazil were ruled by Labour Courts, which have defined the parameters to be observed in order to differentiate stock options from compensation income (i.e., to avert the qualification of stock options as remuneration). First, the beneficiaries must adhere to the ESOPs voluntarily. Second, it is indispensable to have an onerosity aspect in the contract to be sign between the company and employees. In other words, the beneficiaries need to invest their own financial resources to exercise the options granted. Third, the existence of investment risk (if the stock options are exposed to market risks). Hence, it can be said that Labour Courts in Brazil accept the commercial nature of stock options if companies observe the three parameters mentioned. However, although important to stablish the grounds of what is considered remuneration or not (even for tax perspective), the Labour Courts are competent to adjudicate

disputes concerning only labour relations (and not tax causes) and, because of that, Tax Authorities not always respect the parameters established by them.

Recently, Tax Authorities started to pay more attention to stock options plans and issued several tax assessments in order to demand social security contributions from companies that granted stock options to employees assuming that the real intention of the company was to pay an uncovered salary and, therefore, avoid taxation. One of the arguments given in favour of the qualification as compensatory income is the fact that employees are allowed to buy shares at prices lower than market value and then sell them later at higher values.

Since 2013, the Brazilian Administrative Tax Court ("CARF") has been adopting a more strict orientation regarding the qualification of ESOPs than the ones set forth by Labour Courts and, in most of the tax assessments issued, the stock options were considered to be part of the beneficiaries' remuneration, subject to the same taxes levied over ordinary salary. However, it is important to highlight that CARF recognizes in their decisions that stock options may also have an investment purpose, and, in that case, the social security contributions would not be due. Nevertheless, in order to consider stock options as investment income, is necessary to demonstrate the existence of risk and the uncertainty as to gain, which are concepts undefined by Brazilian law and really difficult to prove. Therefore, even though the difference between stock options and compensation income according to the parameters fixed by Labour Courts is accepted, the decisions ruled by CARF suggest that, in the Court's view, is almost impossible to create an ESOP dissociated from the employee's remuneration.

From CARF's perspective, therefore, the qualification of stock options depends on the structure of the plans created by the companies and the benefits given to employees. Usually, as previously mentioned, the Courts recognize that stock options are different from ordinary salary based on the argument of the existence of the risk. Since there's no certainty of gains, the simple fact that the ESOPs are granted during a work contract (in theory) would not be sufficient to qualify the eventual gain as ordinary salary, since the employee may lose money depending on the stock value. What is unacceptable, to CARF, is the inexistence of risks and the certainty of gains for the employees. Finally, since there are no legal provisions regarding the definition of risk for tax purposes, there is always a good reason, specially on the administrative sphere, to defend the remunerative nature of the income and to demand the payment of social security contributions.

The judicial Courts competent to adjudicate tax causes, directly or indirectly related to the Federal Union, and to analyse the validity of tax assessments issued by Tax Authorities have not yet given a

definitive decision on the matter. There are very few decisions rendered and the final conclusion is yet unknown, but, until know, by examining them, it seems that the interpretation given is closer to the one settle by Labour Courts.

In a case involving the Brazilian subsidiary of the Swedish company Skanska, for example, the company presented its defence against the tax assessment issued based on the parameters fixed by Labour Courts and argued that the employees voluntarily used their own money to buy the shares and that the shares are subject to the same market risks as others with no guarantees of profits. The Federal Court considered that the Skanska stock option program is a contractual agreement between the company and its employees and, therefore, ruled in favour of the Company. According to the Court, the stock options were not part of employee's remuneration, but of a mercantile contract between two parties (company and employees), and, in this case, not subject to social security contributions[14].

Despite the lack of specific regulations regarding the qualification of stock options for purposes of taxation, is important to point out that Federal Law 12,973 from May 13, 2014, allows the companies to deduct the stock options costs from the corporate income base. Therefore, considering the above, if certain conditions are respected (such as voluntarity, onerosity and risk), is possible to say that in certain conditions or in certain schemes, Brazil grants preferential tax treatment to stock options, at the same time allowing deductibility at the corporate level.

However, due to the uncertainties in Brazilian law and jurisprudence, even if the parameters fixed by Labour Court's jurisprudence (voluntarity, onerosity and risk) are observed, the companies must be aware of the risk of being questioned by Tax Authorities and eventually having tax assessments issued to demand social security contributions.

3.2 The OECD' conclusion and the Brazilian perspective

Contradicting the general conclusions of OECD of how stock options must be taxed, in Brazil is possible to defend a special tax treatment for employee stock option plans without facing the tax neutrality principle, which is not really considered in the discussions on the tax regime applicable to stock options. Even though there are still no specific regulations regarding the qualification of the income, in general, the benefits obtained with ESOPs are taxed in a different way than ordinary salaries, subject only to capital gains tax. However, due

14 Regional Federal Court for the Third Region (TRF 3). Appel n. 0021090-58.2012.4.03.6100/SP, of April 08, 2016.

to the uncertainties and the risk of receiving tax assessments issued by Tax Authorities demanding social security contributions, many companies have already decided to consider ESOPs as part of the employee remuneration and, in this case, the treatment adopted is in line with OECD's position.

Besides from the qualification of the income, the other issues pointed out by OECD, mainly concerning to the timing of taxation (grant, exercise or disposal of shares), are also unresolved in Brazil. As already mentioned, there are no specific regulations on the matter and even the qualification of the income (if stock options are considered compensation income or capital income) is still being defined according to the jurisprudence. Regarding to the timing of taxation specially, unfortunately, is not possible to determine exactly what will be the outcome of the jurisprudence.

In this context, the necessary conclusion is that the number of issues that arise from the analysis of the tax treatment of stock options in OECD's countries also exists in Brazil. However, without facing the tax neutrality principle. It is not clear yet what would be the true nature of the income and the final decision of Brazilian Judicial Courts, but, for now, is possible to defend the difference between stock options and remuneration and tax the first ones in a more advantageous way than ordinary salary, since it is subject to market risks not faced by compensation incomes.

4. CONCLUSION

This article presents the main conclusions regarding the special treatment of ESOPs in the OECD's context and the Brazilian perspective about the subject. The goal was to analyse the detailed study published by OECD in order to understand the intricacies of stock options taxation and the issues that arise for beneficiaries and companies, presenting how, in OECD's view, the stock options must be qualified and, in consequence, taxed.

According to the conclusions set forth by OECD, an efficient tax treatment of stock options must respect the principle of tax neutrality, specially concerning to the choice of granting stock options and paying ordinary salary. The important thing for OECD is to have a tax treatment that provides no tax-related incentives for a company that decides to grant stock options to its employees and that is neutral regarding the choice of either granting stock options or paying ordinary salary. Regardless of the conclusions, OECD clearly states that the objective of the study was just to present a non-perspective analysis based on the principle of neutrality, leaving to each country the decision whether such a principle must be observed or not.

In Brazil, the tax neutrality principle is not really analysed when it comes to ESOPs and, in general, stock options are treated differently than ordinary salary and other forms of long incentive schemes when it comes to taxation. The benefits of stock options plans are subject, for example, to the same taxation as capital gains, which do not include the social security contributions. However, all the aspects regarding stock options in the country derive from jurisprudence, which still oscillates a lot. The lack of specific regulations on the matter turns the discussions around stock options uncertain for taxpayers (beneficiaries and companies) and difficult to draw.

Overall, the evolution of stock options in Brazil shows that OECD's conclusion based on the neutrality principle is not really discussed in the country. The difference between stock options and ordinary salary is considered to be accepted when certain aspects are observed by the companies, such as voluntarity and onerosity, and when is clear the presence of risks taken by the beneficiary. If such aspects are demonstrated, it is possible to defend that the stock options granted by companies arise from a mercantile contract, with no connection to the labour relation and, therefore, subject to different taxation as ordinary salary.

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HERSCH LAUTERPACHT: AN INTRODUCTION[1]

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INTRODUCTION

Seldom have authors produced such a longstanding impact on doctrine and practice for successive generations of international law scholars. The so-called "fathers" of international law, such as Grotius, Gentilli, Vitoria and Suárez, are frequently recalled as one wishes to quote the most influential scholars of the field, but if one should give international law a sense of dynamism, in the sense of observing it as a set of ideas that must affect reality, its "paternity" should be revalued regularly, and, dare I say, more constantly.

Like few, Hersch Lauterpacht knew that scholars do not communicate with the past through mere bonds of blood, but rather through loyalties that are constantly put to the test. In a major essay originally published in 1946, *The Grotian Tradition in International Law*, he intended to alert his colleagues to a series of duties of which Grotius had been reminding them since the 17th century. The historical moment for such a reminder could not have been more appropriate. In 1946, the world needed to be reconstructed, the projects of longstanding peace were a necessity of the common citizen, institutions and rules needed to warrant stability to the many social relationships that surpassed the borders of the states. Although many which had survived to both world wars could not give up on some level of comprehensible suspicion, there was patent urgency that international law scholars should be the "aerials of the kind". Grotius proportioned, as Lauterpacht said, a source of faith on law as it must be.[2] Today's reader, upon meeting such long essay, must ask himself whether the Grotian tradition is not truly

1 Translated by Raphael de Souza Camisão

2 LAUTERAPACHT, Hersch. The Grotian Tradition in International Law. In: LAUTERPACHT, Elihu (ed.). International Law: Being the Collected Papers of Hersch Lauterapcht. Vol. 2: The Law of Peace. Cambridge: Cambridge University Press, 1975, p. 363.

a Lauterpachtian tradition on international law. After all, to remember the father is also a way to kill him. As Carlos Drummond de Andrade would say, upon remembering his father in one of his most celebrated poems *A Mesa*, "many deaths are left to be long reincarnated on another dead".

On this tension between life and death, Lauterpacht definitely asserted himself, either in a truly Grotian tradition or as one of the new fathers of international law from his own death, in 1960. [3] Undoubtedly, his influence has been questioned or applauded in many fields in which he acted, either as a theorist or a practitioner of international law.[4]

Lauterpacht was a prolific author. His work consists of five books, two of them substantially reedited, plus over sixty articles, four courses ministered in The Hague Academy of International Law, reports presented to the International Law Commission, plus many other scholarly and professional writings, such as opinions emitted as a judge of the International Court of Justice. A large part of these writings – not including the books – was diligently compiled by his son, also a renowned international law scholar, Elihu Lauterpacht, in five substantial volumes.[5]

It would be virtually impossible to synthesize Lauterpacht's work in a few pages in all its complexity and extension. Therefore, this chapter will merely present the main theses defended by the author through his five books. Evidently, this would leave many important and influential writings of Lauterpacht behind, such as on jurisdictional immunity of the states, neutrality, continental platforms, treaty law or international organizations' law. The concentration in his books can be explained: Lauterpacht has always been known by his peers as an author endowed with high methodological rigor and coherence – in all his writings there is "fundamental unity", as, for example, his friend

3 It seems to be no coincidence that Martti Koskenniemi, one of the greatest living Lauterpacht scholars, has identified the decline of international Law as a profession – originally affirmed on 1869 with the creation of the Revue de droit international et de législation comparée and the Institut de Droit International – in 1960. It is also Koskenniemi who doubts the existence of a Grotian tradition (rather than Lauterpachtian) on international Law. See KOSKENNIEMI, Martti. The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960. Cambridge: Cambridge University Press, 2001, p. 3-6, 406-411. Such doubt is also stressed in Lesaffer, who much attributes the Grotian tradition to Franciso de Vitoria. See LESAFFER, Randall. The Grotian Tradition Revisited: Change and Continuity in the History of International Law. British Yearbook of International Law. London. Vol. 73, 2002, p. 103.

4 For one of the most updated list of publications by the author, see LAUTERPACHT, Elihu. The Life of Hersch Lauterpacht. Cambridge: Cambridge University Press, 2010, p. 443-445.

5 Ver LAUTERPACHT, Elihu (ed.). International Law: Being the Collected Papers of Hersch Lauterapcht. 5 volumes. Cambridge: Cambridge University Press, 1970-2004.

and contemporary Wilfred Jenks pointed out. [6] It is on his books that one may find the theoretic and methodological ideas which significantly impacted all his writings. As well as some very brief biographical incursions, some impact left by his work on following generations of internationalists shall be assessed.

1. PRIVATE ANALOGIES

Private Law Sources and Analogies in International Law (henceforth *Private Law Analogies)* was the first monographic work published by Lauterpacht as a book. The work was originally presented as a doctoral thesis to the London School of Economics, under orientation of an important 20th-century scholar who would later on become one of his best friends, Arnold Duncan McNair. *Private Law Analogies* intended to prove, specially resorting to the doctrinal history of international law and many precedents of permanent and arbitration courts, that international law uses analogical thinking referencing to many institutes of private law abundantly, specially Roman.

In such work, dated from 1927, Lauterpacht was especially worried with establishing a defense of the general principles of law as sources of international law. Article 38(1c) of the Statute of the Permanent Court of International Justice, establishing as a rule of law to be applied by the Court "the general principles of law recognized by civilized nation", it would allow jurists to build a permanent bridge between the diversity of domestic laws and international law. The principles of Roman private law, as received by domestic law, would be directly applicable to international law by the force of the aforementioned article. The intellectual ambiance of such time, however, still profoundly marked by positivistic ideals, would leave little room for appliance of general principles of law. Positivists would bother to emphasize the unique character of international law – therefore deeply divergent from internal laws. Recognizing that international law was cultivated across history to be thought diversely from domestic law would be a form to destroy permanent bridges with domestic law, with domestic analogy to private law, and, conclusively, to deny applicability or mitigate the importance of general principles of law as a source of international law.[7]

Lauterpacht saw in basically all fields of international law of peace – referring to the old distinction between international law of peace and of war – the influence of private law. Rules on estoppels and *res judicata*, therefore, would have influenced international procedural

6 JENKS, C. Wilfred. Hersch Lauterpacht – The Scholar as Prophet. British Yearbook of International Law. London. Vol. 36, 1960, p. 3.

7 LAUTERPACHT, Hersch. Private Law Sources and Analogies of International Law. London: Longmans, 1927, p. 3-8.

law, the analogy between states and individuals was responsible for the appearance of the doctrine of fundamental rights of states, the law of international responsibility would relate to internal laws of extracontractual responsibility, the law of treaties would have derived from contract law many elements, rules on acquisition and loss of territory by a state had their own structure originated on rights *in rem* as seen at the level of domestic law. [8]

For our author, the forgetfulness of this influence of private law in international law was a direct result on the impact of positivist doctrines on international juridical science. If international law emanated only from the will of states, anything not included on such will – such as internal private law – ought to be rejected. The principles of private law had become principles of natural law, therefore not subjected to the will of sovereign states. [9] One of the main intentions of the work is to bring natural law back to international law through analogies and general principles of law.

On a scholarly point of view, Lauterpacht made efforts to demonstrate that analogical thought referring to the principles of private law are present in the "fathers" of international law. Even posterior positivist authors, according to him, used such analogy in their reasoning. [10]

The rest of the book aims to prove how seldom does the practice of international law – both contemporarily to the publication of the work and long before it – refrain from using private law analogy.

Martti Koskenniemi suggests that the work is informed by a double agenda: scientism and individualism. On one hand, scientism is outlined by analogy, which is "the jurist method to supplement the fragmentary or contradictory elements to secure systemic unity of law". [11] Individualism, on the other hand, is relevant to allow the sovereign state not to permanently obstruct the direct relationship which it must stablish between international juridical order and individual human beings. This is why direct attacks on sovereignty can be found both in *Private Law Analogies* and various other works by Lauterpacht. [12]

Such a reading, although much plausible, is reductionist on the impact of the book on Lauterpacht's ideas, especially if one considers his posterior works. Koskenniemi seems to see *Private Law Analogies* merely as a test tube of *The Function of Law in the International*

8 Idem, p. 6.

9 Ibidem, p. 7-8.

10 Ibidem, p. 8-31.

11 KOSKENNIEMI, Martti. The Gentle Civilizer, p. 364.

12 Idem, p. 365-366. On a straighter language, Jenks had already stressed a much similar reading when pointing that the first part of the book is na attack against positivism and sovereignty. JENKS, Wilfred. Hersch Lauterpacht, p. 4.

Community, which deals with the problem of non-justifiability of questions and gaps on international law. Analogies, therefore, would be primordially meant to allow the completeness of the system through domestic law.

Beyond solving the problem of gaps in international law, private analogies allow for a unified vision of domestic and international law: a monistic version, to be more precise. Beside the gaps, Lauterpacht was worried with granting international law more effectiveness, something difficult to be obtained, due to, among other factors, the refusal of judges and arbitrators to decide on certain questions. He affirms, therefore, that there should be no necessity to recur to domestic analogies of private law as long as "there is an international law ruling available". [13] The international juridical system, therefore, needs to recur to domestic analogies due to its primitive and fallible structures. It is precisely this primitivity that makes private, and not, say, constitutional analogy necessary. The contractual bases of international law allow for analogies with private law, but not with bodies of law with more explicitly subordinative character, such as criminal, constitutional or administrative law. [14]

In posterior writings, when Lauterpacht evokes the idea of federation of states, more developed points are put forth on the application of international criminal law – such as in Nurnberg – of human rights or those on the functionality of international organizations. In this moment, indeed, analogies to criminal, constitutional and administrative law are more evidenced. [15]

Private Law Analogies is, therefore, more than a mere anticipation of *The Function of Law*, but rather an anticipation of Lauterpacht's ideas in many other directions.

Before present-day eyes, the book provokes some disquiet and contestation, such as the eurocentrist blemish that might be attributed to the author due to his robust emphasis on juridical principles developed basically in a European context and imposed to multiple juridical systems around the world, or the failure of the idea of completeness of law (and thought) that was evidenced with the project of criticism of reason developed in the Post-War Era. Still, it is a book that, from the point of view of the proposed discussion, touches countless themes that

13 LAUTERPACHT, Hersch. Private Law Analogies, p. 34.

14 Idem, p. 35.

15 This is essentially connected to the posteriorly developed by Lauterpacht Idea of the imperative necessity of the creation of a global state, as it shall be further detailed. For a general overview of the theme, comparing similar propositions by Kelsen and Scelle, see GALINDO, George R. B. Revisiting Monism's Ethical Dimension, In: CRAWFORD, James and NOUWEN, Sarah. (ed.). Select Proceedings of the European Society of International Law, Vol. 3, 2010. Oxford: Hart Publishing, 2012, p. 141-153.

would be important for the comprehension of international law in the 20th century.

It should be no exaggeration to say that many contemporary discourses, based on the idea of "lack" or "ineffectiveness" of international law, seek to fulfill what they deem as problematic in the international juridical system through arguments, institutions or rules of internal law. Such is the case, for instance, of the many proposals of constitutionalization of domestic law, which draw much inspiration from constitutionalist ideas found in domestic law. [16] The same point could be made as for the project of the so called Global Administrative Law, as for the administrative ideas of domestic law. [17]

2. LAW AND ITS FUNCTION ON THE INTERNATIONAL COMMUNITY

The Function of Law in the International Community (henceforth *The Function of Law*) has once been considered the most influent English-language international law book of the 20th century. The present-day reader may detect some exaggeration on such an honor given the problem which Lauterpacht intends to explore: the alleged difference between juridical and political questions, justiciable and non-justiciable.

Along the 19th century, when arbitration arose in international law as a means of pacific settlement of controversies, several obstacles were created in order to diminish its effectiveness. The main proposition was that many questions did not fall under the rule of law, and therefore could not be assessed by arbitrators. These were the so-called non-justiciable disputes, as opposed to justiciable disputes, which would fall within the scope of arbitration. The turn to the 20th century and the creation of a permanent court, the Permanent Court of International Justice, would not bring relevant novelties to such opposition. The explanations on the need of distinction were many, but Lauterpacht, at the beginning of the book, traced an origin that led to the prime enemy: the doctrine of sovereignty. [18] At this point, he retook a project of critique to sovereignty that began vigorously with *Private Law Analogies* and would cover virtually all of his work. The doctrine of non-justiciability of

16 Sobre o tema, sob uma perspectiva crítica, ver GALINDO, George R. B. Constitutionalism Forever. Finnish Yearbook of International Law. Helsinki. Vol. 21, 2010, p. 137-170.

17 Ver KINGSBURY, Benedict, KRISCH, Nico, and STEWART, Richard B. The Emergence of Global Administrative Law. Law and Contemporary Problems. Durham. Vol. 68. Nº 1, 2005, p. 15-61.

18 LAUTERPACHT, Hersch. The Function of Law in the International Community. Oxford: Clarendon Press, 1933, p. 4.

matters would perpetuate the rule that compulsory jurisdiction of courts is a merely voluntary restriction of sovereignty within the framework of a contractually established obligation. According to Lauterpacht, this would be the very negation of rule of law in the international society of states.[19]

On these terms, it may be perceived that the theme of the book is not strange to its title. To insist on the existence of matters outside the scope of law – and also of the courts – is to deny to law the important function of regulating the international community itself.

For Lauterpacht, there is no distinction between juridical and political questions, neither between justiciable and non-justiciable ones. Everything can be juridical, and, therefore, justiciable. The international juridical system, therefore, has no gaps. Its completeness – as that of the domestic juridical system – is a presumption of the rule of law. If the headstone function of law is to preserve peace, one cannot admit the inexistence of juridical answers to various situations.[20] Plus, the general principles of law – whose importance was highlighted in *Private Law Analogies* – would fulfill an essential role in providing means for the solution of controversies as long as a treaty or custom did not stipulate applicable rules to the case. The judge is commissioned with the duty of recurring to such principles in the name of completeness of the international juridical system.[21]

Much analytically, Lauterpacht confronts the main arguments for the maintenance of distinction. One example is the impartiality of the international judge, which he points out as one of the "most urgent themes of political organization of the international community".[22] The apprehensiveness of states in handing a specific matter to an international judge would be founded both in his origin – leading to clear bias on his decision – as in the will to expand or restrict jurisdiction to the detriment of state sovereignty.

Additionally, Lauterpacht defies the point that the maintenance of the distinction between justiciable and non-justiciable questions has any relation with the theme of "juridical change". International jurisdiction shall only be applicable considering the current state of the international organization and legislation. The modifications and increases on set law would be entrusted to an international legislator – who does not exist. The mostly contractual base of international law would lead it to a static tendency. Based on the analogy with the function of the domestic judge, Lauterpacht defends the thesis that the international judge has the function of adapting law to mutable

19 Idem, p. 44-45.
20 Ibidem, p. 64-65.
21 Ibidem, p. 85.
22 Ibidem, p. 201-202.

conditions. He did not see any hindrance in considering that the judge also crafts law, [23] may it be recurring to the general principles of law, may it be through the application of doctrines of abuse of law and *rebus sic stantibus*, among other methods.[24]

For our author, the defense of the existence of non-justiciable questions would also relate to the debate on the juridical natural of international law itself. The diversely valuable arguments denying that international law would have the characteristics of a juridical system as visible in the domestic dimension of the states would lower defense to the idea that there are issues uncovered by international law. Defending the juridical character of international law, Lauterpacht clearly sees the necessity that it should be led by a specific kind of social organization, such being found in domestic law. The importance and even desirability of domestic analogy returns and once again becomes explicit. He directly defends that, as long as international law more narrowly approaches domestic law, it should also approach the "moral and order patterns that ultimately fundament law". [25]

The importance of *The Function of Law* lies specially in seeking to attribute a central role to law in international relations. The existence of non-justiciable questions in doctrine not only caused the descoping of merit appreciation of controversy away from international courts: it also generated the effect of making law a mere partial regulator of social relations. Objectives such as justice, order and peace could not be fully achieved with such a limitation.

The centrality of the judge in a system with little legislative centralization was a solution crafted by Lauterpacht to make law more effective. As it was already pointed out by some authors, the idea is an approximation between international law and the common law system. Therefore, law would not be deemed a creation of an extrinsic agent, such as a legislator or even a judge. Such would be the cases that make law evolve. The international judiciary would be the oracle of law itself, which in turn would be a "repository of practical experience".[26]

Such loyalty towards common law, however, could not be taken to its ultimate conclusions. Before subscribing to any specific kind of juridical system, Lauterpacht, native to the Austro-Hungarian Empire and later a British citizen, seems to have absorbed the British sense of pragmatism. According to him, the main *telos* of international law was to reach a level of centralization through a sole legislator. This is why

23 Ibidem, p. 255.

24 Ibidem, p. 307.

25 Ibidem, p. 432.

26 SOMEK, Alexander. From the Rule of Law to the Constitutionalist Makeover: Changing European Conceptions of Public International Law. Constellations. New York. Vol. 18. Nº 4, 2011, p. 573.

he affirms that "the existent tendencies towards political integration of the community of states will later produce the consummation of mechanism of change through the work of an effective international legislator. This will diminish upon the judicial solution obligatory to pressure – partly true, partly imaginary – imposed to him due to the imperfections present in legislative procedure.[27]

The teleological thought of Lauterpacht – also highlighted in recent commentary to his work[28] – proves that he was more worried with making private law as centralized as domestic. The protagonism which he bestowed on the judge in *The Function of Law* was, in a certain way, provisory, until a central international legislator rose up to put forth more radical changes on international law. Such point strengthens the idea that *Private Law Analogies* is no mere appendix to *The Function of Law*. The existence of a global state presupposes unity between domestic and international law. Recurrence to analogies is an important way to practice the idea that there is only one juridical system and one rule of law to guide it. Lauterpacht, therefore, was only continuing his initial project of making international law a true *civitas maxima*, in order to encompass both domestic and international law.[29]

The legacy of such work is very noticeable nowadays. *The Function of Law* has influenced the following generations of international law scholars not only to attribute great importance to the judiciary, but also to international judges.

All enthusiasm in the 1990s with the creation of new international courts and their role in paving a way of progress for international law may certainly be traced back to *The Function of Law*. [30] Lauterpacht constantly associates the expansion of activities of the international judiciary to a way of progress, justice, peace and social order at an international scale. The judiciary solution is seen as somewhat more evolved in comparison with more political others. This is made clear, for instance, when he when it emphasizes clear advantage in the solution of controversies by courts, as opposed to conciliation.[31] Meanwhile, to the

27 LAUTERPACHT, Hersch. The Function of Law, p. 346.

28 Ver CAPPS, Patrick. Lauterpacht's Method. British Yearbook of International Law. London, 2012. Disponível em http://bybil.oxfordjournals.org/content/early/2012/06/09/bybil.brs001.full.pdf+html, p. 1-33.

29 On such sense, it is important to note that, as he refutes the argument that the nationality of the judge interferes on his independence, Lauterpacht stresses the necessity that the international judge creates the "consciousness of citizenship toward a civitas maxima", rather than loyalty to nation states. LAUTERPACHT, Hersch. The Function of Law, p. 233.

30 Sobre o tema, ver SKOUTERIS, Thomas. The Notion of Progress in International Law Discourse. The Hague: TMC Asser Press, 2010, p. 159-216.

31 LAUTERPACHT, Hersch. The Function of Law, p. 268-269.

extent that this enthusiasm with the courts has mingled,[32] Lauterpacht's influence in the theme of preponderance of the judicial solution over the others has been losing strength.

Such attribution of importance to judges may be perceived on the emphasis that many international law scholars have given to exegesis, [33] including as a possible escape to the problems which the so-called fragmentation of international law has brought forth, such as the principle of systemic integration in the general rules of interpretation of the Vienna Convention on the Law of Treaties.[34] In Lauterpacht, the judge must appreciate whether a matter is political or juridical, therefore non-justiciable or justiciable. Such choice will follow na individual hermeneutical effort that seeks to find the best answer to such question. This is why Koskenniemi argues that The *Function of Law* is the last book on theory of international law – the theory of the non-theory – because the international law scholar (specially the judge) is forced to abandon the general theory of law or other great theories to focus on interpretative practice. Such practices, however, are not liberal or enlightening per se, since they make the scholar "hostage and limited to the conventions and ambitions" of his profession. [35] They may mask the political decisions of the choice makers, but they do not eliminate such characteristic.

3. RECOGNITION OF STATES

In 1947, *Recognition in International Law* [henceforth Recognition] was published. It seems that such book was written before the beginning of World War II, upon a direct invitation by Arnold McNair.[36]

Once again, Lauterpacht deliberately explored the relationship

32 See, for instance, the lucid criticism by Alvarez to the functioning of international criminal courts ad hoc: ALVAREZ, José A. Rush to Closure: Lessons of the Tadic Judgment. Michigan Law Review. Ann Arbor. Vol. 96, No. 7, 1998, p. 2031-2112. On the Interamerican Court of Human Rights and its solutions prejudicing domestic juridical acommodations, ver VEÇOSO, Fábia Fernandes Carvalho. Entre absolutismo de direitos humanos e história conceitual: Aspectos da experiência da Corte Interamericana de Direitos Humanos [Tese de Doutorado]. Universidade de São Paulo: Circulação Interna, 2012.

33 See VENZKE, Ingo. How Interpretation Makes International Law: On Semantic Change and Normative Twists. Oxford: Oxford University Press, 2012.

34 See, specially, MCLACHLAN, Campbell. The principle of systemic integration and Article 31 (3) (c) of the Vienna Convention. International and Comparative Law Quarterly. London. Vol. 54, No. 2, 2005, p. 279-320.

35 KOSKENNIEMI, Martti. Hersch Lauterpacht (1897-1960). In: BEATSON, Jack and ZIMMERMANN, Reinhard (ed.). Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth Century Britain. New York: Oxford University Press, 2004, p. 623

36 LAUTERPACHT, Elihu. The Life, p. 84-85.

between law and politics. The book's project is clear and repeats the tone of *Function of Law*: what he intended was to make recognition – especially of states, governments and belligerent parts – a juridical act. Yet in the preface, Lauterpacht recognizes that there is probably no other theme in international relations in which law and politics intersect the most. Such finding would lead many to defend that it was not properly a theme of international law. There would be no recognition as a result of juridical duty, but rather of national interest. [37]

As in *The Function of Law*, Lauterpacht will not simply deny that the theme has deep political contours, as other kinds of controversy do in international law. What he seeks is to co-opt politics to the field of law as he affirms that the act of recognition is a juridical duty with political consequences, taking place as certain conditions are fulfilled. This is when he disconnects himself from both more widespread theses on the theme – declaratory and constitutive – which traditionally deny that recognition involves any juridical duty. The separation between politics and law would be a source of positivist influence on international law. Positivism, according to Lauterpacht, "elevates the arbitrary will of states not only to the authority of a source of particular rights of states, even if fundamental, but also of its own appearance and existence". For him, it would be logical, for instance, that champions of the declaratory thesis defended that there is a juridical duty of recognition, but they would not advance on such direction specially due to some "positivist orthodoxy" that did not see the influence of law in the act of recognition, but only in its consequences. [38]

For our author, the disconnection between law and politics in such a theme had a strong resemblance with the way that war was treated in international law for centuries: a prerogative of the will of the state, therefore outside the realm of law. Therefore, just like the proscription of war as a means of solution of controversies had been established by many international documents – such as the then recent United States Charter – the same should pass with recognition. It seems clear that there is a deliberate strategy of associating the cry for pacifism typical of periods immediately posterior to great wars to sensitize scholars and even the global public opinion on matters such as recognition. Ultimately, Lauterpacht identifies that the pacific organization of the international community relies on a new perspective on how states practice the act of recognition. [39]

It is important to remember that the declaratory thesis traditionally maintains that recognition is only the declaration of an already real situation, in which facts prevail over the will and consent of other states, which would merely have the function of declaring a given situation. For the constitutive thesis, it is the act of recognition by

37 LAUTERPACHT, Hersch. Recognition in International Law. Cambridge: Cambridge University Press, 1948, p. v.

38 Idem, p. 1-3, 77.

39 Ibidem, p. 3-4.

other states that creates a new state – and therefore its personality – and not the process through which it became independent. Diversely from the declaratory thesis, the will and consent of other states would be essential. [40]

Lauterpacht saw a variety of problems on the admission on each of the traditional theses. On one hand, the declaratory thesis made the simple existence of facts a condition for the creation of a state, while one knows that it is not a mere creation of nature. On the other hand, it would be exaggerated to subscribe to the constitutive thesis, as it eliminates the importance of facts in the name of a pure act of will with no necessary connection with reality.

For this reason, our author argues that the act of recognition has both a declaratory and a constitutive dimension. It is not, however, a mere admission of a third way, since the separation between law and politics is criticized in both prior theories. For him, "recognizing a political community as a state means to declare that it fulfills the conditions of stateness as required by international law. If such conditions are present, the states have the duty to grant recognition. In the absence of a competent international organization to certify and imperatively declare the presence of the criteria of full international personality, the already established states fulfill such function in their capacities of organs of international law". Recognition declares facts, and such declaration, made in the fulfillment of a juridical duty, is constitutive of both rights and duties. "Such rights and duties, before recognition, only exist to the extent that they have been either explicitly granted or legitimately established, referring to imperious rules of humanity and justice, both by existing members of the international society and the people that requires recognition." [41]

Along his work, Lauterpacht seeks to persuade the reader that his vision on recognition can already be found in the practice of states, although it could not easily be identified. [42] Most of the examples presented, however, are circumscribed to the United States and the United Kingdom, only representing a small fraction of actual practice, not necessarily allowing for a safe way for further development on the subject. On the other hand, as he defends, some principles already established on international law, such as the prohibition of precocious recognition, would exemplify that recognition must be seen as a juridical duty of the state not only towards another collectivity, but also to the international community itself as a whole[43]. According to him, there is

40 Ver, v.g., SHAW, Malcolm. International Law. 5th ed. Cambridge: Cambridge University Press, 2003, p. 368-369.

41 LAUTERPACHT, Hersch. Recognition, p. 6.

42 Idem, p. 3.

43 Ibidem, p. 74.

a connection between the duty towards the state that suffered secession and the obligation towards the collectivity requiring recognition.[44]

Lauterpacht's thesis on the both declaratory and constitutive character of the act of recognition, however, is a kind of palliative towards what he considered to be imperfections of the international juridical system. Here, teleology has again a strong role, connecting itself to the project of constitution of a *civitas maxima* that appears since from *Private Law Analogies*, being further articulated in *The Function of Law*. Lauterpacht is clearly a champion of what he calls the "collectivization of the recognition procedure". His declaratory-constitutive thesis is one to be provisionally defended until a "high level of political integration of the international community in the form of an international organization of states" is achieved. He further adds: "the recognition of states, although consisting of the application of a juridical principle and the certification of the existence of conditions of stateness disposed by the international law could – and, due to its political implications, should – be laid in the sphere of competence of the superior executive authority and, to some extent, of judicial organs of the international organization. Such collectivization procedure would only be possible if the international organization were both universal and compulsory." [45]

Regarding recognition, Lauterpacht granted a subsidiary place for the international judiciary. Differently from what *The Function of Law* may suggest on the chapter on resolution of disputes, he did not intend, on this field, that judges should "rule the world".[46] The role of courts, in the decision on recognition, could be prejudicial to the international system due to its high political connotation, such as in cases, for instance, in which the act of recognition involves territorial loss for a state. He even visualizes that a court should be called to testify on the theme as advisory opinion . A centralized executive authority, however, should be more appropriate for the decision on recognition of a new state. [47] One can once more see that Lauterpacht did not defend some kind of disappearance of politics on recognition, but rather a preponderance of law on it.

The book still regards some other kinds of recognition, such as that of governments and the state of belligerence. Similarly, his declaratory-constitutive thesis, in which there is a duty of recognition, is seen as more adequate for a decentralized system that does not yet count with a structure of collectivization of recognition. [48] As for the

44 Ibidem, p. 11-12.
45 Ibidem, p. 67-68, 78.
46 KOSKENNIEMI, Martti. The Function of Law, p. 366.
47 LAUTERPACHT, Hersch. Recognition, p. 69-70.
48 Idem, p. 165-170, 253-255.

recognition of insurgents, one cannot see the same duty due to the inexistence of a state of insurgence, but rather mere rights and duties conceded by states on an individual and specific basis.[49]

Recognition clearly makes an effort to find space for law in a field on deep interference of political factors. Lauterpacht did not delude himself as for the difficulty of such a duty. The book frames itself, as aforementioned, to the presuppositions of the construction of more centralized structures on international laws. Centralization, therefore, would be the antidote against politics – or at least against the excesses of politics.

Apparently, the greatest of Lauterpacht's merits was not to have identified an alternative way to conceive recognition on international relations. Despite his insistence to fund the thesis on the practice of (some) states, it did not fundament itself properly on the way that states face the recognition of collectivities that intend to affirm themselves as their peers. It is well true that, across the years, some other authors have based their theses on the necessity of collectivization of the process of recognition, thereby associating, for instance, the procedure of new members on the United Nations to some kind of analysis of such a theme.[50] Recent cases involving the independence of more diverse peoples (such as Kosovo, for instance), [51] however, show how tortuous it is to identify a uniform practice on the field, and even more a duty of recognition.

His greatest merit seems to have been to show how law and politics are interlinked on such matter, to the point of producing unsatisfactory solutions to ordain the theme at a minimum. Modern commentary well perceives such lesson when affirming that "there was almost no change on the reality of international law as compared to the one described by Hersch Lauterpacht 64 years ago – 'recognition of states is not a matter governed by law, but rather a matter of politics'", [52] or that there is a "distorted relationship between law and politics on

49 Ibidem, p. 270-271.

50 For a skeptical summary of such propositions, see WORSTER, William Thomas. Law, Politics, and the Conception of the State in State Recognition Theory. Boston University International Law Journal. Boston. Vol. 27. No. 1, 2009, p. 163-168.

51 Ver INTERNATIONAL COURT OF JUSTICE. Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Request for Advisory Opinion). Disponível em *www.icj-cij.org/docket/files/141/15987.pdf*. Importante mencionar que a opinião separada do Juiz Cançado Trindade nesse caso cita expressamente o livro de Lauterpacht, mas não para encampar sua tese declaratória/constitutiva de um dever de reconhecimento. Ver Separate Opinion of Judge Cançado Trindade, para 132. Disponível em http://www.icj-cij.org/docket/files/141/16003.pdf.

52 QUERIMI, Querim. What the Kosovo Advisory Opinion Means for the Rest of the World. Proceedings of the American Society of International Law. Washington. Vol. 105, 2011, p. 273

the procedure of recognition of states and the way that this is reflected on recent practice". [53]

More recently, the way that Lauterpacht analyzed the practice of states seeking the formation of a customary rule on the duty of recognition has deserved some attention due to its fundament on eminently teleologically perspective. Although many do criticize the partial form through which Lauterpacht saw such practice (mostly English and North American), authors such as Patrick Capps understand that this was coherent with the way that Lauterpacht saw the role of international law itself. Therefore, he analyzed the practice of states intending to realize certain objectives: a substantive orientation (protection of human rights) and a functional one (pacific resolution of controversy and coordination of international relations). [54] Although such recent reading of Lauterpacht must still be confirmed in comparison with his more general work, it opens possibilities both to understand our author in a different way and to shed light on new methods to comprehend the practical element on the formation of international customs.

4. HUMAN RIGHTS

International Law and Human Rights, from 1950, is the synthesis of Lauterpacht's thoughts on the role of the individual in international law. Ever since *The Function of Law*, a certain concern with such issue can be identified. [55] After all, one of the possible consequences for his severe criticism of sovereignty would be to emphasize the position of those who are traditionally obscured by the state: human beings. This is the path drawn by several authors, contemporaries to Lauterpacht, who suggested a revision of the whole chapter of subjects of international law, such as Hans Kelsen, his former professor in Vienna Georges Scelle, or James Brierly.[56]

The book is actually the extended version of a work published in the suggestive year of 1945: *An International Bill of the Rights of the Man*. This first version was commissioned by the American Jewish Committee. Lauterpacht, during his youth, especially in his years as a student at the University of Vienna, stood out as an important Zionist

53 RYNGAERT, Cedric and SOBRIE, Sven. Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia. Leiden Journal of International Law. Leiden. Vol. 24. No. 2, 2011, p. 490

54 CAPPS, Patrick. Lauterpacht's Method, p. 19-20

55 Elihu Lauterpacht recognizes such worry as dating back to the early years of his father in Vienna. LAUTERPACHT, Elihu. The Life, p. 251.

56 The interwar interest on individuals by this authors is well understood by NIJMAN, Janne Elisabeth. The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law. The Hague: T. M. C. Asser Press, 2004, p. 85-244.

leader, even though he was never a rather religious man.

The first part of the book deals with persistent legal, political and philosophical issues that used to stop international law from directly dealing with relations between private individuals, guaranteeing their rights and punishing them for certain types of offenses.

Lauterpacht identified in state practice over a long period several levels of treatment of the subject of the individual as a subject of rights. According to himself, however, the UN Charter was the first consecration of the individual as having fundamental human rights and freedom. [57] On the other hand, the creation of the Nuremberg Tribunal and the recognition of crimes against humanity proved the passive personality of the individual to be imputed in violations of international law. In fact, he saw a strong correlation between both developments, since "to prescribe that crimes against humanity are punishable means therefore to establish the existence of human rights based on a right superior to the law of the state."[58]

Recognition of the subjectivity of the individual was linked, among other aspects, to the integration of international society in the form of a supranational world federation, which he considered to be "a development that should be considered as the ultimate rational postulate of the political organization of man". The realization of such a purpose should happen gradually, through the adoption of the principles of a federal government. Thus, if individuals are directly subordinated to federal law, they should also be subordinate to international law, which roams towards a certain federal organization.[59]

The mere recognition of the personality of individuals was not sufficient for the development of international law. Lauterpacht saw no obstacle in international law of its time to recognize the procedural capacity of individuals to sue against states in the sphere of treaties to which they had subscribed[60].

A set of rights should be recognized for individuals by international law due to a change of character and function of the latter. While traditional international law had a formal character, in which it was primarily concerned with delimiting the competence of states, the surge on interdependence began to require more substantive rules.[61] At this point, it is possible to affirm that Lauterpacht perceived the necessity of a type of domestic analogy other than that of private law: the analogy of public law. The constant references to the desire for

57 LAUTERPACHT, Hersch. International Law and Human Rights, London: Stevens, 1950, p. 33.

58 Idem, p. 36.

59 Ibidem, p. 46.

60 Ibidem, p. 51-56.

61 Ibidem, p. 62-63.

the construction of a federal world state make this clear. If private law plays a formal role of regulating the autonomy of the individual will, public law aims, among other things, to guarantee rights to citizens. Consequently, sovereignty needed to be relativized, and our author, who had little sympathy for it, saw a great opportunity in the consecration of human rights, since the "fundamental rights of human beings are rights superior to the law of the sovereign state. [62]"

Naturalistic tendencies – a much explored theme in the work of Lauterpacht - appear in *International Law and Human Rights*. While recognizing that natural rights were not sufficient for the guarantee of rights, they are "the foundation of its ultimate validity and [...] a standard for its approximation of justice."[63]Also, he tries to identify in natural law the basis of rights and freedoms in history. In the exercise of what may today be considered a historical anachronism - to see in the past typical characteristics of the present - Lauterpacht traces a path from Greek civilization, going through the Roman and Stoic, into the Middle Ages and the Protestant Reformation until the advent of modern constitutions to prove his thesis of the relationship between natural law and domestic positive law[64].

Besides the aforementioned relationship, international law has, in Lauterpacht's view, a close relationship with natural law ever since its origins. Furthermore, the latter has acted through the ages as "the main vehicle of the development of international law". If natural law owes "much of its appeal, its reason for being and its very origin to its connection with the affirmation of the rights of man", our author logically concludes that "international law is therefore bound to the notion of inherent human rights".[65]

Lauterpacht dedicates the second of his book to explaining the configuration of human rights within the framework of the United Nations in the 1950s. Many of its positions are dated because of the great modification and expansion through which the global system of human rights protection passed in such organization. Anyway, its foundations demonstrate essential aspects of the author's perspective on the role and functions of international law. It is the case of his uncompromising defense to see in the Charter clearly juridical obligations addressed to states on the protection of human beings or, still related to this same theme, the inapplicability of the reserved clause of the states in the obligations concerning human rights.[66] He saw potentialities in the protection organs then created, such as the Commission on Human

62 Ibidem, p. 70.
63 Ibidem, p. 74.
64 Ibidem, p. 73-113.
65 Ibidem, p. 115.
66 Ibidem, p. 213-220.

Rights, which should have broader powers than, for example, the mere drafting of texts of declarations and treaties. Measures should be taken to ensure in these bodies some form of enforceability of the right of individual petition which, although not expressed in the Charter, should be inherent to a human rights system.[67]

The third part deals with issues relating to an international bill of rights man. Lauterpacht recalls that, during the drafting of the Charter of the United Nations itself, a mandatory instrument, including rights in the international sphere, has been proposed, although it has not been put in practice. Such failure to enforce the document, however, did not make it less important and urgent, but rather revealed that it should be in the hands of individuals for the establishment of an effective right of petition to an international commission or council, without which the problems of effecting an international charter of rights would remain insoluble. This, however, did not abstract from Lauterpacht the desire for a judicial system to be developed in the future for the application of the bill of rights.[68]

It is in this very part of the book that the author presents his proposal for an international charter of human rights. Especially comprehending individual rights - and some social and economic ones - the project stressed the institutional apparatus as a means of guaranteeing consecrated rights. A non-judicial body with powers of investigation and recommendation that should act previously to the judicial analysis of the case was visualized. The International Court of Justice or an International Court of Human Rights to be created, at the convenience of states, would serve as the final decision-making body in the case.[69]

Perhaps the most well-known aspect of the book is the harsh criticisms made against the Universal Declaration of Human Rights. The choice of the "declaration" form to argue about rights at the international level did not serve Lauterpacht even as a palliative because of the lack of a mandatory instrument on the subject. For him, the Declaration could not be seen as an interpretation of the Charter of the United Nations, since it was not obligatory, unlike the Charter itself, nor could it be seen as a formulation of general principles of law, because it had not been drafted for that purpose. Similarly, he argued that it was unnecessary to see it as recognition pf part of the state's "public policy", and thus be enforceable by domestic courts, since some states had already denied this possibility. Likewise, Lauterpacht did not consider the argument of seeing directly in the declaration, as a recommendation of the General Assembly, obligatory character - which, in his perspective, did not exist.

67 Ibidem, p. 221-223, 229-234, 244-251.

68 Ibidem, p. 286-292.

69 Ibidem, p. 313-321.

Last but not least, the Declaration could not be regarded as binding on the organs of the United Nations because they could not treat as binding an instrument which does not have such a characteristic. In short, our author suggests that the Declaration would simply be "outside international law", and not even morally would the instrument hold any authority since, for example, it did not limit the freedom of states and had unclear and unauthoritative redaction. Lauterpacht preferred to see in the UN Charter itself a minimum framework for the protection of rights, to be supplemented when a binding instrument, such as the international charter of rights, came into force.[70]

In the final chapter, Lauterpacht discusses proposals for the creation of the European Commission and the European Court of Human Rights. He looked at them rather sympathetically, not knowing that they would come to fruition, and, after a few years, consecrate a high degree of judicialization of human rights on the continent, in such a course that would probably please him.[71]

The last pages of the book are dedicated to linking the matter of human rights to the preservation of world peace and the necessity of appearance of an international federation of states to warrant such objective. Such a development would not lead to the elimination of state sovereignty, but rather to a reconfiguration of its content, since the recognition and protection of rights implies a reduction of sovereignty. Investigating federative theory, he saw no imperative to eliminate sovereignty, despite the historical experience of federalism. Against this background, more localized initiatives for the development of a human rights system, such as the European one, were welcomed because they both provided a regional link in the evolution towards a global federation and represented a gradual acceptance of institutions essential to a federal system. [72] This is why Lauterpacht concluded: "inasmuch as regional experience is a stage of the evolution towards the more complete integration of international society, the recognition and protection of human rights themselves can become a significant factor contributing to the consummation of the organized *civitas maxima*, with the individual human being at the very center of the constitution of the world". [73]

It is truly impressive for today's eyes to perceive the similarities between the arguments set on *International Law and Human Rights* and

70 Ibidem, p. 408-428.

71 Ibidem, p. 435-456.

72 Ibidem, p. 456-463.

73 Ibidem, p. 463. It is important to note that the idea of a world state seemed to come from a truly genuine belief by Lauterpacht, as demonstrated by some correspondency exchanged with his wife, Rachel Lauterpacht, reproduced in LAUTERPACHT, Elihu. The Life, p. 236-237.

the widespread general vocabulary of human rights specialists. They are all present: criticism against the sovereign will of states, the need for institutions that objectively guarantee, protect and make human rights effectives, distrust of the state, and a belief in multilateralism and the capacity of international tribunals. [74] Koskenniemi is fully correct when he claims that, if the book is not the starting point of scholarly concern with human rights, it is the first exhaustive treatment of the subject by an international law scholar, as well as being responsible for creating a sub-discipline in the field.[75]

The book is also responsible for establishing an intrinsic link between human rights protection and international criminal law.[76] Identifying a correlation between active and passive individual subjectivity and its linkage with the development of the international legal system, Lauterpacht placed on the same side interests that can often be countered, such as individual criminal prosecution and the guarantee of rights. [77] The impact of positions such as this one can be felt today when, for example, the Rome Statute, when setting the law applicable in its judgments, requires compatibility "with internationally recognized human rights".[78]

By associating human rights to a substantive agenda that must be defended by international law scholars, as opposed to a purely formal agenda – a position that would characterize more traditional international law – Lauterpacht's ideas influenced a discourse that became majoritarian in international law, assessing values rather than what he claimed to be some kind of obsession with form. The promotion of such values involves "the virtual elimination of reciprocity, the contraction of domestic jurisdiction and the operation of law not between theoretically equal sovereign entities, but rather between

74 For a history of the international human rights movement and its priorities, see NEIER, Aryeh. The International Human Rights Movement: A History. New Jersey: Princeton University Press, 2012.

75 KOSKENNIEMI, Martti. Hersch Lauterpacht (1897-1960), p. 643-644. Brian Simpson additionally affirms that Lauterpacht's contribution was important to the establishment of the practical possibility of protection of individual human rights itself. SIMPSON, A. W. Brian. Hersch Lauterpacht and the Genesis of the Age of Human Rights. Law Quarterly Review. London. Vol. 120. No. 1, 2004, p. 79.

76 On Lauterpacht's contribution to international criminal law, see KOSKENNIEMI, Martti. Hersch Lauterpacht and the Development of International Criminal Law. Journal of International Criminal Justice. Oxford. Vol. 2. No. 3, 2004, p. 810-825.

77 The relationship between international criminal prosecution and the international protection of human rights in Lauterpacht's work is well perceived in VRDOLJAK, Ana Filipa. Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law. European Journal of International Law. Firenze. Vol. 20. No. 4, 2009, p. 1163-1194.

78 Art. 21 (3) do Estatuto de Roma. Decreto n. 4.388/2002, DOU de 26.09.2002.

duty-bound governments and individuals benefiting from rights".[79] It is still commonplace, therefore, to hear statements such as that human rights have made international law shift its focus to individuals rather than states, [80] or that human rights promoted a "Copernican twist" in international law. [81]

Such distrust towards the state and sovereign power, however, meets its limits when confronted against the assumption that the decentralization of international law is directly linked to its lack of effectiveness. Lauterpacht himself recognized that the primary agent for applying the international charter of rights ought to be the state and its organs.[82] The state, with this double face of Janus, protector and violator of rights, makes the construction of the *civitas maxima* possible at the same time that it makes it extremely difficult, given that it pushes it towards a very uncertain future - if thesState is also a protector of rights, one cannot eliminate it immediately.

It is at this very point that Lauterpacht's teleology becomes one with the present, as it opens little space for the reimagining of human rights outside protective-violating state schizophrenia. Koskenniemi lays the question in similar terms, seeing a tension in the book, which "both appeals to the primacy of individual rights over potentially hostile public power and becomes a cry for a specific institutional arrangement (public power!) in order to support individual rights".[83]

If there is little room for reimagination, the role of the international law scholar will become increasingly irrelevant in the eyes of those who seek a peaceful alternative international organization. It will be outside international law that proposals for solutions will emerge more easily.

A case can also be made that criticism made against the Universal Declaration of Human Rights has underestimated the political potential of the instrument to produce very perceptible legal effects. Lauterpacht's position seems to have produced in jurists a vision of the declaration as a document that bordered uselessness (both juridically and politically). After a few years of its adoption, however, and by the direct influence of important political personalities, the instrument began to be gradually

79 MERON, Theodor. International Law in the Age of Human Rights. Recueil des Cours de l'Académie de Droit International de la Haye. La Haye. Tome. 301, 2003, p. 21.

80 Idem, p. 22.

81 See RENSMANN, Thilo. Munich Alumni and the Evolution of International Human Rights Law. European Journal of International Law. Firenze. Vol. 22. No. 4, 2011, p. 973-991.

82 LAUTERPACHT, Hersch. International Law and Human Rights, p. 287.

83 KOSKENNIEMI, Martti. Hersch Lauterpacht (1897-1960), p. 644. Such tense relationship between human rights and the (sovereign) state is present not only in doctrine, but also in the general human rights movement. For a series of worries coming from such tensions, see KENNEDY, David. The International Human Rights Movement: Part of the Problem? Harvard Human Rights Journal. Cambridge. Vol. 15, 2002, p. 101-125.

seen as establishing customary obligations to states. [84] Today, the statement, however flawed it may be seen, is constantly invoked as a legal norm and parameter for the creation of many others. If this is not enough, at least it shows that the creation and application of international law goes through many tortuous paths, which may escape teleological imagination.

5. THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT

On 1958, about two years before his death, Lauterpacht published what would be his last book, *The Development of International Law by the International Court* [henceforth *The Development*]. By the end of 1954, he had been elected to a judge's seat in the International Court of Justice. Nothing could more appropriate for someone who considered the courts a key element in overcoming the various shortcomings of the international legal system. Lauterpacht could now put into practice his postulates on international justice that he had long been defended, or at least feel the real difficulties to operate changes inherent to exerting such a function.

Indeed, the book is the reprint of a series of lectures which the author had given at the Graduate Institute of International and Development Studies in Geneva in 1933, which had been published under the title *The Development of International by the Permanent Court of International Justice*. The new – rather extended – version had a small difference, which Lauterpacht himself recognized in addition to the number of pages: it was now written by a judge of the International Court of Justice, who, exerting his functions, was restrained from commenting on cases judged by such institution. In my view, this has significantly compromised the critical character of the work, and it is not uncommon to find, in several of its parts, an apologetic tone for the International Court of Justice's exercise of jurisdiction (whether contentious or advisory). There is no reason, however, to reject the whole book. It is an astonishingly analytical and sophisticated analysis of virtually all cases judged by the Permanent Court of International Justice and the International Court of Justice from different angles.

The work's aim is to present a series of problems that affect international judicial function. Ever since the publication of the first version of the book, more than twenty years had gone by and examples

84 Such track is more noted in more detail, including reference to the important influence of Lauterpacht on his time's international law scholars, by VON BERNSTORFF, Jochen. The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law. European Journal of International Law. Firenze. Vol. 19. Nº 5, 2008, p. 903-924.

have multiplied, even if recognized that the International Court - a term encompassing both the Permanent Court of International Justice and the International Court of Justice – administers a set of rules much less clear than that found in domestic law.[85]

As in *The Function of Law*, Lauterpacht believes that the Court is an important agent in the development of international law. By associating this development with the maintenance of international peaceful relations, however, he admits that the Court has not been a significant instrument for the maintenance of peace – assuming a more pessimistic[86] tone and a probable response to Kelsen, who, in the 1940s, proposed a model of peace through the right to recognition of the compulsory jurisdiction of an international court.[87] The old enemies here return to justify this lack of effectiveness: the low degree of centralization of the international legal system, if compared to that of the state, and national interests, several times overlaid with the mask of sovereign power. Even in this context, Lauterpacht believes that the Court has played an important role in the development and clarification of the norms of international law. [88]

In *The Development*, Lauterpacht could already find a Court which was structured around precedents that it had itself created, which made it flirt, among other elements, with the certainty and stability necessary for proper administration of justice. Also, where there are no codes or a generally recognized system of law, as in common law countries, courts play an important role in identifying (and, in some cases, creating) law. Our author could already identify this. [89]

Lauterpacht certainly welcomed the tendency of the International Court in, whilst dealing with a given topic, to do so in an exhaustive manner, touching on the various preliminary and merit matters of the case. [90] This was the most complete proof that, from the method's point of view, there are no gaps in international law. Exhaustion of any case means that the international court has the apparatus necessary to answer a variety questions, whether through the use of treaties and customs or of general principles of law. It also means that, in dealing with an issue with exhaustion, the Court is fulfilling its role of developing international law. [91]

85 LAUTERPACHT, Hersch. The Development of International Law by the International Court. Cambridge: Cambridge Universtiy Press, 2011, xiii.

86 KOSKENNIEMI, Martti. Hersch Lauterpacht (1897-1960), p. 654.

87 KELSEN, Hans. Peace through Law. Chapel Hill: University of North Carolina Press, 1944.

88 LAUTERPACHT, Hersch. The Development, p. 3-5.

89 Idem, p. 14.

90 Ibidem, p. 37-43.

91 SCOBBIE, Iain G. M. The Theorist as Judge: Hersch Lauterpacht's Concept of the

It was also sympathetically that Lauterpacht defended the position of the International Court of contention and retention in involving itself in academic disputes and redundancies in controversial subjects,[92] something that is perceived until the present day. After all, for him, the technique used by the Court has repercussions on the very development of international law and its aims. [93] It is from this very teleological framework that Lauterpacht strives to justify several decisions that use extreme caution when interpreting international law, but he also sees an opposite effect of judicial stewardship, proper to the international legal system: the need to modify rigid, unjust and obsolete rules in the absence of international legislature. This caused, on one hand, judicial caution, and, on the other, "the desire to create the appearance of caution".[94] Such caution, therefore, is "bound up with the present, temporary and intrinsically unsatisfactory character of international society".[95]

Hesitation may arise from caution, and Lauterpacht, with extreme parsimony, identified subjects in which the International Court demonstrated such tendency, as in the cases on usage of preparatory works in the interpretation of treaties. He urged a more precise position on the subject with... the necessary caution proper to an international judge occupying this very function![96]

Additionally to contention, restraint and hesitation, the Court has yet appeared indecisive, says Lauterpacht, especially recalling the case of diplomatic asylum. Here, however, he stresses that it was only an appearance of indecision. An old enemy returns as justification for the Court's criticized position in the case: the imprecision of international norms on the subject, which certainly stems from an imperfect legal system. [97]

A subject that already appeared prominently in *The Function of Law* returns strongly in *The Development*, which is that of judicial legislation. The diagnosis is quite similar. Cases regarding judicial creation of law arise from the desire to improve an imperfect system, massively pressed by the sovereignty of states and the consequent restriction of the international judicial function. Although he did not consider it a panacea for the evils of the international system, Lauterpacht saw judicial legislation as "healthy" and "inevitable". The International

International Judicial Function. European Journal of International Law. Firenze. Vol. 2. No. 2, 1997, p. 278.

92 LAUTERPACHT, Hersch. The Development, p. 61.

93 Idem, p. 70.

94 Ibidem, p. 77.

95 KOSKENNIEMI, Martti. Hersch Lauterpacht (1897-1960), p. 655-656.

96 LAUTERPACHT, Hersch. The Development, p. 140-141.

97 Idem, p. 152.

Court had, in different ways, already engaged in this exercise - such as when it applied generalized principles of law or, by not identifying rules governing a situation, it established principles to govern a matter. It is also sympathetically that the author explains the occurrence of such examples, although he minimizes their impact, as he understands that the Court has never completely disregarded the principles and restrictions that govern it by virtue of the sovereign states that created it.[98]

The book also deals with several other aspects of exert of the international judicial function, such as the principle of effectiveness as an element that guides the Court's action in various fields, such as the interpretation of the treaty or the clauses of submission of controversies to its own judgment.[99]

The fifth and final part of the work is completely linked to the way that the International Court views the principle of state sovereignty. The author offers a number of examples in which the Court was more or less close to securing sovereign interests of states. For him, this showed once again the constant tension between the trend of centralization of the international system and its maintenance around the sovereign national interests of the same states that make up that system. Thus, he summarized, although the consequences of state sovereignty "express their weakness [of international law] as a legal system, they are nevertheless part of it".[100]

More than twenty years after the publication of The Function of Law and the series of lectures that had composed the first version of The Development, international law had changed profoundly - as did Lauterpacht's own individual position.

Even though he recognized difficulties in exerting judicial function, Lauterpacht managed to peacefully identify a body of rules and principles that structured the actuation of the International Court. Although this did not represent the realization of a state in a global scale, it meant that international law was already endowed with a significant level of sophistication. The dense book is an attempt at proving that it is possible to trace back a series of themes and issues relative to judicial function in both domestic and international law. It is only due to the international law scholar, with an open spirit and endowed with a good systematization rigueur, to identify such themes and issues.

As in all books written by Lauterpacht, the specter of *civitas maxima* is quite present. It is the result that is intended to overcome the deleterious effects to the dogma of sovereignty – which, by the way, puts constant pressure on the work of the International Court, which is

98 Ibidem, p. 200-225.
99 Ibidem, p. 227-293.
100 Ibidem, p. 334.

not simply allowed to despise him. Here, however, Lauterpacht seems to be more aware than ever that it is not enough to aspire to *civitas maxima* or to prove that it is rationally the best option for the peaceful organization of the world; one must prove that the doctrine and practice of international law are prepared for it, something evidenced by a sophisticated scholarly systematization of jurisprudence made in *The Development* and the cases tried by the International Court, some of them by the author himself as a judge.

Here there is no clear distinction between Lauterpacht the scholar and Lauterpacht the judge. Such figures are confounded because they ought to be. The scholar and the judge must both communicate in the same *telos*: the development of international law through the creation of centralized structures – among which the courts – towards a world state. This seems to be one of the problems of the work, which left a relevant legacy for successive generations of internationalists: that the scholar should join power rather than opposing it. Certainly Lauterpacht would not see power clearly in the hands of judges, but rather in the sovereignist policies that restrict the courts' performance. Time, however, has made it clear that there is, as there has always been, a lot of power around an international judge. For instance, the current debate on trans-judicialism in the field of human rights, by extolling the role of dialogue between different courts, distorts the central focus of the issue, such as "understanding the sociology of violations".[101] Judges, seeing themselves in a global community of courts, can certainly dismiss the concrete effects of their decisions on an ever-increasing number of groups. Additionally, the environment in which the international judge is involved today is extremely complex, and often way too close to power.[102]

The role of the international law scholar is also, though not only, to stand against power, and his conception of the development of international law does not need to be in tune with that of the judge. In this sense, it is important to realize that contemporary international law has reached a moment in which the paradigm of compulsory international courts is replacing the paradigm of consensuality – which has marked the International Court of Justice from Lauterpacht until today. Acceptance of treaties is increasingly meaning automatic acceptance of the jurisdiction of courts. This change, which would be certainly welcomed by Lauterpacht, did not necessarily bring about a

101 TOUFAYAN, Mark. Identity, Effectiveness and Newness in Transjudicialism's Coming of Age. Michigan Journal of International Law. Ann Arbor. Vol. 31. No. 2, 2010, p. 382.

102 There is some timid but interesting more sociological literature regarding the international judge. See TERRIS, Daniel; ROMANO, Cesare; SWIGART, Leigh. The International Judge: An Introduction to the Men and Women who Decide the World's Cases. Oxford: Oxford University Press, 2007.

greater order or centralization of the international legal system. On the contrary, it has made it more complex, with a number of new problems to be faced. It is, in other words, a development of international law that many may dislike.

Nevertheless, *The Development* consecrates the coherence of presuppositions and an important step on Lauterpacht's so clearly exposed convictions ever since at least *Private Law Analogies*.

CONCLUSION

The essay above has sought to trace, in a narrow way, the themes presented and the assumptions on which the five Hersch Lauterpacht books are based (apart from two that have undergone modifications and updates).

It is a substantive and sophisticated work, which had a decisive impact on the doctrine and practice of 20th-century international law, with still strong traits being carried on. Lauterpacht's political project, however, is not difficult to identify, despite his intervention in virtually all important public international law issues of his time. The perception that international law was an instrument incapable of promoting the peace and well-being of individuals led him to mirror the structure of domestic law: it is no mere coincidence that his first book deals precisely with defending the use of sources and analogies of private (domestic) law in international law. The construction of a *civitas maxima* essentially went through the realization that domestic law and international law make up the same legal system equally subject to the rule of law. While such *civitas maxima*, as subsequently conceived by him from a federation of states, would not take place, much had to be done: to spread the understanding that any international controversy could be covered by international law; to remove political arbitrariness from the process of recognition of states, transforming it into a legal duty; to strengthen the human rights dimension as a direct link between the individuals who make up the state and the international community; and to prove that the international judiciary is endowed with a high degree of sophistication in its structure and that its contribution to the development of international law depends on the constant elimination of the dogma of sovereignty and its correlates.

Even in light of his strong subscription to an Enlightenment reason that modernity itself has shown to be based on endless contradictions and a significant tendency to regard the world as a reflection of typically European ideas and institutions, it is difficult not to feel sympathy for the work and the person of Hersch Lauterpacht. There is a sense of nonconformity and a desire for change worthy of admiration on him, especially if one has in mind the deprivations that he underwent as a

politically active Jew and a subject of the Austro-Hungarian Empire expatriated in the United Kingdom. Of all the legacies, this seems to be the greatest that Lauterpacht has left: that international law must serve important purposes, such as peace, justice, human rights, order, and that all must fight for them. Even if some of the ways he found to carry out such purposes may now seem dated, inconvenient, or socially undesirable, it matters more to recall the sense of personal courage which he carried with him when he wore the judge's robe or joined the war effort in the city of Cambridge; when he was away from his son and wife, who were in the United States, for much of the war period; when he ceased to receive news of his family who had stayed in the territory of today Poland, because almost all were dead in concentration camps or in conflicts.

More than fifty years after his death, Lauterpacht teaches us that it is impossible for one to be a boneless international law scholar, refraining from the discomfort that propels one to change and sensibility towards death and suffering; that is true faith – even if secular – that the world can become, at last, a better place.

EDITORIAL POLICY AND SUBMISSION GUIDELINES

REASONS

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

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

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

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

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

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