Revista Eletrônica de Direito Processual – REDP.
Rio de Janeiro. Ano 16. Volume 23. Número 2. Maio-Agosto de 2022
Periódico Quadrimestral da Pós-Graduação *Stricto Sensu* em Direito Processual da UERJ
Patrono: José Carlos Barbosa Moreira (*in mem.*). ISSN 1982-7636. pp. 592-630
www.redp.uerj.br

IN DEFENSE OF THE HORIZONTAL APPLICATION OF DUE PROCESS CLAUSE[1]

EM DEFESA DA APLICAÇÃO HORIZONTAL DA CLÁUSULA DO DEVIDO PROCESSO LEGAL

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ABSTRACT: The main objective of this paper is to answer the following research problem: is it possible to apply the constitutional clause of due process of law in a horizontal dimension, in the context of relationships between private subjects? The hypothesis is the understanding of due process as an adaptive guarantee of the rule of law, which must be responsibly extended to new contexts outside the individual-state relationship, based on a specific test. As a main result, the factual and theoretical premises that support the hypothesis inform that the promotion of constitutional liberties, empirically, depends not only on the State, but also on the conduct of other social agents. Therefore, the conclusion is that by failing to consider the relevance of the internal structure of society — and thus failing to distinguish asymmetrical forms of power exercise — the liberal doctrine of state action fails considerably. The theoretical grounds of the paper are provided by a comparative analysis, with emphasis on the precedents of foreign Constitutional Courts — such as the Supreme Court of the United States and the Constitutional Court of South Africa — and international courts. The method employed is the hypothetical-deductive approach.

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Revista Eletrônica de Direito Processual – REDP.
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KEYWORDS: Constitutional law. Rule of law. Due process of law. Horizontal effect. State action doctrine.

RESUMO: O artigo tem por objetivo responder ao seguinte problema de pesquisa: é possível aplicar a cláusula constitucional do devido processo legal em uma dimensão horizontal, no âmbito de relações travadas entre sujeitos privados? A hipótese sustentada é a compreensão do devido processo legal como uma garantia adaptativa do Estado de Direito, que há de ser responsavelmente ampliada para novos contextos fora da relação indivíduo-Estado, a partir de um teste específico. Como resultado principal, as premissas fáticas e teóricas que dão suporte à hipótese informam que a promoção das liberdades constitucionais, empiricamente, depende não apenas do Estado, mas também da conduta de outros agentes sociais. Conclui-se, assim, que, ao não considerar a relevância da estrutura interna da sociedade — e, portanto, não distinguir as formas assimétricas de exercício de poder —, a doutrina liberal do *state action* falha consideravelmente. Os suportes teóricos do trabalho são fornecidos por uma análise comparatista, com destaque para precedentes de Cortes Constitucionais estrangeiras — a exemplo da Suprema Corte dos Estados Unidos e da Corte Constitucional da África do Sul — e tribunais internacionais. O método de abordagem empregado é o hipotético-dedutivo.

PALAVRAS-CHAVE: Direito constitucional. Estado de Direito. Devido processo legal. Eficácia horizontal. Doutrina do *state action*.

1 INTRODUCTION[3]

[3] This article is a result of the research group "Transformations in the theories of process and procedural law", linked to the Federal University of Bahia and registered in the National Directory of Research Groups of CNPQ (dgp.cnpq.br/dgp/espelhogrupo/7958378616800053). This group is a founding member of "ProcNet - International Research Network on Civil Justice and Contemporary Process" (http://laprocon.ufes.br/rede-de-pesquisa).

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The modern conception of due process derives from two main sources: the English Magna Carta and the American constitutionalism, which enshrined, through the precedents of the Supreme Court, the doctrine of the vertical effects of fundamental rights. This choice is not random. It is a logical consequence of the liberal tradition that inspired (and strongly inspires) the common law. Its origin goes back to the contractarianism of authors such as Thomas Hobbes and John Locke, as opposed to the classical republicanism of thinkers such as Aristotle and Cicero.

Nowadays, notably after the so-called "fourth industrial revolution" inaugurated in the 2010s, the concentrated and discretionary exercise of power by private agents, in asymmetric legal relationships, has questioned the traditional role of constitutionalism as a tool exclusively aimed at limiting governmental powers.

The quasi-monopoly regime, the questionable manipulation of private data, and the massive expansive trend of algorithmic use over various fields challenge not only the exercise of fundamental rights, but also the institutionalization of the digital public sphere. The lack of transparency in its governance structures raises constitutional questions of democracy and public control.

In this context, a preliminary issue that has been revisited is the hypothesis of the permeability of due process clause, as a metonymy of the rule of law, to asymmetric relationships between private agents.

This paper argues for this possibility, presenting some conditions under which the clause can be responsibly extended to new contexts outside of relationships between individuals and the state, based on a specific test.

To do so, I will first explore the historical origin of the due process of law clause in order to highlight the gradual expansion of its scope, reinforcing the possibility of using an evolutionary interpretation.

Next, the theoretical assumptions of the doctrine of state action and the successful experiences of horizontal application of fundamental rights by constitutional courts in countries such as Brazil, Canada, Germany and South Africa, as well as the Court of Justice of the European Union and the European Court of Human Rights will be presented. As a

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www.redp.uerj.br

main result, the analysis of the factual circumstances of the precedents reveal that the promotion of constitutional liberties, empirically, depends not only on the State, but also on the conduct of other social agents. Consequently, by not considering the relevance of the internal structure of society — and therefore not distinguishing asymmetrical forms of exercise of power — the liberal doctrine of state action fails considerably.

At the end, based on the recognition of the role of the direct effect of the due process clause as a response to the challenges arising from complex private relationships, some guidelines are established. Such conclusions will be necessary so that the horizontal application of the clause, in its procedural and substantive dimensions, does not occur in an unregulated manner, in excessive prejudice to the autonomy of will and legal certainty.

The factual and theoretical supports are provided by a comparative analysis. The approach used is hypothetical-deductive.

2 THE HISTORICAL EVOLUTION OF DUE PROCESS CLAUSE

2.1 The containment of power in classical antiquity

The set of three words that form the expression "due process of law" is a simple and faithful representation of the fusion of a complex way of thinking politically and legally[4]. Such is its relevance that the due process clause, in a view that goes beyond its exclusively "procedural" dimension, is usually confused with the notion of rule of law itself.[5]

[4] PASQUALE, Frank. Inalienable Due Process in an Age of AI: Limiting the Contractual Creep toward Automated Adjudication. In MICKLITZ, H.; POLLICINO, O.; REICHMAN, A.; SIMONCINI, A.; SARTOR, G.; DE GREGORIO, G. (Eds.), Constitutional Challenges in the Algorithmic Society (pp. 42-56). Cambridge: Cambridge University Press, 2021.

[5] "The principles of equality and due process lie at the heart of the rule of law, when interpreted as an ideal of constitutionalism, based on each citizen's equal dignity. I have argued in Chapter 3 that the principles of natural justice or procedural fairness are intrinsic to the concept of law assumed by that ideal: they are necessary components of a scheme of justice intended to elicit each person's consent and co-operation. The meaning of the rule of law cannot, however, be confined to matters of procedure, narrowly interpreted: 'procedure' is merely an aspect of 'process', whose integrity preserves the fundamental right of equality, or equal citizenship. Since due process supplements fair procedures by insisting on the application, by public officials, of appropriate criteria of decision, it imposes substantive limitations on their power. Legislative and administrative judgments alike must be made within a constitutional framework that identifies, and enforces, explicit and widely

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www.redp.uerj.br

The remote influences of the rule of law — and therefore also of due process of law — can be remotely traced from antiquity, notably ancient Greece, until we reach the concrete provision of the clause in the English Magna Carta. As Sullivan points out, the Magna Carta of 1215 can be conceived as a relevant codification of centuries of thinking and writing about the idea that individuals should be governed equally by general laws, rather than an arbitrary set of rules.[6]

Although its concept is debated[7], the rule of law comprises a general idea that law should be predictable, just, and enforceable. According to the maxim of the American "founding father" John Adams, it is about recognizing the existence of a "government of laws, not of men".[8] It is thus the sum of values necessary for a republican and democratic government, from which are drawn the principles by which governmental institutions are to operate, and the procedures by which these principles are operated.

Within the rule of law, there are procedural elements[9], which aim to avoid the whims of rulers in the definition and application of legal norms, and substantive elements, which seek to avoid unfair decisions.[10] Not by chance, from the clause of due process introduced in the Constitution of the United States by the Fifteenth Amendment, the U.S. Supreme Court (SCOTUS) has extracted, throughout history, a series of procedural guarantees, such as the right to be heard, and substantive ones, such as the right to privacy.

The remarkable advance of North American jurisprudence has a distant ancestor: the notion of isonomy among the Greeks, understood as the equality of people before the law.

recognized precepts of justice. Conformity to these precepts ensures a genuine-substantive-equality of all before a law that serves a coherent (if capacious and adaptable) conception of the common good." (ALLAN, T. R. S. *Constitutional Justice*: A Liberal Theory of the Rule of Law. Oxford: Oxford University Press, 2003, p. 121).

[6] SULLIVAN, E. Thomas. *The arc of due process in American constitutional law*. Oxford: Oxford University Press, 2013, p. 1.

[7] FALLON, Richard H. The Rule of Law as a Concept in Constitutional Discourse. *Columbia Law Review*, vol. 97, n. 1, 1997.

[8] ADAMS, John. Novanglus Papers n. 7. In: ADAMS, Charles Francis (ed.). *The Works of John Adams*, vol. 4, 1851, p. 106.

[9] On the subject, see: REDISH, Martin H.; MARSHALL, Lawrence C. Adjudicatory Independence and the Values of Procedural Due Process. *Yale Law Journal*, vol. 95, n. 3, 1986.

[10] SULLIVAN, E. Thomas. *The arc of due process in American constitutional law*. Oxford: Oxford University Press, 2013, p. 4-5.

Revista Eletrônica de Direito Processual – REDP.
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www.redp.uerj.br

After all, the idea of the rule of law, for the Greeks, was even more relevant than the democratic system of the time. This is what Aristotle reveals when he affirms that not only is it better to have "an eternal law which it is better to obey than to be subject to any citizen", but also that "to want the spirit to command is equivalent to wanting the command to belong to God and the laws. To hand it over to man is to associate him with the irrational animal."[11] The Aristotelian notion of the separation of functions of the magistracies inspired the organization of the Roman Republic, in which "all men are disciplined by the supreme law of the land."[12]

2.2 Medieval English rule of law

Despite the undeniable influences of ancient social organizations, the rule of law is considered by many to be a characteristic of medieval English constitutionalism.[13] It is not something that arose by chance, but rather from discussions and the application of principles that took place long before June 15, 1215[14], when the "great charter of liberties or concord between King John and the barons for the granting of the liberties of the Church and the English kingdom" was signed.[15]

With the publication of Magna Carta of 1215, its chapters 39 and 40 can be considered the fundamental textual framework of both rule of law and due process of law, serving as inspiration for constitutions from modernity to the present day. According to Chapter 39,

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

[11] ARISTOTELES. *Política*. São Paulo: Martin Claret, 2006, p. 90.
[12] WALKER, Geoffrey. *The Rule of Law*: Foundation of Constitutional Democracy. Melbourne: Melbourne University Press, 1988, p. 93-94.
[13] SULLIVAN, E. Thomas. *The arc of due process in American constitutional law*. Oxford: Oxford University Press, 2013, p. 9.
[14] HOLT, James Clarke. *Magna Carta*. 2. ed. Cambridge: Cambridge University Press, 1992, p. 295.
[15] Cf. http://www.direitoshumanos.usp.br/index.php/Documentos-anteriores-%C3%A0-cria%C3%A7%C3%A3o-da-Sociedade-das-Na%C3%A7%C3%B5es-at%C3%A9-1919/magna-carta-1215-magna-charta-libertatum.html. Accessed on: 25 Oct. 2021.

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www.redp.uerj.br

In turn, Chapter 40 stated that "To no one will we sell, to no one deny or delay right or justice". Later, in 1354, a new edition of the Charter introduced the expression "due process of law" for the first time, stating

> That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law.[16]

The re-edition came during the rule of King Edward III (1327-1377), when the English Parliament enacted six statutes designed to clarify the scope of the liberties that Magna Carta had inaugurated. The expression "the law of the land" was then refined, understood as the set of procedural guarantees necessary to restrict royal power.

Although Magna Carta planted the necessary seeds, the development of a truly robust rule of law nurtured by procedural guarantees did not occur immediately, due primarily to the doctrine of the divine right. In fact, as Sullivan points out, the beginning of the Tudor dynasty in 1485 was characterized by the exercise of royal power in the conduct of wars against their rivals, to the detriment of the security and prosperity of the rest of the country.[17] This is a historical period marked by the recognition of broad powers to the king so that he could resolve internal conflicts, religious violence, and foreign invasion. In McIlwain's words, "the people and the king, or rather possibly the people through the king, were exercising vast and undefined powers."[18]

An example of the doctrine of the divine right of the kings was certainly the rule of Henry VIII, beginning in 1509, who went so far as to declare that he would "subject himself to no law of any other earthly creature." In 1533, the Act of Restraint of Appeals prevented citizens from appealing to the Pope in order to challenge the king's decisions.[19] The hostile environment of the Tudor dynasty did not prevent the English rule of law from surviving and developing, with the presence of a functioning Parliament. Despite its blatant submission

[16] Available at: https://www.legislation.gov.uk/aep/Edw3/28/3. Accessed on: 25 Oct. 2021.
[17] SULLIVAN, E. Thomas. *The arc of due process in American constitutional law*. Oxford: Oxford University Press, 2013, p. 8.
[18] MCILWAIN, C. H. *The High Court of Parliament and Its Supremacy*. Oxford, Oxford University Press, 1910, p. 341.
[19] DUNHAM, William Huse. Regal Power and the Rule of Law: a Tudor Paradox. *Journal of British Studies*, vol. 3, no. 2, pp. 24-56, 1964, pp. 30-34.

to the king at the time, it was up to Parliament to define laws for government action.[20]

The next dynasty (House of Stuart), which began in 1603, did not stop the advance of the rule of law. A reference at the time, Sir Edward Coke, English jurist and politician, revolutionized the not yet fully formed principles underlying the rule of law. Coke lived in a liminal moment of power structures, becoming an icon in defending the supremacy of common law over royal powers, densely influencing the development of English law and its uncodified Constitution.

Although a member of a minority, Coke was able to exert his influence, for example, in reconfiguring the use of *habeas corpus*, an instrument originally designed to ensure the presence of a defendant or investigated in court. Thanks to Coke, the instrument was reformulated to protect the freedom of arbitrarily detained individuals.[21] Coke is also credited, as a magistrate, with a remote English precedent of judicial review, in the case of *Thomas Bonham v. College of Physicians* (1610), from the Court of Common Pleas, under his leadership.[22]

After almost a century, the struggle between parliamentary supremacy and Stuart absolutism culminated with the Glorious Revolution (1688 and 1689)[23] and its Bill of Rights. This document established not only that "the pretended power to suspend the laws or the execution of laws by royal authority, without the consent of Parliament, is illegal," but also, among other measures, that "it is the right of subjects to petition the king," all restrictions and retaliations to its exercise being illegal.[24]

It is precisely in this historical moment that we see the rise of England as the great

[20] SULLIVAN, E. Thomas. *The arc of due process in American constitutional law*. Oxford: Oxford University Press, 2013, p. 9.
[21] SULLIVAN, E. Thomas. *The arc of due process in American constitutional law*. Oxford: Oxford University Press, 2013, p. 9.
[22] In the words of Judge Coke: "In many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void" (WILSON, James; WILSON, Bird. *The Works of the Honourable James Wilson, L.L.D.* New Jersey: The Lawbook Exchange Ltd.)
[23] COX, Gary W. Was the Glorious Revolution a Constitutional Watershed? *The Journal of economic history*, vol. 72, no. 3, pp. 567-600, 2012.
[24] Cf. https://avalon.law.yale.edu/17th_century/england.asp. Accessed on: 26 Oct. 2021.

world power, whose theorists would directly influence the constitutions of the States in America. Proof of this is the role of John Locke, considered by many as the "ideologue by antonomasia of the Glorious Revolution and the liberal-conservative regime that resulted from it"[25] in the writing of the "fundamental constitutions of Carolina".[26] The English rule of law and the due process of law were consolidated at this time.

2.3 The due process clause in the fifth and fourteenth amendments to the United States Constitution

Although it does not expressly mention the term rule of law, the United States Constitution of 1787 is certainly the result of many principles developed in Europe over the centuries. This did not occur by chance. The colonists' political thought was strongly influenced by writings from classical antiquity, by Enlightenment authors — among them John Loke —, by English common law, and by Puritan theories. All these sources influenced not only the Declaration of Independence, but the Constitution and the later American Bill of Rights — consisting of the first ten amendments.[27]

Its original wording, however, did not contemplate the due process of law clause.[28] The guarantee was inserted in the 5th[29] and 14th amendments[30], whose texts are clearly

[25] CONTRERAS, Francisco José. *La filosofía del derecho en la historia.* 2. ed. Madrid: Tecnos, 2016, p. 181.
[26] CONTRERAS, Francisco José. *La filosofía del derecho en la historia.* 2. ed. Madrid: Tecnos, 2016, p. 180.
[27] LUTZ, Donald. The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought. *The American Political Science Review*. Vol. 78, pp. 189-197, 1984.
[28] Cf. https://www.archives.gov/founding-docs/constitution-transcript. Accessed on: 26 Oct. 2021.
[29] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Cf. https://constitution.congress.gov/browse/amendment-5/. Accessed on: 26 Oct. 2021.
[30] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (Cf. https://constitution.congress.gov/browse/amendment-14/. Accessed on: 26 Oct. 2021).

Revista Eletrônica de Direito Processual – REDP.
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www.redp.uerj.br

inspired by the Magna Carta.

According to the 5th amendment, which is part of the Bill of Rights ratified in December 1791,

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

In turn, the 14th amendment, adopted in 1868, states that

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The process of including a bill of rights, however, was not without arduous debate. The absence of a clause protecting due process of law and other individual rights was noticed during the process of ratification of the Constitution, in whose conventions it was invoked as an important objection.[31] An example was the New York ratification convention in 1788, when it was proposed that the clause be included in the Constitution.[32]

The authors of the text, on the other hand, argued that the provisions of a due process clause and another, providing for individual rights, would be unnecessary, since they could be extracted from the principles of the rule of law. This is the case of Alexander Hamilton, who also pointed out that "charters of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogatives in favor of privilege, reservations of rights not delivered to the prince."[33] For him, it is clear "that, according to their primitive meaning," declarations of rights "do not apply to constitutions, founded on the power of the people and

[31] SULLIVAN, E. Thomas. *The arc of due process in American constitutional law*. Oxford: Oxford University Press, 2013, p. 14.
[32] HYMAN, Andrew. The little word "due". *Akron Law Review*, vol. 38, 2005.
[33] HAMILTON, Alexander. *The Federalist No. 84.* Available at: http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss7.html, p. 534. Accessed on: 26 Oct. 2021.

Revista Eletrônica de Direito Processual – REDP.
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www.redp.uerj.br

executed by their immediate representatives and servants."[34]

The objections led American states to incorporate the provision of a bill of rights into their own constitutions. Thus, by 1860, about eighty percent (80%) of the states had adopted the due process clause, many of them using the term "law of the land″ from the first version of the English Magna Carta.[35] Later, influenced by pressure and state constitutions, James Madison introduced the wording that would become part of the 5th amendment, which would change the expression "law of the land" to "due process of law". His bill was presented to a committee of the United States Congress, which reviewed the amendments. Despite intense debate at the federal level, once approved, the amendments were ratified by the states without much debate, with only two being rejected. The 5th amendment, providing for the due process clause, was easily ratified in 1791, in view of the consensus on the need to limit the abuses of the executive and legislative branches.[36]

Over the decades, especially after the passage of the 14th amendment in 1868 following the Civil War, the due process clause has played a central role in the American constitutional tradition, especially from the jurisprudence of the Supreme Court.

Much of what is known today about American judicial review stems from the use of these amendments as parameters of control, in its procedural and substantive perspectives. Many are the emblematic cases decided on their grounds, such as *Brown v. Board of Education* (1954), concerning racial segregation, *Roe v. Wade* (1973), concerning abortion, *Bush v. Gore (*2000), concerning the 2000 presidential elections, and *Obergefell v. Hodges* (2015), concerning homosexual marriage.

2.4 The development of due process in its procedural and substantive dimensions

[34] HAMILTON, Alexander. *The Federalist No. 84*. Available at: http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss7.html, p. 534. Accessed on: 26 Oct. 2021.
[35] MOTT, Rodney L. *Due Process of Law*: A Historical and Analytical Treatise of the Principles and Methods Followed by the Courts in the Application of the Concept of the "law of the Land". Thesis (Doctor of Laws). University of Wisconsin, 1922.
[36] SULLIVAN, E. Thomas. *The arc of due process in American constitutional law*. Oxford: Oxford University Press, 2013, p. 17-18.

Revista Eletrônica de Direito Processual – REDP.
Rio de Janeiro. Ano 16. Volume 23. Número 2. Maio-Agosto de 2022
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www.redp.uerj.br

2.4.1 The "abandonment" of English *common law* towards an evolutionary interpretation

The modern conception of due process of law, as seen, derives from two main sources: the English Magna Carta and American constitutionalism.

At an early stage, when judging the first cases based on due process of law, the Supreme Court of the United States employed a historical interpretation that went back to Coke's views on the English Magna Carta. An example of this was the 1856 *Murray's Lessee v. Hoboken Land & Improvement Company,* in which Justice Benjamin R. Curts, in a vote followed by his peers, pointed out that due process of law meant that all citizens would be judged "by the law of the land," a "concept established by the Magna Carta."[37] This reference also appeared in the *Slaughter-House Cases,* decided in 1873. The underlying issue was a Louisiana state law that restricted slaughterhouse operations in New Orleans to a single corporation. According to the Court, the legislation did not violate the due process clause.[38]

Later, in a second step, the Court moved away from the explicit reference to English common law.[39] In the 1884 case of *Hurtado v. California*, it was discussed whether the provision of the California Constitution authorizing the commencement of a criminal prosecution directly on a written complaint from a prosecutor, rather than on a prior grand jury indictment, violated the due process clause of the 14th amendment. The importance of the debate was that a prior grand jury indictment was part of English common law.

According to the Court, there was no violation of the constitutional provision, because any legal procedure in respect of freedom and justice could be understood as due process. For the majority of the Court, the Constitution cannot be locked into static conceptions limited by time and place. This is because "the Constitution of the United States was made for an indefinite and expanding future," so that the requirement of due process of law in suits involving life, liberty, and property must be construed so as not to deny the law the capacity

[37] SUPREME COURT OF THE UNITED STATES, *Murray v. Hoboken Land & Improv. Co*., 59 U.S., 1856.
[38] SUPREME COURT OF THE UNITED STATES, *Slaughterhouse Cases*, 83 U.S. 36, 1872.
[39] REDISH, Martin H.; MARSHALL, Lawrence C. Adjudicatory Independence and the Values of Procedural Due Process. *Yale Law Journal*, vol. 95, no. 3, 1986, p. 468.

for progress and improvement.[40]

Many of the cases that have embraced an evolving interpretation of the due process clause have resulted in a broader application of the fundamental right. In this regard, in *Powell v. Alabama* (1932), the Court was called upon to rule on the validity of the convictions of nine young black men "found to be ignorant and uneducated" and without prior contact with their attorneys. The Court held that the trials denied due process because the defendants did not have reasonable time and opportunity to obtain counsel for their defense. At the time, the Court made clear the need to expand the understanding of due process beyond English common law. According to George Sutherland's majority vote, if recognition of the right of a defendant to have the assistance of counsel "depended upon the existence of a similar right at English common law at the time the Constitution was adopted, there would be great difficulty in identifying it as an element of due process."[41]

The evolution of the interpretation of the due process clause, in addition to detaching itself from English common law, *has* also resulted in the recognition of at least two dimensions of this fundamental right: a procedural and a substantive one.

2.4.2 What are the minimum guarantees of the procedural dimension of due process?

The text of the due process clause in the 14th Amendment to the U.S. Constitution states the categories of rights to which it applies: life, liberty, and property. Each of these is at the core of the exercise of citizenship in a democracy. Moreover, these rights qualitatively represent the level of seriousness of the act of deprivation to justify the invocation of due process, as well as reflect the type of harm that is sought to be prevented.[42]

[40] "It is said by the court that the Constitution of the United States was made for an undefined and expanding future, and that its requirement of due process of law in proceedings involving life, liberty and property must be so interpreted as not to deny to the law the capacity of progress and improvement; that the greatest security for the fundamental principles of justice resides in the right of the people to make their own laws and alter them at pleasure." (U.S. Supreme Court, *Hurtado v. California*, 110 U.S. 516, 1884).
[41] SUPREME COURT OF THE UNITED STATES, *Powell v. Alabama*, 287 U.S. 45, 1932.
[42] CRAWFORD, Kate; SCHULTZ, Jason. Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms. *Boston College Law Review*, vol 55, 2014, p. 110.

Revista Eletrônica de Direito Processual – REDP.
Rio de Janeiro. Ano 16. Volume 23. Número 2. Maio-Agosto de 2022
Periódico Quadrimestral da Pós-Graduação *Stricto Sensu* em Direito Processual da UERJ
Patrono: José Carlos Barbosa Moreira (*in mem.*). ISSN 1982-7636. pp. 592-630
www.redp.uerj.br

As we will see in the following topics, there are interests capable of triggering procedural protections under the due process clause, just as there are substantive interests capable of preventing or restricting the state power to make arbitrary interventions. Some of them derive from a very broad interpretation of the triad brought in the constitutional text, or even from its affectation in an indirect way.[43]

Today, it is possible to reasonably conceptualize the procedural dimension of due process as the constitutional requirement that any deprivation of a person's life, liberty, or property *by the state* must be preceded by minimum guarantees. These guarantees comprise, in essence, the right to be notified, the right to be heard and the right to an impartial adjudicator.[44]

Historically, American constitutionalism developed this dimension of due process from two Supreme Court cases: *Goldberg v. Kelly* (1970) *and Mathews v. Eldridge* (1976).

John Kelly, acting on behalf of New York residents receiving welfare programs, sued the Supreme Court, arguing that the existing procedures for notification and termination of benefits were unconstitutional. In response, the Court, by majority vote (5 to 3), held that the procedural dimension of due process requires the government to hold evidentiary hearings before terminating welfare benefits, at which time the beneficiaries can be heard.

The welfare benefits were understood as integral elements of the beneficiaries' property, and not as privileges. In addition, the Court pointed out that the State's interest in reducing the costs arising from the implementation of hearings would not be sufficient to overcome the beneficiaries' interest in due process of law. Finally, it understood that the State did not need to provide the opportunity for a complete procedure, such as those of a

[43] "Yet despite the limited applicability of this rigid framework for defining interests, principles of procedural due process also developed through other constitutional doctrines. For example, in the first half of the twentieth century a series of cases established fundamental rules of procedural due process in areas of law that were not directly related to government-created property and liberty interests. The Court also found other avenues to protect important 'privileges', such as employing the Equal Protection Clause or establishing the doctrine of 'unconstitutional conditions'" (SULLIVAN, E. Thomas. *The arc of due process in American constitutional law*. Oxford: Oxford University Press, 2013, p. 57).

[44] CRAWFORD, Kate; SCHULTZ, Jason. Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms. *Boston College Law Review*, vol 55, 2014, p. 110.

Revista Eletrônica de Direito Processual – REDP.
Rio de Janeiro. Ano 16. Volume 23. Número 2. Maio-Agosto de 2022
Periódico Quadrimestral da Pós-Graduação *Stricto Sensu* em Direito Processual da UERJ
Patrono: José Carlos Barbosa Moreira (*in mem.*). ISSN 1982-7636. pp. 592-630
www.redp.uerj.br

judicial nature, being sufficient the respect for four procedural guarantees[45]: a) opportunity to be properly heard; b) prior and adequate notice; c) opportunity to present witnesses; d) opportunity to present arguments and evidence.

Most significant was the 1976 case of *Mathews v. Eldridge*, in which the Court ultimately mitigated the precedent previously established in *Goldberg*. George Eldridge, an individual who had been found unable to work due to chronic anxiety and a back injury, appealed to the United States Supreme Court after receiving a letter from Social Services stating that he had been found rehabilitated and that his social security benefits would be terminated. Social Services properly notified Eldridge and conducted evidentiary diligence, but the benefits were cut off before evidence was produced in an administrative proceeding.

Although the facts of the case were very similar to those presented in *Goldberg* six years earlier, the result was different. By majority vote (6 to 2), in addition to differentiating between the termination of welfare benefits (*Goldberg*) and the termination of disability benefits, the Court held that due process was a flexible guarantee[46], depending on the circumstances of the particular case. Moreover, it reasoned that, "in some cases, the additional benefit or guarantee to the individual affected by the administrative action and also to society, in terms of the assurance of a fair decision, may be outweighed by the costs" of the guarantee.[47] In order to balance the guarantees previously set forth in *Goldberg*, the Court established a test aimed at analyzing the constitutionality of the deprivation of liberty or property by a state action.

This test consists of weighing three elements[48]: a) first, the private interest that will be affected by a state action; b) second, the risk of an erroneous deprivation of such interest

[45] SUPREME COURT OF THE UNITED STATES, *Goldberg v. Kelly*, 397 U.S. 254, 1970.
[46] For a broad understanding of the criticisms of this "flexible" approach, see: REDISH, Martin H.; MARSHALL, Lawrence C. Adjudicatory Independence and the Values of Procedural Due Process. *Yale Law Journal*, vol. 95, no. 3, 1986.
[47] SUPREME COURT OF THE UNITED STATES, *Mathews v. Eldridge*, 424 U.S. 319, 1976.
[48] "[...] first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail" (SUPREME COURT OF THE UNITED STATES, *Mathews v. Eldridge*, 424 U.S. 319, 1976).

through the procedures used, and the likely value, if any, of additional or substitute procedural safeguards; c) third, the state interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In summary, by the precedent set in *Mathews v. Eldridge*, the Supreme Court of the United States has set the guideline that due process of law, in its procedural dimension, varies according to the severity of the deprivation and the magnitude of the opposing state interest.

In more recent cases, such as *Cleveland Board of Education v. Loudermill*[49] (1985) and *Hamdi v. Rumsfeld*[50] (2004), without overcoming the test established in *Mathews*, the Court consolidated the minimum procedural guarantees applicable in cases of deprivation of liberty or property. These are: a) participatory procedures; b) the existence of a neutral judge; c) the existence of a formal procedure; d) the continuity of the exercise of the defense at all stages of the proceedings.

In addition, the Supreme Court has excepted the test set forth in *Mathews v. Eldridge* in criminal cases, cases involving military personnel, and cases where there was no notification at all.[51]

In 1971, in *Wisconsin v. Constantineau*, the Supreme Court made clear the elasticity of the understanding of the triad "life, liberty and property", recognizing procedural due process in the protection of interests against state actions capable of causing damage to one's reputation. According to the facts of the case, the Hartford police made Constantineau's name public in liquor stores, notifying the owners not to sell him alcohol because of his allegedly unlawful conduct while intoxicated. The Court concluded that there was a liberty interest at stake, noting that, "when a person's good name, reputation, honor, or integrity are at stake because of what the government is doing to him, notice and the opportunity to be heard are essential."[52]

[49] SUPREME COURT OF THE UNITED STATES, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 1985.
[50] SUPREME COURT OF THE UNITED STATES, *Hamdi v. Rumsfeld*, 542 U.S. 507, 2004.
[51] SULLIVAN, E. Thomas. *The arc of due process in American constitutional law*. Oxford: Oxford University Press, 2013, p. 24.
[52] SUPREME COURT OF THE UNITED STATES, *Wisconsin v. Constantineau*, 400 U.S. 433, 1971.

Revista Eletrônica de Direito Processual – REDP.
Rio de Janeiro. Ano 16. Volume 23. Número 2. Maio-Agosto de 2022
Periódico Quadrimestral da Pós-Graduação *Stricto Sensu* em Direito Processual da UERJ
Patrono: José Carlos Barbosa Moreira (*in mem.*). ISSN 1982-7636. pp. 592-630
www.redp.uerj.br

2.4.3 The substantive dimension of due process

Although it is commonly said that the doctrine of the substantive dimension of due process originated in *Lochner v. New York*[53] (1905), it is a subject that had already been the subject of debate at earlier times.

In the aforementioned *Slaughter-House Cases*, decided in 1873, the Court was asked to decide whether a Louisiana law restricting slaughterhouse operations in New Orleans to a single corporation violated the Due Process Clause. The underlying question was whether the Due Process Clause had a substantive component capable of protecting economic rights, which was rejected by the Court. Justice Stephen Johnson Field's dissenting vote can be pointed to as a defense of the substantive due process doctrine even before *Lochner*.[54]

For some authors[55], it is possible to find even more remote roots, such as Justice Chase's vote in *Calder v. Bull*[56] (1798). Be that as it may, the fact remains that *Lochner* is a clear and striking example of the Court's application of the doctrine. The underlying issue was an examination of the constitutionality of a New York State statutory provision that prohibited bakery employees from working more than ten hours a day or sixty hours a week. Lochner had been fined for having a worker for more than sixty hours a week in his establishment.

According to the Supreme Court in *Lochner*, the right to contract is part of the right to liberty protected by the due process of law clause established by the 14th amendment. It ruled, there would be no "reasonable basis, in the health field, for interfering with the liberty of the person or the right of free contracting, in determining the hours of work, in the

[53] RADU, M. I. Incompatible theories: Natural law and substantive due process. *Villanova Law Review*, v. 54, n. 2, p. 247-290, 2009.
[54] SUPREME COURT OF THE UNITED STATES, *Slaughterhouse Cases*, 83 U.S. 36, 1872.
[55] "The roots of a 'substantive' component of due process, however, arguably extend back even further than Justice Field's dissent. In 1798, Justice Chase eloquently laid out many of the principles that modern substantive due process reflects, though his precise intentions obviously must be taken in their narrower, historical context" (SULLIVAN, E. Thomas. *The arc of due process in American constitutional law*. Oxford: Oxford University Press, 2013, p. 17-18).
[56] SUPREME COURT OF THE UNITED STATES, *Calder v. Bull*, 3 U.S. 386, 388-90, 1798.

Revista Eletrônica de Direito Processual – REDP.
Rio de Janeiro. Ano 16. Volume 23. Número 2. Maio-Agosto de 2022
Periódico Quadrimestral da Pós-Graduação *Stricto Sensu* em Direito Processual da UERJ
Patrono: José Carlos Barbosa Moreira (*in mem.*). ISSN 1982-7636. pp. 592-630
www.redp.uerj.br

occupation of a baker." Nor could a law limiting such hours "be justified as a law designed to safeguard the public health."[57]

In summary, the New York legislation governing employment in bakeries was considered by a majority of the Court to be an "unreasonable, unnecessary and arbitrary interference with the right and freedom of the individual to engage the labor of others and, as such, is in conflict with the Constitution and is void."[58] The unreasonable intervention in the right — and not the absence or deficiency of a formal procedure — was the main basis of the decision.

Although the precedent in *Lochner* would be superseded fifty years later[59], the due process clause was used in many cases as a basis for declaring the unconstitutionality of normative acts that, in the view of the Supreme Court, implied unreasonable interventions on the rights to life, liberty, and property.

As far as the right to liberty is concerned, its scope has been increasingly broadened to encompass rights derived from it, such as privacy, conceived as the freedom *to be let alone*.[60] An example of this was the judgment in *Griswold v. Connecticut* (1965), in which Justice Harlan, joining the majority, noted that the due process clause also protects the right to privacy against arbitrary interference. In this case, the Court ruled that state laws prohibiting the use of contraceptives were unconstitutional.[61] Precedents like this one have opened space for the use of due process as a basis, among others, for the protection of sexual and reproductive rights.

Although the jurisprudence of the Supreme Court has, of course, judged each case according to its circumstances, the use of the substantive due process clause has a common

[57] SUPREME COURT OF THE UNITED STATES, *Lochner v. New York*, 198 U.S. 45, 1905.
[58] SUPREME COURT OF THE UNITED STATES, *Lochner v. New York*, 198 U.S. 45, 1905.
[59] 348 U.S. 483, 1955.
[60] "The protection guaranteed by the (Fourth and Fifth) amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the signifi cance of man's spiritual nature, of his feelings and of his intellect. Th ey knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men" (SUPREME COURT OF THE UNITED STATES, Olmstead v. United States, 277 U.S. 438, 1928).
[61] SUPREME COURT OF THE UNITED STATES, *Griswold v. Connecticut*, 381 U.S. 479, 1965.

Revista Eletrônica de Direito Processual – REDP.
Rio de Janeiro. Ano 16. Volume 23. Número 2. Maio-Agosto de 2022
Periódico Quadrimestral da Pós-Graduação *Stricto Sensu* em Direito Processual da UERJ
Patrono: José Carlos Barbosa Moreira (*in mem.*). ISSN 1982-7636. pp. 592-630
www.redp.uerj.br

assumption, which remains today. This is the identification of a governmental action that is unreasonable and, therefore, arbitrary.

3 IN DEFENSE OF THE HORIZONTAL EFFECT OF DUE PROCESS CLAUSE

3.1 The American doctrine of state action

Whether in its procedural or substantive dimension, the application of the traditional due process doctrine, in the Anglo-American legal tradition, demands the deprivation of a constitutional interest due to a state action. For authors such as Christina Bambrick[62], it is a logical consequence of the liberal legal tradition that inspired — and strongly inspires — the common law. Its origin goes back to the contractarianism of authors such as Thomas Hobbes and John Locke, in opposition to the classical republicanism of thinkers such as Aristotle and Cicero.

The topic was the subject of express debate in the judgment of two relevant cases: *Lugar v. Edmondson Oil Co*. (1982) and *Am. Mfrs. Mut. Ins. Co. v. Sullivan* (1999).

The facts of *Lugar v. Edmondson Oil Co*. go back to a contractual relationship. Giles Lugar had rented property from Edmondson Oil Co. and was late in paying the rent due. This led Edmondson to file an action against Lugar in a state court in Virginia. In addition, the plaintiff reported suspicion that the defendant was disposing of his property to avoid paying the debt. Before the court reached a final decision, a clerk of the court issued an injunction restraining Lugar from selling any property in his domain while the case was pending. The act was later revoked by a court judge, who found it unlawful.

Lugar then filed a suit for damages, claiming that he had suffered financial loss as a

[62] According to Bambrick, the republican tradition comfortably justifies the doctrine as the uniformity of obligations of the public and private spheres and the solidarity that horizontal effect suggests. This is because, just as republican thought holds the common good as a standard for public and private entities, horizontal effectiveness also imposes on public and private actors the promotion of constitutional values. This uniformity in the applicability of the Constitution to public and private entities can be justified by republicanism and, more fundamentally, by the common good that serves a republican conception of liberty. Cf. BAMBRICK, Christina. Horizontal Rights: A Republican Vein in Liberal Constitutionalism. *Polity*, vol. 52, n. 3, p. 401-429, 2020.

Revista Eletrônica de Direito Processual – REDP.
Rio de Janeiro. Ano 16. Volume 23. Número 2. Maio-Agosto de 2022
Periódico Quadrimestral da Pós-Graduação *Stricto Sensu* em Direito Processual da UERJ
Patrono: José Carlos Barbosa Moreira (*in mem.*). ISSN 1982-7636. pp. 592-630
www.redp.uerj.br

result of the decision that was later overturned. He alleged, as a central thesis, that Edmondson and a state agent, in collusion, were responsible for the deprivation of his property without due process of law guaranteed by the 14th amendment, an argument that was rejected in the first instance.

One of the central questions was whether conduct by a state official that exceeds the limits of his authority constitutes state action for the purposes of the 14th amendment. On appeal, the Supreme Court granted Lugar's claim, holding that the state will be liable for damages for unconstitutional conduct when two conditions are met. First, "the deprivation [of a constitutional right] must be caused by the exercise of some right or privilege created by the state." Second, "the party charged with the deprivation must be a person who can be considered a state actor." This includes state officials and those who are significantly assisted by them.[63]

Justice White, who wrote the majority opinion, noted that, as a matter of substantive constitutional law, "the state action requirement reflects judicial recognition of the fact that most of the rights guaranteed by the Constitution are protected only against infringement by governments." White further recalled the precedent drawn from *Jackson v. Metropolitan Edison Co.* 1974[64], in which the Court reaffirmed the essential dichotomy established in the Fourteenth Amendment between a deprivation of rights by the state, subject to scrutiny under its provisions, and private conduct, "albeit discriminatory or unlawful, against which the Fourteenth Amendment affords no protection."[65] The careful adherence to the state action requirement was conceived, at the time, as a justification for the protection of a legitimate space for the exercise of individual liberty.

[63] 457 U.S. 922, 1982.
[64] SUPREME COURT OF THE UNITED STATES, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 1974.
[65] "As a matter of substantive constitutional law, the state action requirement reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments,' Flagg Brothers, 436 U.S. at 436 U. S. 156. As the Court said in Jackson v. Metropolitan Edison Co., 419 U. S. 345, 419 U. S. 349 (1974): 'In 1883, this Court in the Civil Rights Cases, 109 U. S. 3, affirmed the essential dichotomy set forth in [the Fourteenth] Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield'" (SUPREME COURT OF THE UNITED STATES, *Lugar v. Edmondson Oil Co.*, Inc.)

Revista Eletrônica de Direito Processual – REDP.
Rio de Janeiro. Ano 16. Volume 23. Número 2. Maio-Agosto de 2022
Periódico Quadrimestral da Pós-Graduação *Stricto Sensu* em Direito Processual da UERJ
Patrono: José Carlos Barbosa Moreira (*in mem.*). ISSN 1982-7636. pp. 592-630
www.redp.uerj.br

Later, in *Am. Mfrs. Mut. Ins. Co. v. Sullivan* (1999), the issue was again discussed by the Supreme Court. The case concerned the application of the Pennsylvania Workers' Compensation Act in providing that once an employer's liability for the injury suffered by an employee of his is recognized, the self-insured employer or an insurer itself is responsible for "reasonable" and "necessary" medical services for treatment. In 1993, this system was amended to allow insurers to withhold payment for disputed treatment pending the outcome of an independent review. Ten public employees and two organizations representing employees who received benefits filed suits against state officials, a self-insured Philadelphia school district, and several private insurance companies.

The central thesis was that the state and private defendants, acting under state law, deprived the plaintiffs of their property in violation of the due process clause. The case came before the Supreme Court, which was to provide answers to two questions: a) can the private insurers' decision to withhold payment for the challenged medical treatment be considered state action, so as to bring them within the reach of the 14th amendment?; b) do the workers have a constitutionally protected property interest, to result in the funding of the treatment prior to a final decision as to its "reasonableness" and "necessity"?

In a nearly unanimous decision (8 to 1), the Court decided to answer in the negative to both questions. According to the winning vote of Justice William H. Rehnquist, application of the due process clause requires that the deprivation of a right is caused by actions taken under state law and that the deprivation is reasonably attributable to the state.[66]

According to Rehnquist, although the alleged deprivation was clearly taken pursuant to state law, the decision by private insurers to withhold medical payments for disputed treatments cannot "fairly" be attributed to the state. This is because the mere creation of a new dispute resolution mechanism does not constitute state encouragement or authorization. Nor did Pennsylvania delegate to private insurers powers that were exclusively the state's, since it merely authorized insurers to do what they would do in the absence of regulation: dispute payment for unnecessary treatment.

[66] SUPREME COURT OF THE UNITED STATES, *American Mfrs. Mut. Ins. Co. v. Sullivan*, 1999.

Revista Eletrônica de Direito Processual – REDP.
Rio de Janeiro. Ano 16. Volume 23. Número 2. Maio-Agosto de 2022
Periódico Quadrimestral da Pós-Graduação *Stricto Sensu* em Direito Processual da UERJ
Patrono: José Carlos Barbosa Moreira (*in mem.*). ISSN 1982-7636. pp. 592-630
www.redp.uerj.br

It further emphasized that in order to claim a protected property interest, a worker should demonstrate not only that his employer was responsible for a work-related injury, but also that the treatment for which payment is sought was reasonable and necessary. In the case, the plaintiffs merely asserted their initial eligibility for treatment, and failed to demonstrate that the treatment was reasonable and necessary.

In summary, according to the precedent set by the Supreme Court in *American Mfrs. Mut. Ins. Co. v. Sullivan*, the "state action" requirement requires both that (a) the alleged constitutional deprivation was caused by acts done in accordance with the law and that (b) the allegedly unconstitutional conduct can reasonably be imputed to the state. Consequently, (c) the mere fact that a private enterprise is subject to extensive state regulation does not convert its action into state action.[67]

3.2 The doctrine of the horizontal effect of fundamental rights in the world

According to the liberal tradition stemming from the Anglo-American common law, constitutions should be understood essentially as documents aimed at the organization of the state and the protection of individuals against state arbitrariness. Although the development of new written constitutions, especially after the Second World War, has resulted in the positivization of new rights — social, collective, economic, etc. —, the doctrine of the vertical relationship has been preserved in many legal systems.

The rationale is clear: this vertical relationship would be necessary to preserve a necessary space for the private sphere, in which individuals can pursue their own interests

[67] "A private insurer's decision to withhold payment and seek utilization review of the reasonableness and necessity of particular medical treatments is not fairly attributable to the State so as to subject the insurer to the Fourteenth Amendment's constraints. State action requires both an alleged constitutional deprivation caused by acts taken pursuant to state law and that the allegedly unconstitutional conduct be fairly attributable to the State. E. g., Lugar v. Edmondson Oil Co., 457 U. S. 922, 937. Here, while it may fairly be said that the first requirement is satisfied, respondents have failed to satisfy the second. The mere fact that a private business is subject to extensive state regulation does not by itself convert its action into that of the State. See, e. g., Blum v. Yaretsky, 457 U. S. 991, 1004" (SUPREME COURT OF THE UNITED STATES, *American Mfrs. Mut. Ins. Co. v. Sullivan*, 1999).

and projects freely, without state intrusion.[68]

On the other hand, some constitutions and constitutional courts in some countries have recognized the horizontal effect of *certain* fundamental rights, on the grounds that constitutional commitments are capable of generating obligations not only to the state. As pointed out by Tushnet, the doctrine of horizontal effect can be conceived as a response to the threat to freedom caused by the concentration of private power.[69] It is a limitation on the "self-constitutionalization" of private relationships by subjecting them to the constitutional framework.

This horizontal effect can occur either *directly* or *indirectly.*

An example of *direct* horizontal effect can be extracted from the express provision of the Constitution of Portugal, whose art. 18,1 states that "the constitutional precepts regarding rights, liberties and guarantees are directly applicable and binding on public and private entities."

At the Court of Justice of the European Union (CJEU), it is possible to identify horizontalist precedents, such as the *Van Gend En Loos* case (1963), in which it stated that, "independently of the legislation of the Member States, Community law not only imposes obligations on individuals, but also aims to confer upon them rights which become part of their legal heritage." And further: "These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way on individuals, on Member States and on the institutions of the Community."[70]

The premise was later confirmed in *Walrave v. Association Union Cycliste International* (1974), where the CJEU stated that "the prohibition of discrimination applies not only to action by public authorities, but extends to rules of any other nature to regulate

[68] BAMBRICK, Christina. Horizontal Rights: A Republican Vein in Liberal Constitutionalism. *Polity*, vol. 52, n. 3, 2020.
[69] TUSHNET, M. The issue of state action/horizontal effect in comparative constitutional law. *International Journal of Constitutional Law*, vol. 1, p. 79-98, 2003.
[70] COURT OF JUSTICE OF THE EUROPEAN UNION, *Case 26/62 van Gend & Loos v Netherlands Inland Revenue Administration*, 1963.

collectively the employment and provision of services."[71]

In Brazil, although not expressly provided for, the doctrine of *direct* horizontal effect was applied by the Federal Supreme Court (STF), in the paradigmatic judgment of Extraordinary Appeal No. 201.819-8. As the Second Panel decided, violations of fundamental rights occur not only in relationships between the citizen and the State, but also in relationships between private individuals and legal entities.[72] Consequently, as decided, the fundamental rights assured by the Constitution are directly binding not only on the public powers, but also on the protection of private individuals against private powers.

The case concerns the exclusion of a member from the social chart of the União Brasileira de Compositores – UBC (Brazilian Union of Composers), without prior guarantee of contradictory and ample defense. Justice Gilmar Mendes, author of the winning vote, expressly pointed out that private autonomy, "which faces clear legal limitations, cannot be exercised to the detriment or with disrespect to the rights and guarantees of third parties, especially those set forth in the Constitution".

It is important to note, however, a relevant factual circumstance. It is that the União Brasileira de Compositores – UBC, a non-profit civil society, as recognized by the STF, "assumes a privileged position to determine the extent of enjoyment and fruition of copyrights of its members." As stated in the vote of Justice Gilmar Mendes, the private associations that "play a predominant role in a certain economic and/or social sphere, keeping their members in relations of economic and/or social dependence, are part of what may be called a public space, even if non-state".

It was not, therefore, a question of the application of the due process clause to every private activity, such as the relationships between consumers in a shopping center. For situations like this, such as those involving associations of another nature, the civil legislation may come to contemplate rules that guarantee its members the right to due process, this being a political choice.

[71] COURT OF JUSTICE OF THE EUROPEAN UNION, *Case 36/74 Walrave v Association Union cycliste international*, 1974.
[72] SUPREMO TRIBUNAL FEDERAL, RE 201819, Second Panel, Rapporteur: Justice Ellen Gracie, Reporting Justice Gilmar Mendes, Judgment: October 11, 2005, Publication: October 27, 2006.

Revista Eletrônica de Direito Processual – REDP.
Rio de Janeiro. Ano 16. Volume 23. Número 2. Maio-Agosto de 2022
Periódico Quadrimestral da Pós-Graduação *Stricto Sensu* em Direito Processual da UERJ
Patrono: José Carlos Barbosa Moreira (*in mem.*). ISSN 1982-7636. pp. 592-630
www.redp.uerj.br

Two elements were highlighted by the STF to justify the direct application of the due process clause provided in the Brazilian Constitution: a) the "public character of the activity exercised by the society"; and b) the "dependence of the associative bond for the professional exercise".

As for the second element, it can be abstractly translated as a considerable power relationship ("dependency") that affects the free exercise of a fundamental right ("fundamental exercise"). This premise seems to be shared by Paula Sarno Braga, when she points out that "those who participated in the process of producing the negotiating norm will not always be there in equal conditions." The imbalance between the parties in the negotiation process "makes it an open field for the imposition of abusive restrictions on the rights of the weak party." This occurs especially in the context of the formation (e.g.: constitution of adhesion contracts or medical contracts) and of the restrictive performance of contracts (e.g.: exclusion of an associate member).[73]

This distinction is important in order not to apply the doctrine of horizontal effect to each and every private case. In fact, an indiscriminate application could bring undesirable results, such as (a) weakening the legal certainty of private relations, (b) excessive empowerment of courts, weakening political processes, as well as (c) excessive restriction of the exercise of private autonomy.

This concern is exposed by Giovanni De Gregorio, for whom the extensive application of this doctrine may have negative effects for legal certainty, especially if we consider its *ex post* recognition by the courts:

> Applying extensively this doctrine could lead to negative effects for legal certainty. Indeed, every private conflict can virtually be represented as a clash between different fundamental rights. The result could lead to the extension of constitutional obligations to every private relationship, thus hindering any possibility to foresee the consequences of a specific action or omission. Fundamental rights can be applied horizontally only ex post by courts through the balancing of the rights in question. This process could increase the degree of uncertainty as well as judicial activism, with

[73] BRAGA, Paula Sarno. The application of due process of law to private legal relations. Dissertation (Master in Public Law) - Federal University of Bahia. Salvador, 2007, p. 215.

Revista Eletrônica de Direito Processual – REDP.
Rio de Janeiro. Ano 16. Volume 23. Número 2. Maio-Agosto de 2022
Periódico Quadrimestral da Pós-Graduação *Stricto Sensu* em Direito Processual da UERJ
Patrono: José Carlos Barbosa Moreira (*in mem.*). ISSN 1982-7636. pp. 592-630
www.redp.uerj.br

evident consequences for the separation of powers and the rule of law.[74]

Other courts, such as the Constitutional Court of South Africa, in *Daniels v. Scribante and Another*, also embrace the theory of direct horizontal effect of fundamental rights under certain circumstances. According to their understanding, not all fundamental rights bear vertical and horizontal application. Furthermore, questions concerning the application of their bill of rights in the private sphere could not be resolved in advance.

In that occasion, the African Court established an important test for the application of the doctrine of horizontal effect, starting with the following questions[75]: (a) what is the nature of the right? (b) What is the history behind the right? (c) What does the right seek to achieve? (d) What is the best way to achieve this? (e) What is the potential for invasion of this right by persons other than the state or organs of the state? (f) Would leaving private persons outside the constitutional incidence not negate the essential content of the right?

In American doctrine, it is common to invoke a fanciful hypothesis to demonstrate why horizontal effect would be incompatible with basic liberal assumptions: a white racist could not be held liable for failing to invite a black neighbor to a vacation party held in the living room of his house.[76] However, the same result can be achieved by the doctrine of horizontal effect, either because of the absence of a power/dependency relationship and the exercise of public activity, or because the rights to inviolability of the home, free assembly/association, and privacy are also constitutionally protected and may prevail in a balancing exercise.

Somewhat differently, some constitutional courts have applied fundamental rights to private relationships *indirectly*. This is the case of the Supreme Court of Canada, in the *Dolphin* case[77] (1986), as well as the Federal Constitutional Court of Germany, in the *Lüth*

[74] DE GREGORIO, Giovanni. From constitutional freedoms to the power of the platforms: protecting fundamental rights online in the algorithmic society. *European Journal of Legal Studies*, vol. 11, n. 2, 2019, p. 100.
[75] CONSTITUTIONAL COURT OF SOUTH AFRICA, *Daniels v. Scribante and Another*, CCT50/16, 2017.
[76] Without adhering to it, the hypothesis is explained by Tushnet. Cf. TUSHNET, M. The issue of state action/horizontal effect in comparative constitutional law. *International Journal of Constitutional Law*, vol. 1, p. 79-98, 2003.
[77] SUPREME COURT OF CANADA, *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd*, 2 S.C.R., 1986.

Revista Eletrônica de Direito Processual – REDP.
Rio de Janeiro. Ano 16. Volume 23. Número 2. Maio-Agosto de 2022
Periódico Quadrimestral da Pós-Graduação *Stricto Sensu* em Direito Processual da UERJ
Patrono: José Carlos Barbosa Moreira (*in mem.*). ISSN 1982-7636. pp. 592-630
www.redp.uerj.br

case[78] (1958).

In the paradigmatic *Lüth* judgment, the German Court recognized that fundamental rights are, in the first place, rights of defense of the citizen against the State, as expressly provided in art. 1 of the German Constitution (*Grundgesetz*). However, in the infra-constitutional sphere, the legal content of fundamental rights is developed indirectly through the norms applicable to private relations. It is up to the judging body, therefore, when applying legal principles and rules, to interpret them in accordance with the fundamental rights established in the Constitution, mainly through the general clauses, which work as a means of legislative mediation.

While the German technique adopted in *Lüth* is certainly more careful with regard to preserving legal certainty and private autonomy, it may also prove insufficient in situations of abuse of power in the private sphere.

3.3 The silent "horizontalist revolution" undertaken by the European Court of Human Rights and the positive obligations set out in the convention

Luc Verheij states that the European Court of Human Rights (ECHR) has undertaken a "silent revolution" in recent years.[79] This revolution stems from an expansive reading carried out by the ECHR in a series of decisions in which it has identified *positive duties* attributed to states and recognized a generic right of personality for citizens, based on art. 8 of the Human Rights Convention.[80] These decisions have resulted in a break with the traditional view of the vertical State-citizen relationship in the application of human rights,

[78] FEDERAL CONSTITUTIONAL COURT OF GERMANY, *Lüth*, 7 BverGe 198, 1958.
[79] VERHEIJ, L. F. M. Horizontale werking van grondrechten: de stille Straatsburgse revolutie. In: BARKHUYSEN, T.; EMMERIK, M. L. van; LOOF, J. P. (Eds.) *Geschakeld recht*: verdere studies over Europese grondrechten ter gelegenheid van de 70ste verjaardag van prof. mr. E.A. Alkema. Deventer: Kluwer. P. 517-535, 2009.
[80] European Convention on Human Rights: "Art. 8 Right to respect for private and family life. 1. (1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others."

some of which have recognized applicability also in the sphere of private relations.

The silent character of the revolution lies in the Court's deliberate intention not to expressly mention the doctrine of the horizontal effect of fundamental rights.[81] This stems, as already mentioned by the ECHR itself — *Vgt Verein gegen Tierfabrieken v. Switzerland* case — from the "inconvenience" and the "absence of necessity" of developing a general theory to clarify in which situations there would be a horizontal application of rights.[82]

Instead, the so-called *positive duties approach* is adopted, taken from the provisions of art. 1 of the Convention, by attributing to the signatory states the duty to ensure to all persons the rights provided for therein. Thus, through this "interpretative crutch", a violation of a right in a relationship between private parties can be interpreted as a "failure" or state omission to adequately protect the right foreseen in the Constitution. This omission may result, for example, from the absence of a protective legislative discipline.[83]

Two cases are representative of the issue: *Young, James and Webster v. the United Kingdom*[84] (1981) and *Vgt Verein gegen Tierfabrieken v. Switzerland*[85] (2001), already mentioned.

In *Young, James and Webster v. the United Kingdom*, the plaintiffs, former employees of the British Railways Board, were dismissed from the company in 1976 because of non-

[81] DER WALT, Johan van. *The Horizontal Effect Revolution and the Question of Sovereignty*. Berlin: De Gruyter, 2014, p.1-2.
[82] "The Court does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals inter se" (EUROPEAN COURT OF HUMAN RIGHTS, *Vgt Verein gegen Tierfabrieken v. Switzerland*, Application no. 24699/94, 28.09.2001).
[83] "45. Under Article 1 of the Convention, each Contracting State 'shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention'. As the Court stated in Marckx v. Belgium (judgment of 13 June 1979, Series A no. 31, pp. 14-15, § 31; see also Young, James and Webster v. the United Kingdom, judgment of 13 August 1981, Series A no. 44, p. 20, § 49), in addition to the primarily negative undertaking of a State to abstain from interference in Convention guarantees, 'there may be positive obligations inherent' in such guarantees. The responsibility of a State may then be engaged as a result of not observing its obligation to enact domestic legislation" (EUROPEAN COURT OF HUMAN RIGHTS, *Vgt Verein gegen Tierfabrieken v. Switzerland*, Application no. 24699/94, 28.09.2001).
[84] EUROPEAN COURT OF HUMAN RIGHTS, *Young, James and Webster v. the United Kingdom*, Application no. 7601/76, 13.08.1981.
[85] "The Court does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals inter se" (EUROPEAN COURT OF HUMAN RIGHTS, *Vgt Verein gegen Tierfabrieken v. Switzerland*, Application no. 24699/94, 28.09.2001).

Revista Eletrônica de Direito Processual – REDP.
Rio de Janeiro. Ano 16. Volume 23. Número 2. Maio-Agosto de 2022
Periódico Quadrimestral da Pós-Graduação *Stricto Sensu* em Direito Processual da UERJ
Patrono: José Carlos Barbosa Moreira (*in mem.*). ISSN 1982-7636. pp. 592-630
www.redp.uerj.br

union membership. This was because, in 1975, an agreement was signed between British Rail and three unions, stating that from then on, membership in one of these unions was a condition of employment. The claimants did not comply with this condition and were thus dismissed, as the practice was at the time permitted by the courts in England. The case came before the European Court of Human Rights on the grounds of violations of Articles 9, 10, 11 and 13 of the Convention, which establish, among others, the right to freedom of association.

In ruling in favor of the plaintiffs, the ECHR noted that by virtue of article 1 of the Convention, each State must ensure to all persons within its jurisdiction the rights and freedoms provided therein. Consequently "if a violation of these rights and freedoms is the result of the failure to comply with this obligation in the development of domestic legislation, State responsibility can be sought".[86] It also pointed out that although the proximate cause of the events consisted of the agreement concluded between British Rail and the unions in 1975, it was the domestic legislation in force that made the treatment received by the workers legal.

In *Vgt Verein gegen Tierfabrieken v. Switzerland*, the facts relate to the actions of an animal welfare association that had attempted to run an advertisement critical of the meat industry on a television network. In 1994, the association sent a cassette tape to the Commercial Television Company, which refused to publish the advertisement on the grounds of its "clear political character". After several administrative complaints, the association tried to reverse the decision in a Federal Court, on the grounds of discrimination. The court, however, ruled for the prevalence of the autonomy of the television company in

[86] "49. Under Article 1 (art. 1) of the Convention, each Contracting State 'shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention'; hence, if a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged. Although the proximate cause of the events giving rise to this case was the 1975 agreement between British Rail and the railway unions, it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained. The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis. Accordingly, there is no call to examine whether, as the applicants argued, the State might also be responsible on the ground that it should be regarded as employer or that British Rail was under its control" (EUROPEAN COURT OF HUMAN RIGHTS, *Young, James and Webster v. the United Kingdom*, Application no. 7601/76, 13.08.1981).

Revista Eletrônica de Direito Processual – REDP.
Rio de Janeiro. Ano 16. Volume 23. Número 2. Maio-Agosto de 2022
Periódico Quadrimestral da Pós-Graduação *Stricto Sensu* em Direito Processual da UERJ
Patrono: José Carlos Barbosa Moreira (*in mem.*). ISSN 1982-7636. pp. 592-630
www.redp.uerj.br

defining its programming, clarifying that the association had other ways to disseminate its ideas. Furthermore, it highlighted that the Federal Radio and Television Act would prohibit "political propaganda", being applicable to the case. The request was then rejected.

The case came before the European Court of Human Rights, under the allegation of violations of articles 10 (freedom of expression), 13 (right to an effective remedy) and 14 (prohibition of discrimination) of the Convention. The ECHR recognized the violation of article 10 (freedom of expression), as well as the State's responsibility, due to its prohibitive domestic legislation. To this end, it emphasized that the case was not merely a dispute between private persons, since article 1 of the Convention imposes a (positive) obligation on states to ensure means of protection of the human rights listed therein. Thus, "in addition to a state's primarily negative commitment to refrain from interfering with the guarantees of the Convention, there may be positive obligations inherent in such guarantees." A State's responsibility can then be assumed as a result of its failure to fulfill its obligation to enact domestic legislation in an adequate manner[87], i.e. as a breach of a duty of protection.[88]

He concluded by emphasizing, as already mentioned, that he does not consider it desirable or necessary to establish a general theory concerning the extension of the Convention's provisions to relationships between private persons.

Cases such as these reveal an autonomous basis for the application of fundamental rights, such as due process of law, in the private sphere: the recognition of the existence of

[87] "44. It is not in dispute between the parties that the Commercial Television Company is a company established under Swiss private law. The issue arises, therefore, whether the company's refusal to broadcast the applicant association's commercial fell within the respondent State's jurisdiction. In this respect, the Court notes in particular the Government's submission according to which the Commercial Television Company, when deciding whether or not to acquire advertising, was acting as a private party enjoying contractual freedom.
45. Under Article 1 of the Convention, each Contracting State 'shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention'. As the Court stated in Marckx v. Belgium (judgment of 13 June 1979, Series A no. 31, pp. 14-15, § 31; see also Young, James and Webster v. the United Kingdom, judgment of 13 August 1981, Series A no. 44, p. 20, § 49), in addition to the primarily negative undertaking of a State to abstain from interference in Convention guarantees, 'there may be positive obligations inherent' in such guarantees. The responsibility of a State may then be engaged as a result of not observing its obligation to enact domestic legislation." (EUROPEAN COURT OF HUMAN RIGHTS, *Vgt Verein gegen Tierfabrieken v. Switzerland*, Application no. 24699/94, 28.09.2001).
[88] BÖCKENFÖRDE, Ernst-Wolfgang. Fundamental Rights as Constitutional Principles. In: *Constitutional and Political Theory - Selected Writings*, Oxford: Oxford University Press, 2017, v. 1, p. 243-245.

Revista Eletrônica de Direito Processual – REDP.
Rio de Janeiro. Ano 16. Volume 23. Número 2. Maio-Agosto de 2022
Periódico Quadrimestral da Pós-Graduação *Stricto Sensu* em Direito Processual da UERJ
Patrono: José Carlos Barbosa Moreira (*in mem.*). ISSN 1982-7636. pp. 592-630
www.redp.uerj.br

positive obligations on states. These obligations may derive not only from an international treaty, but also from the Constitution itself or from infra-constitutional legislation, which may indicate the need to adopt an appropriate regulatory discipline.

4 TEST FOR HORIZONTAL APPLICATION OF DUE PROCESS CLAUSE

The concern expressed by the European Court of Human Rights in *Vgt Verein* is perfectly understandable. After all, the development of a doctrine or "test" for deciding, in concrete terms, on the application of fundamental rights (in general) in private conflicts is not an easy task. This is not the proposal of the present work, which would be too ambitious. The proposal has a narrower, though also difficult, scope: to establish a "test" under which a particular fundamental right can be applied horizontally: due process of law.

To this end, it is necessary to distinguish the horizontalization of *procedural* due process from the horizontal application of *substantive* due process. This distinction is necessary for the proper preservation of what the verticalist doctrine aims to protect: the exercise of private autonomy. This is because, while the procedural dimension aims at providing formal guarantees for the legitimate exercise of a decision-making act, the substantive dimension of the due process goes beyond. It has the ability to invalidate decisions due to their content, whenever unreasonable and, therefore, whenever arbitrary.

Abstractly, the mere assertion that people in general should act in a "reasonable" manner seems a simple task. However, the exercise of control over the validity of consummated private acts, such as contractual relations, by the Judiciary, based exclusively on the "unreasonableness", may lead to excessive weakening of private autonomy. For this reason — and also due to the concerns already explained about the excessive empowerment of the courts, weakening the political processes — I understand the recognition of the horizontal effect of the due process, in its substantive dimension, to be adequate only *indirectly*. This means that a legal act practiced in the private sphere, if considered arbitrary by an interested party, may be invalidated *ex post* if the court identifies the absence of reasonableness in the use of infra-constitutional legislation. This interpretative permeability

Revista Eletrônica de Direito Processual – REDP.
Rio de Janeiro. Ano 16. Volume 23. Número 2. Maio-Agosto de 2022
Periódico Quadrimestral da Pós-Graduação *Stricto Sensu* em Direito Processual da UERJ
Patrono: José Carlos Barbosa Moreira (*in mem.*). ISSN 1982-7636. pp. 592-630
www.redp.uerj.br

is particularly facilitated by the use of the technique of general clauses. Examples can be found in civil law (e.g.: articles 113 and 421 of Brazilian Civil Code[89]) and procedural law (e.g.: art. 113 of Brazilian Civil Procedure Code[90]).

On the other hand, with regard to procedural due process, minimum guarantees — such as the right to notification and defense — can and should be recognized either *directly* or *indirectly*, depending on the situation.

Direct horizontal effect should be recognized whenever it is identified a context of considerable power relationships (dependence) that affects the free exercise of a fundamental right — such as the right to freedom of expression or freedom to exercise one's right to work. In the absence of this relationship, as well as the constitutional rule expressly addressed to the private sphere, the horizontal effect will only be recognized *indirectly*, through infra-constitutional legislation — such as the Civil Code and the Consumer Protection Code.

Moreover, the content — that is, the guarantees to be recognized — will vary according to the severity of the deprivation to the right, as recognized by SCOTUS in *Mathews v. Eldridge*. This conclusion also derives from writings by Henry Friendly, who, in a seminal article published in 1971, highlighted the absence of a procedural check-list. The guarantees, if not previously established in law, should be drawn from the characteristics of a particular subject, such as the severity of the deprivation and the existing public interest.[91]

Friendly's analysis takes into consideration precedents such as the famous *Greene v. McElroy* (1959) case, in which the United States Supreme Court ruled for the violation of due process of law when the government identified an association as communist and subversive without the opportunity to be heard.[92] This practice is not so different from the

[89] Brazilian Civil Code: "Art. 113. Legal business must be interpreted in accordance with good faith and the uses of the place where it was entered into"; "Article 421. Contractual freedom will be exercised within the limits of the contract's social function".
[90] Brazilian Code of Civil Procedure: "Art. 5 He who participates in the process in any way must behave in accordance with good faith."
[91] FRIENDLY, Henry. Some kind of hearing. *U. Pa. L. Rev.*, vol. 123, n. 1267, 1975. Available at: https://scholarship.law.upenn.edu/penn_law_review/vol123/iss6/2. Accessed Nov. 4, 2021.
[92] SUPREME COURT OF THE UNITED STATES, *Greene v. McElroy*, 360 U.S. 474, 1959.

Revista Eletrônica de Direito Processual – REDP.
Rio de Janeiro. Ano 16. Volume 23. Número 2. Maio-Agosto de 2022
Periódico Quadrimestral da Pós-Graduação *Stricto Sensu* em Direito Processual da UERJ
Patrono: José Carlos Barbosa Moreira (*in mem.*). ISSN 1982-7636. pp. 592-630
www.redp.uerj.br

current no-fly lists, in which individuals are banned from air travel based on inferences about data indicating that they may be framed as terrorists.

For the analysis of this severity, it is possible to apply the test established by the Constitutional Court of South Africa in *Daniels v. Scribante and Another*, confronting the following questions: (a) what is the nature of the fundamental right affected? (b) What is the history behind the right? (c) What does the right seek to achieve? (d) How can this best be achieved? (e) What is the potential for invasion of this right by persons other than the State or organs of the State? (f) Would leaving private persons outside the constitutional focus negate the essential content of the right?

5 CONCLUSION

At the end of the above, the following conclusions are presented, without prejudice to other inferences made throughout the text:

Due process of law is a multifaceted fundamental right that results from the fusion of complex political and legal thinking. Such is its relevance, that the due process clause is usually confused with the very notion of rule of law.

Whether in its procedural or substantive dimension, the application of the traditional due process doctrine, in the Anglo-American legal tradition, demands the deprivation of a constitutional interest due to a state action. It happens that constitutions cannot be locked into static conceptions limited by time and place, because they are designed "for an indefinite and expanding future", so that "the requirement of due process of law in cases involving life, liberty, and property must be interpreted in a way that does not deny the law the capacity for progress and improvement" (SCOTUS, *Hurtado v. California*).

In this sense, some constitutions and constitutional courts in some countries have recognized the horizontal effect of certain fundamental rights, on the grounds that constitutional commitments are capable of generating obligations not only to the state. In fact, the doctrine of horizontal effect can be conceived as a response to the threat to freedom caused by the concentration of private power. It is a limitation on the "self-

constitutionalization" of private relationships by subjecting them to the constitutional framework.

It is also possible to identify an autonomous basis for the horizontal application of fundamental rights in some situations: the recognition of the existence of positive obligations on states. These obligations may derive not only from an international treaty, but also from the Constitution itself or from infra-constitutional legislation, which may indicate the need to adopt an appropriate regulatory discipline.

An indiscriminate application of the horizontalist doctrine may bring undesirable results, such as (a) the weakening of legal certainty in private relations, (b) excessive empowerment of courts, weakening political processes, as well as (c) excessive restriction of the free exercise of private autonomy. It is not, therefore, a matter of the application of the due process clause to any private activity. In this sense, the horizontalist doctrine was applied by the STF in a context of considerable power relationship ("dependency") that affected the free exercise of a fundamental right ("fundamental exercise").

Having established these premises, it is necessary to distinguish the horizontalization of procedural due process from the horizontal application of substantive due process. This distinction is necessary for the proper preservation of what the verticalist doctrine aims to protect: the exercise of private autonomy.

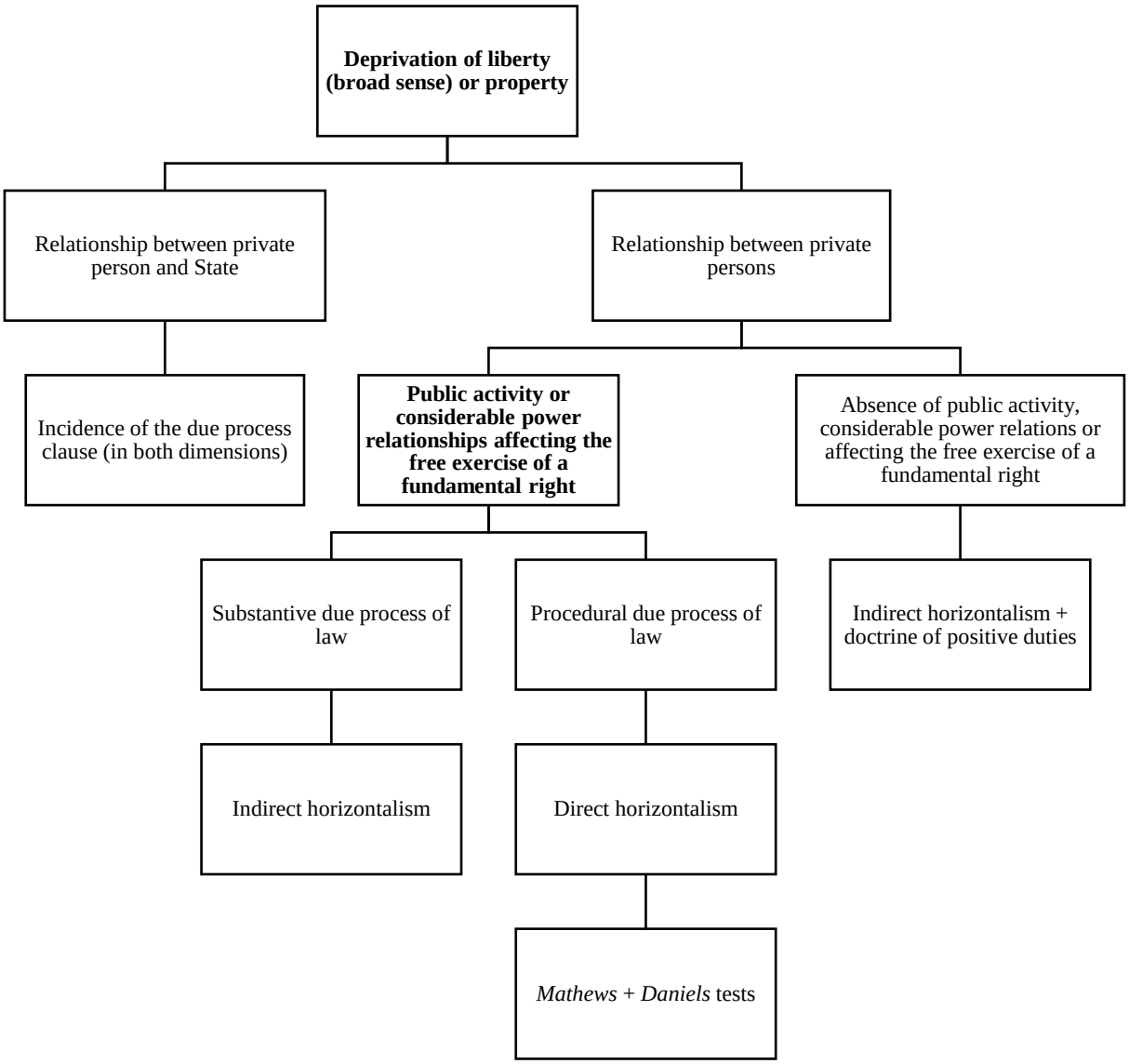
In fact, the exercise of control over the validity of consummated private acts, such as contractual relations, by the Judiciary, based exclusively on the "unreasonableness", may lead to excessive weakening of private autonomy. For this reason, I understand that it is appropriate to recognize the horizontal effect of due process of law, in its substantive dimension, only *indirectly*. This means that a legal act practiced in the private sphere, if considered arbitrary by an interested party, may be invalidated *ex post* if the court identifies the absence of reasonableness in the use of the infra-constitutional legislation.

With respect to procedural due process, guarantees can and should be recognized both *directly* and *indirectly*, depending on the situation. *Direct* horizontal effect should be recognized whenever a context of considerable power relationship (dependence) is identified that affects the free exercise of a fundamental right (such as the right to freedom of speech

or the right to work). In the absence of this relationship, as well as a constitutional rule expressly addressed to the private sphere, horizontal effect should only be recognized *indirectly*, by means of infra-constitutional legislation.

Moreover, the content (i.e. the guarantees to be recognized) will vary according to the severity of the deprivation to the right, as recognized by SCOTUS in *Mathews v. Eldridge*. For the analysis of this severity, it is possible to apply the test established by the Constitutional Court of South Africa in *Daniels v. Scribante and Another*, confronting the following questions: what is the nature of the fundamental right affected? What is the history behind the right? What does the right seek to achieve? What is the best way to achieve this? What is the potential for invasion of this right by persons other than the State or organs of the State? Would leaving private persons outside the constitutional focus negate the essential content of the right?

The proposed test can be summarized by the following flowchart:



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