STATE AND CIVIL SOCIETY: THE CONSTRUCTION OF LAW AND CONSTITUTIONAL LAW IN BRAZIL OF THE 21st CENTURY[1]

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ABSTRACT

The objective of this work is to think the legal phenomenon "law" based on empirical research of public consultations on internet by the State in order to promote the democratization of legislative process. Law is not exclusive production of the state or society. It is a complex and contradictory reality, as well as the relations of which it results. Right-law is produced in institutional design that is not normative prediction expressed in the Constitution of the State. The role of civil society in drafting law depends on the state rules, whose drafting their own sectors of society are not participating.

KEYWORDS: civil society - political society – constitutional law – construction of law.

ESTADO E SOCIEDADE CIVIL: A CONSTRUÇÃO DO DIREITO E O DIREITO CONSTITUCIONAL NO BRASIL DO SÉCULO XXI

RESUMO

O objetivo deste trabalho é pensar o fenômeno jurídico “lei” com base na investigação empírica de consultas públicas realizadas na internet pelo Estado como forma de promover a democratização do processo legislativo. O direito não é produção exclusiva nem do estado nem da sociedade. Ele é realidade normativa contraditória e complexa, assim como as relações das quais ele resulta. O direito-lei é elaborado segundo desenho institucional que não encontra previsão normativa expressa na Constituição do Estado. O papel da sociedade civil na elaboração do direito depende de regras do estado, de cuja elaboração os próprios setores da sociedade não participam.

PALAVRAS-CHAVE: sociedade civil - sociedade política – construção do direito – direito constitucional

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1. INTRODUCTION

Since 2009, the Ministry of Justice, through the Secretariat of Legislative Matters, has been using the legislative debates developed on the internet as a mode of promoting the interaction between the Ministry and the society, as well as the democratization of the legislative process. The debates on the internet count with the contribution of any citizen who is interested in the discussions about projects or draft bills of law. This initiative has two aims: to complement the traditional law sources and even to replace them, whenever it is allowed, for example, by forming commissions of legal experts. On the other hand, the online legislative debates are an innovative alternative to the traditional patterns of public consultation, since the former emphasizes the participation and interaction among the web platform users. After all, the leaders can hear to the governed. Besides this, the internet users have access to all the comments on the legislative proposals. They can suggest changes on the writing of the normative texts, contest other users' positions and gather art.s and news.

This pattern of direct participation through the multiple society groups in the democratic construction of law – both in the elaboration of Executive proposals and in the active discussion about propositions passing through Congress – has been systematically applied since then. The Ministry of Justice has already promoted debates to discuss, for instance, the Project of Law number 1.572/2011, which aims at updating the legislation on Commercial Law, as well as the Senate proposal for the Civil Procedure Code change, which aims at fighting slowness in the justice system[4].

The Brazilian Copyright Act (9.610/98) is being reviewed under these circumstances. After two public consultations – the first one from June 14th to august 30th, 2010; and the second one from April 25th to may 30th, 2011 – this review gathers the juridical, political and social dimensions that define the reality which will be studied in this paper. According to the criteria defined beneath and by the public power, the changes in this law permits thinking Law not as an absolute product of the State or reduced to its legal and normative dimension, but as a broadened political process integrated by the State and the civil society.

This reality – a result of interactions between political and civil society in Brazil since the beginning of the 21st century – is theoretically treated in this paper according to two different perspectives.

The first of them, identified with Antonio Gramsci's thoughts, creates two different categories: *civil society* and *political society* (GRAMSCI, 2000, pages 21-22). However, it was not built according to the traditional political and sociological ideas, Marxist or not, which is a crucial point in the split between State and Society. Through a category named "Historical Block" – 'the complex and contradictory gathering of superstructures is a consequence of the social production relationships' (GRAMSCI, 2001, p. 250, v. 1) – GRAMSCI puts together the structural and superstructural dimensions that permits thinking the complex and contradictory relationships which articulate the public and the political society.

4 Information and data available on: http://portal.mj.gov.br/data/Pages/MJ5C2A38D7PTBRNN.htm. It is important to recall that, aiming at preserving the juridical order, the Secretariat of Legislative Matters of the Ministry of Justice constantly works on evaluating and improving Brazilian Law. In this regard, and in order to ensure the citizens' participation in the discussions about the multiple subjects of the Public Prosecutions' interest, the Secretariat of Legislative Matters has started, in may 2007, a project named "Thinking Law".

The second of these perspectives is associated to a conception of State which gathers Law, State and Society, under the Latin-American and Brazilian constitutional vision of the last 25 years. The influence of European and American authors, besides the historical universalized linearity of "generations of rights", composes a factual and theoretic framework to the Brazilian constitutional doctrine which, based on the "movement" of law (REALE, 1977), aims at composing a conception of State which comes up with a proper answer to the social needs, enhancing the importance of hermeneutics, to the detriment of legalism, and at fulfilling and legitimizing concepts based on principals, especially the ones considered essential to the effectiveness of the so-called "citizen Constitution" (SARLET, 2001). In these terms, the idea of a single constitutional theory is being replaced by multiple constitutional theories, which are capable of carrying out the constitutional ideals of "equality", "social justice" and "citizenship", according to the needs noticed in different States (STRECK, 1999; STRECK, MORAES, 2006).

These theoretical perspectives, when deductively applied to the factual reality of public consultations for the revision of a specific Act, support the hypothesis that answers to the research problem on which this paper is based. What factors explain the role of written Law within the historical context of modernity changes and crisis in the 21st century? Law is not exclusively produced by the State or society. It is a normative reality as complex and contradictory as the relationships behind it, which articulate State and society. This hypothesis brings two consequences. First: under the constitutional point of view, written Law is built according to an institutional framework which has no democratic prevision on the constitutions of the states. Second: under the sociological point of view, the role of civil society in the democratic building of Law depends on rules created by state authorities, in which development society does not take part.

These consequences claim for a definition of the kind of relationship that articulates State and civil society in Brazil, and the understanding of the role of Brazilian Constitution in the creation of Acts and Codes in the 21st century. These are the goals of this paper.

These goals are justified by the contemporary need of explaining "law" as juridical phenomenon beyond the classical clashes that marked the discussions in the last century, mostly based on the dichotomy of "state" and "society", and on the opposition between an "open" and a "closed" legal system.

Under the methodological point of view, the ideas of method and the methodological procedures here applied are different from the ones adopted by the State, who, through the Ministry of Justice Secretariat of Legislative Matters, aims at making the legislative process more democratic with the participation of the civil society. According to the dialectical vision that articulates the ideas of "product" and "process" to explain the reality of Law, there are three steps that define the rules of the method adopted.

The first of them concerns to the reality of public consultations. It aims at describing the process of public consultation according to the patterns established by the State, and, then, finding singularities and regularities that make it possible to understand the role of civil society and its vision about itself in the process of Law creation. The second of these steps analyzes categories of Gramsci's ideas, such as "civil society", "political society" and "historical block", as well as some concepts of the traditional Constitutional Law doctrine. Finally, the third step refers to the relationships that articulate the dimensions studied on the two first steps, and aims at analyzing the kind of relationship which is established between the

civil society and the State in Brazil at the dawning of the 21st century, as far as the construction of Law goes.

2. STATE, SOCIETY AND LAW IN MOVEMENT

2.1 Public Consultations about the Changes to the Law 9.610/98: Context and Criteria

The law construction and discussion model adopted by the Ministry of Justice Secretariat of Legislative Matters, with the large and direct participation of several sectors of Brazilian society, through online debates, was also applied to the revision of Brazilian Copyright Act (9.610/98).

The revision of Brazilian Copyright Act was divided in two different moments and followed two different methods, which were also evaluated by different authorities. After Dilma Vana Rousseff was elected president, in October, 2010, Ana Cristina Buarque de Holanda became the Minister of Culture and brought up, in May, 2011, new considerations about the draft bill written after the first public consultation, in 2010.

In both moments, civil society was invited to take part in the process of revision and construction of Law, in spite of the changes that took place in the Ministry of Culture. During João Luiz Silva Ferreira's management, the public consultation promoted between June and August, 2010 consisted of an institutionalized commitment, which aim was to become a proper large-scale operation and information spreading project. Using open source *WordPress* was not an isolate measurement, as far as the approaching of the government to civil society goes.

During the 18 months after Gilberto Gil became the Minister of Culture, a network of "affinity and opportunities" (COSTA, 2011, p. 119) was created, influencing the "[…] placement of questions that determined how the Ministry of Culture would absorb the new digital facilities, and how that same Ministry would turn its position into a new public policy, represented by Points of Culture, with digital studios connected to the internet and using the free software" (COSTA, 2011, p.121).

Since it is a part of a national culture management broad project, copyright has also suffered the influence of these relationships. For example, the sole paragraph of art. 46 of the previous draft bill of Copyright Act admitted the creative resources as a limit for the author's patrimonial rights. The usage of legally protected pieces of work as a tool for making new ones, forbidden by the Copyright Act, was the way found by the Ministry of Culture, at that time, to stimulate the culture democratization in Brazil.

> Joining the ones who worried about it, Gil also stated that '[…] the issue of information democratization is very important at the level of development reached by the country. In Brazil, exclusion is, nowadays, digital and analogical […]'. The discussion of an alternative mean of licensing as Creative Commons – supported by the current copyright Act – was not only a proactive action against the *status quo*, but a way of turning legal some copying and remixing practices that are, legally or illegally, frequent on the web.' (COSTA, 2011, p. 158).

Art. 46, sole paragraph of the previous Copyright Act draft bill was removed when the definitive one was written, still under Lula's government, because it was considered as a source of juridical insecurity (BRAZIL, Ministry of Culture. Report.). The answer found by the Ministry of Culture was to remove the sole paragraph and to add a new clause to art. 46, specifically concerning to the usage of artworks with an educational priority (XXI), besides of

establishing a general clause, which made the Judiciary able to define the proper usage of artistic and intellectual pieces (Second paragraph, art. 46).

The discourse which motivated the reevaluation of the Copyright Act, in 2011, showed how discontented some layers of the artistic class were about the changes proposed by the previous draft bill. Unlike Gilberto Gil, Ana de Hollanda considered the payment for the artist's work when she opened the lecture that finished the process of considerations about the revision of the Copyright Act. Differences on the management, method and publicity leaded to pronounced gaps between the evaluations. The time the documents remained available also showed some singularities. The first period of consultations lasted 78 days – from June 14th to August 31st, 2010; the last one, 45 days – from April 25th to May 30th, 2011. However, both of these events leaded to the same conclusion: it is necessary to promote formal equality on the acceptance of judgments.

The criteria used on the second consultation were criticized. Claiming for more transparence on the exposition of suggestions and Interministerial discussions, some groups of the organized civil society, and even some individuals, have posted comments to the internet and the Ministry of Culture website, questioning the methods privileged by this Ministry[5]. That criticism leaded to the following questions:

1) Why is all the consultation process being redone? What are the items which indicate that the text is still immature or that it is not consensual? Will the polemics cease within 40 more days of discussion? If some points will remain polemical, then the goal is not to reach a consensual solution, but to change the solution itself – in other words, instead of giving continuity to them, it aims at reversing the political directions of the changes proposed under Lula's government.
2) What will become of all the contributions sent during the first public consultation process? Shall they be submitted again, in order to be evaluated in the second process? Are any new positions being expected? Have any new protagonists came up?
3) How were the seven foundations of the discussion selected? Who chose them, and why?
4) Why is not the public consultation process open? If the digital platform which makes the contributions public is already ready (and was used in the first consultation), why does the Ministry of Culture want to hide who said what?
5) Why does the process take part under a closed system (filling in a Microsoft Word form is mandatory)? Why does the Ministry of Culture disrespect the pattern set by the Federal Government e-PING (Electronic Government Patterns of Interoperability, in a free translation from Portuguese), that impose the usage of an open system[6]?
6) Why does the form ask for juridical justifications for the suggestions? It is a question for the society or for lawyers? Obviously, any proposition with acceptable juridical justifications will be more likely to succeed. I do not doubt this. On the other hand, I ask myself whether social or economic justifications would be taken less seriously. Shall it be like that? Should it be like that? Is not Law good for regulating the activities – including the economic ones – performed by the society?[7]

In spite of the differences concerning to the criteria that regulate the public consultations, Minister Gilberto Gil and Ana de Hollanda mostly tried to come close to the

5 At the point, see: http://www.arede.inf.br/inclusao/component/content/art./106-acontece/4116-nova-consulta-publica-sobre-a-reforma-da-lei-de-direitos-autorais-limita-participacao and http://www.cultura.gov.br/site/2011/08/11/ultima-fase-da-revisao-da-lda/comment-page-1/#comments.

6 Check the content of these questions on: http://www.gpopai.org/ortellado/2011/04/revisao-da-revisao-governo-de-continuidade/.

7 For more information, check: ://pedroparanagua.net/2011/04/25/somos-todos-josef-k/#more-543

society, which leaded to arguments based on a supposed need of balancing the artwork authors' and customers' interests.

2.2 – Public Consultations about the Revision of the Copyright Act (Law 9.610/98)
2.2.1 – First Step: formation structures and qualitative and quantitative dimensions

On June 14th, 2010 the public consultation for the revision of the Copyright Act (9.610/98) was officially started. On the website created by the Ministry of Culture exclusively for the consultation, Brazilian society was able to express, during 78 days, its opinions about the previous Copyright Act draft bill written by the Executive. Originally conceived to last for only 45 days, the consultation was extended until August 31st, 2010, when about 9.000 manifestations had been registered, being 7.863 of them collected only on the website.

The channel chosen to receive those manifestations was structured under a collaborative development system, named *Código Livre* (Free Code), which performance aims at the interoperability ideal conceived by the Federal Government. For the evaluation of the previous Copyright Act draft bill, the Ministry of Culture developed, besides the website (http://www.cultura.gov.br/consultadireitoautoral), a plug-in for WordPress named *Dialogue*, which allows the publication of comments per paragraphs. The publication of the comments depended on the following steps: first, each collaborator had to fill in a form to access and include content in the WordPress platform. The program asked for username, e-mail address, full name, CPF[8], State, city, segment or sector of actuation, kind of manifestation (individual or in group) and, in the case of connection, the name of the institution.

It is important to point that the labor activities considered as *Civil Society* by the Ministry of Culture composed a closed list, which only included: education and research, preservation and conservation, titular associations, radio or audiovisual exhibitions, tour and entertainment, written press, lawyers, writing, related artists, music edition, music production or recording, titular of patrimonial rights, culture professional and the category "other segment"[9]. Once anonymous posts were forbidden, all the manifestations could be identified by the collaborators' full names, and only one post was allowed for each of them.

At the end of the first consultation phase, the subject "partial copy", specifically related to the new devices introduced by the subdivision of the current art. 46, II of the Copyright Act, had inspired 316 manifestations. On the other hand, art. 88-A, which aimed at regulating reprography, had only 43 opinions about clauses I and II, which were directly associated to the replication of scientific and intellectual texts by copy machines.

Following the order set by the previous Copyright Act draft bill, the collaborations may be organized this way:

> Art. 46, I:
> Writing:
> Art. 46. Using protected works is not an offence against copyright, and the previous and clear authorization by the titular of the rights is dispensed, as well as the mandatory payment by the users of these works, on the following cases:
> I – reproduction, by any mean or process, of any work legally acquired, as long as it is replicated just once and only for the copyist's private use.

The writing of this article relied on 119 contributions. 109 of these contributions were

8 In Brazil, *CPF* means the Individual Taxpayer Registration Number.

9 Information available on: http://www.cultura.gov.br/consultadireitoautoral/wp-login.php?action=register. Access on August 15th, 2010.

individual, while only 10 of them were signed by institutions. In other words, approximately 92,43% of them came from citizens who individually developed their opinion about the proposals of the Ministry of Culture, while 7,57% represented the demands of organized entities. 52,94% (63) of these manifestations supported the changes, considering both the total and partial opinions from individual and institutional users. The same parameters were applied to find the 47,06% (56 opinions) who disagreed.

Among the individual contributors, 55 (50,46%) people support the legalization of full copies, while 54 (49,54%) of them disagree.

Aiming at finding an answer to the requests created by the *technologic order* and the so-called "*information society*", art. 46, clause II, written by the Ministry of Culture, inspired 67 manifestations. Trying to conciliate the legalization of full copies and an alleged variety of existing supports, the Ministry of Culture proposed the preservation and dynamics of intellectual contents, as seen on the following text:

> Art. 46. […]
> II – reproduction, by any mean or process, of any work legally acquired, whenever the copy ensures its portability or interoperability, and only for private and non-profit use.

Among these evaluators, 59 (88,06%) were individuals and 8 (11,94%) were institutions. On the general score, 14,8% (28 evaluators) disagreed. It is important to remind that all the evaluators who agreed were included to the percentages, by the same method applied to the analysis of art. 46, clause I, which will also be applied to the upcoming structural exposition of art. 88-A, *caput* and clause I. The single opinions were distributed this way: 40,32% (22 evaluations) agreed with the proposed writing of art. 46, clause II, while 59,67% (37 evaluations) were against it.

This rejection by the general audience was not the same among the institutional contributors. Considering 8 collective evaluations, 11,94% of the total (6 out of 8 or 75% of the institutional opinions) agreed with the previous Copyright Act draft bill, while only 2 of them (25%) were against.

Extending the limits to the patrimonial rights of the authors, the proposed writing of art. 46, sole paragraph includes some situations described by abstract expressions and words, with subjective meanings, such as "educational, didactical and informational points", "normal exploitation of the work", "unjustified damages" and "creative resources". 126 opinions on this sole paragraph were collected. 92% (112) of these manifestations came from individuals, while 8% (14) of them came from institutions. 72 out of the 126 evaluators (57,15%) did not agree with the writing proposed by the Ministry of Justice, while 54 (42,85%) supported the changes. Among the ones who decided to present the reasons why they did not agree, 21% of them criticized the expressions "creative resources" and "didactical points". The other ones based their disagreement on the main subjects: justice, law efficacy and literal interpretation of the legal text.

The opinions against the legal text prevailed. However, by analyzing the possible evaluations separately (singular and institutional), the drawing of two different opinion lines is stated. Considering the number of institutions that participated, 8 out of 14 entities supported the changes proposed by the Ministry of Culture. In other words, 57,1% of the institutions agreed with the inclusion of a sole paragraph to the legal text.

Among the 112 individuals who analyzed the proposal, the sole paragraph was rejected by 66 (60%) of them, while 46 (40%) of them accepted it.

The subject "private copy" has also received specific treatment, represented by the proposal of a new article, 88-A. Divided in two clauses, the second of them with four paragraphs, the new article (*caput* and clauses I e II) was the object of 43 manifestations. The exclusion of the second clause paragraphs can be explained because *caput* and clauses I e II were considered sufficient to regulate the full copies. Developed to legalize the copies

performed mainly at schools and colleges, the new legal text elaborated by the Ministry of Culture was the following:

> Art. 88-A. The complete or partial reproduction of literary, artistic and scientific works on copy machines or by similar means, with commercial or profitable aim, must obey the following dispositions:
> I – The reproduction treated on the *caput* is conditioned to a retributive payment to the copyright owners, except when they authorize the free reproduction of the work, according to the sole paragraph of art. 29;
> II – Any store which offers paid copy services shall be authorized by the authors or copyright owners, or by the collective associations that represent them.

This way, article 88-A, *caput* was the target of 15 manifestations, while the clauses I e II, *caput*, inspired 28 opinions. However, all of these opinions were related to the full text of article 88-A, since the manifestations posted to the Ministry of Culture website did not respect the predetermined order of subjects. So, among 43 manifestations, 35 (81,39%) came from individuals, while 8 of them (18,61%) were collective. 54,28% of the single evaluators (19 people) support the text which legalizes the copies performed after a retributive payment to the copyright owners, while 45,72% of them (16 collaborators) are against it. Such as the other articles proposed by the Ministry of Culture, the new article 88-A stimulated deep discussions about the efficacy of juridical rules, the reality experienced by the collaborators and the different conceptions of Justice. The efficacy of juridical rules came up as one of the main arguments for 1 negative and 6 positive evaluations. The reality experienced by the collaborators supported 1 negative and 9 positive manifestations, while the different conceptions of justice justified 4 negative and 6 positive opinions. As far as the 8 institutional manifestations go, 62,5% of them (5 institutions) agree with the new rules, while 37,5% of them (3 institutions) refuse the option given by the Ministry of Culture. The different conceptions of justice appear in 2 negative and 1 positive opinions, and reality is mentioned in 2 favorable and 1 contrary manifestations. Finally, the efficacy of juridical rules comes up in 3 favorable and two contrary opinions about article 88-A.

The analysis of the motivations behind the manifestations which totally or partially accepted or refused the changes proposed by the Ministry of Culture let show, initially, a wish of adapting the legal rules to a reality perceived and discussed out of the national juridical knowledge spectrum. A reality, then, understood according to readings of factual data, interpreted as contradictory truths related to a certain behavior expected by the juridical rules. In other words, "real" and "day-by-day" come up as the spine of many of the comments posted by the evaluators, as the following example demonstrates:

> The fair payment owed to the authors for their relevant intellectual work, which produces visible results on Brazilian economy, since it represents an important part of the national GDP, cannot be left behind for the creation of a supra-right of access to culture. The private and public interests must be balanced. The stimulation to the authors' creativity does not come exclusively from their need of expressing themselves, but also from the economical profit they make out of it. Creating is not a hobby for those who live of their art, and that's why the money they get is treated as their wage. Depriving the creators of this profit under certain circumstances is the same as imposing a heavy penalty against them. What will become of the composers who do not perform concerts? Will they become a disappearing species? If the copies for private use are released, there must be a compensation for authors, which may be an additional charge by the Internet Service Providers, or the incidence of taxes on the purchases of multimedia devices, such as mobile phones, iPods etc. (BRASIL, 2011).

When someone states that "the current circumstances bring a great variety of means of access to creative works, what is clearly demonstrated by the popularization of gadgets as smartphones, e-readers and portable music and video players, creating a great number of CODECs (BRAZIL, 2011) or codes for the storage of music, book and movies […]" or "the stimulation to the authors' creativity does not come exclusively from their need of expressing

themselves" (BRAZIL, 2011), the speaker works relying on the notoriety of the information which supports his discourse. When the idea of reality is thought based on the national context, its interpretation turns social and concerned about the consequences of an imperative model. Professional differences among the collaborators, however, could not avoid the recurrence of certain meanings inferred from the manifestations. Still on the "reality" plan, the concern about including to the legal text as many social conflicts as possible is highlighted by the caution with the efficacy of law in the social ambit. Literal interpretation of law is the main point of a discourse which understands the blanks as a defect to be suppressed during the Copyright Act revision. Decoding the words used by the Ministry of Culture on the Copyright Act previous draft bill demonstrates the civil society's need to recognize its own practices, aiming at adjusting them to the prescribed content. The search for the commands ideally established by law predominates over the typically doctrinarian literature, which is mostly based on principals. This one, on the other hand, is structured to provide access to culture and education, and unconditionally supports the approval of the full text produced by the Ministry of Culture. The intelligibility of juridical rules is also a subject related to their own credibility, which is proved by the manifestations that consider good writing as a way to make the content of legal texts more democratic, or by opinions like the following:

> Bad text, terribly written, what does "designed to ensure its portability and interoperability" exactly mean??? People who deal with Law must know that well written Portuguese is understandable to everyone, this text seems to me as something made up to create gaps in the Act.

2.2.2. Second Step: structures of formation and qualitative and quantitative dimensions

The second step of the public consultation took place between April 25th and May 30th, 2011. Justifying its distance from the intention to announce a new proposal of Copyright Act revision, the Ministry of Culture suggested some "final settings" to the text sent from former minister Juca Ferreira to the Civil Office of the Cabinet of the President of the Republic, mostly on the rights related to digital works and reprography. This way, the method employed at this second step gave priority to the traditional public consultations, based on filling in and sending forms to the e-mail address: endereço revisao.leiautoral@cultura.gov.br.

The following fields were of mandatory filling: name, CPF, e-mail address, city, State, subject and article to be evaluated. Unlike the WordPress system, it was not necessary to inform the sector of actuation; but, if the author wanted to do so, he could handwrite his labor, since the closed list of occupations had been extinguished. The field for justifications was shattered in factual and juridical justifications. Factual justifications were understood as the descriptive presentation of the facts which demonstrate the need for changes or improvements on the Copyright Act draft bill's text. Juridical justifications, in turn, were understood as arguments based on national or international Acts related to Copyright. Finally, the form had a space where the collaborator could propose a new writing for the provision he decided to evaluate. Once the form was completely filled in, it should be sent to the proper addressee.

The draft bill of Copyright Act, as far as private copies go, was different from the previous draft bill published on June 14th, 2010. The new provisions were written by GIPI (Portuguese initials for Inter-ministerial Group for Intellectual Property) and remained this way:

> Chapter IV: Limitations to Copyright
> Art. 46. It is not an offence against Copyright:
> I – creating, by any mean or process, one single copy per person, for private and non-commercial use, of a legally obtained piece of work, except for the ones obtained by location, since it is extracted from a legally published copy;
> II – reproducing, by any mean or process, one single copy per person, for private and non-commercial use only, a legally obtained piece of work, except for the ones obtained by location or for a previously determinate period of time [...];
> §2º Judiciary shall authorize the use of works in similar cases, since the following conditions are fully observed:

I – There must be no intention to obtain profit, directly or indirectly;
II – The copy cannot interfere in the commercial exploitation of the work;
III – Author and source must be mentioned whenever possible.

Chapter IX: Reprographics
Art. 88-A. The complete or partial reproduction of literary, artistic and scientific works, which are not in the public domain, on copy machines or by similar means, with commercial or profitable aim, depends on the previous authorization by the authors or copyright owners, or by the collective management associations that represent them:
I – The reproduction treated on the *caput* is conditioned to a retributive payment to the copyright owners, except when they authorize the free reproduction of the work, according to the sole paragraph of art. 29;
Art. 88-B. Judiciary shall authorize the reproduction of literary works whenever the copyright proprietors or collective management associations clearly exceed the limits imposed by the works' economical or social aims, or when the authors or associations cause harm to the constitutional right to education;
§1º The authorization mentioned on the *caput* is presumably costly, and its value shall be arbitrated by the competent authority.
§2º The ones legitimated to start the actions related on art. 5º of Law n. 7347/85 are able to request the authorization described on the *caput*, whenever diffuse, collective or homogeneous individual rights are harmed.

The number of forms sent to the Ministry of Culture in 2011 was much lower than in 2010. In 2010, 8.431 collaborations from entities or individuals were registered, while in 2011 there were only 158 opinions, 105 of them from individuals and 53 from entities. The consultation performed in 2010 obtained 379 manifestations about the current article 46, clause II of the Copyright Act, while the process carried out in 2011 collected only 8 opinions which considered the non-profit copies as a problem to be solved. Among these 8 opinions, 2 of them came from individuals (21,1%), while the other 6 ones came from entities (78,9%).

Adopting different methods and publicity resources, the consultations performed in 2010 and 2011 were equally and formally directed to the civil society. However, some aspects like the variety of participators caused the concentration of opinions among lawyers and representatives of institutions. Only one manifestation, from an individual, indicated no professional activity. It was the same one which showed some comprehension problems. The other opinions showed had no problems with the justifications asked by the Ministry of Culture. The individual forms were not enough to measure the reaction of any professional segments, except for the juridical, about the arguments asked by the Federal Executive. Considering all the judgments under exam, the division per articles is the following: 37,5% (3 manifestations) mentioned reprographics in their justifications of articles 88-A and 88-B, while 62,5% of them (5 manifestations) criticized the limitations of the writing of article 46, clauses I and II.

Among the mentioned 37,5%, 66, 6% (2 forms) came from individuals, revealing their interest for different subjects. One single collaborator for article 46, clauses I and II and another one for reprographics (articles 88-A and 88-B). The 62,5% left were divided the following way: one individual contribution (20%) and 4 institutional. At the last step of the process, there was no room for punctual manifestations which would just support or reject the proposal. Due to the good writing performed by the evaluators, it was not possible to measure, in quantitative terms, percentage discrepancies on the acceptance of the disseminated rules. The opinionated text, for being free, prevents a more accurate analysis of the question. The elaboration of a new proposal do not mean the immediate rejection of the text under exam, as well as solely factual and legal justifications are not favorable to the legal content. In the process developed in 2010, the inclusion of items as “I agree with the legal device”, “I do not agree with the legal device” and “I partially agree” made it possible to catalog the judgments, though the justifications were also written as opinionated texts.

The reduced number of documents, as well as the reiteration of questions, did not prevent the study of the subject. However, 7 out of the 8 contributions revealed the opinions of musicians, lawyers and Law schools. Only one form did not indicate its author's occupation, the subject under exam and the legal device to be commented. This one, in spite of following the parameters set by the Ministry of Culture, criticized, in the field "factual justifications", the consultation method itself. This way, the collaborator stated: "I found it better and easier to send my critics and comments by e-mail, since the form availed by the Ministry of Culture made me a little confused – I could not adapt my opinions to it." in spite of the criticism, the participation rules did not prevent the expression of ideas about reprographics.

Once again, there is a concern about the efficacy of legal rules over a reality described as a framework of higher complexity than that one supposed when the previous draft bill of Copyright Act was written. This is what can be clearly verified in this factual justification: "The matter of reprographics and its control is being treated by the draft bill in a way, let's say, even ingenuous, because we all know that it is not possible to control all of the copy machines, or even to get the authors' authorization or to refund the Associations of Copyright Owners – and the same happens whenever a CD is copied or music is downloaded. The only way to "control" these copies would be the creation of a tax to be applied to the copying equipment factories which operate in Brazil [...]". The unquestionable quality attributed to realities comes with, as seen at the first step of consultations, other subjects which emerge from the body of suggestions. At the second moment of evaluation, reality as truth, in the opinion of law experts (including the representatives of associations of copyright owners), is followed by representations of justice and questions about the literal meaning of the legal text. It all can be illustrated by the following example:

> Much is spoken about the need of adequating the Copyright Act to a new social reality, specially when the internet and the digital world are considered. This discussion also brings up the boasted need of turning the authors' patrimonial rights more flexible, in order to face new technological facilities. This claim for more flexible rights is based on the ease in obtaining author work on the internet (and its dissemination through the digital world) and on the adversities faced by the proprietors of rights in getting effective protection against the illicit use of their work. Many people call it "democratization" or "something socially accepted", aiming at making a heinous and reproachable attitude seem moral and licit. It is a real example of twisted values, where the difficulties faced by the copyright owners, combined to the ease found by users at violating author rights, works as an excuse to reduce legal protection, while it should be exactly (and logically) the opposite. Facing the new technological facilities that put copyright – specially author rights – in risk, the idea should be just the opposite, in order to develop new ways of enhancing the protection to authors.

In spite of being regular, the variety of arguments collected in the second consultation process was not as wide as that one found in 2010. While in 2010 most of the judgments came from the sector named "other segment", in the last collective evaluation the suggestions from lawyers or institutions were predominant. The only testimonial which pointed at problems with the research method did not bring enough data to identify its author's occupation. The voluntary inclusion of personal data (name, ID and CPF) provided enough information to qualify this manifestation as an individual one. In the other situations, reality supported literalness as a predominant yearning in 2 institutional manifestations. In these ones, the justifications referred to existing and valid contractual species, which should be integrated by the legal text. Efficacy, on its turn, was associated to the idea of juridical security. Security as a representation of justice and the preservation of authors' rights. This case illustrates the integration of the concept of "just" to the following Judiciary functions: interpretation of legal rules and enunciation of Law.

3. STATE, SOCIETY AND LAW IN PERSPECTIVE
3.1 – The Political, the social and the juridical in Gramsci's thought

> For a while, it is possible to visualize two great super-structural 'plans': the one which may be called 'civil society' (in other words, the gathering of vulgarly named 'private' organs) and the 'political society or State', plans which are, respectively, related to the hegemonic function of a dominant group over society and the direct domination or command function, which is expressed by the State or the 'juridical' government. (GRAMSCI, 2000, p. 20-21).

In a functionalist perspective, the concept of "civil society" is defined by Gramsci according to the idea of 'hegemony', while 'political society' or 'State' are defined according to the concept of 'direct domination'. Defined as the "gathering of vulgarly named 'private' organs", the civil society embraces the churches and religious orders, the schools and medias, the party political and intellectual life institutions. Defined as a command, the political society represented by the State comprises the coercive system.

However, Gramsci thinks the civil society in its relations with the State, "in the sense of political and cultural hegemony of a social group over the whole society, as ethics content of the State" (GRAMSCI, 2000, p. 225).

"While the political society finds its material porters in the repression machines of the State (which are controlled by the executive, police and army bureaucracies), the material porters of the civil society are what Gramsci calls 'hegemony machines, collective and voluntary social organs which are relatively autonomous to the political society'." (COUTINHO, 1999. p. 128-129).

This way, the differences between "civil society" and "political society" are given by their own (social and institutional) materiality, and they are, respectively, related to the ideas of "consensus" and "coercion". In this perspective, the comprehension of civil and political societies, as well as the predominance of consensus or coercion, depends on the placement of these societies in the context of occidental or oriental societies, and on the contemporary classification of States as central or peripheral countries.

Gramsci also defines State as: "besides the government machine, the private machine of hegemony, or the civil society" (GRAMSCI, 2000, p. 254-255). This definition enhances the idea of relative independence that allows the civil society to stand in front of the State, and reveals Gramsci's concern with the causes of political subordination and the problem of hegemony, which concept presents some variations in his thought.

> Until 1926 (including in The Meridional Question), hegemony mainly designated an alternative strategy of the proletariat (hegemony of the proletariat). Well, the Notebook number I not only introduced a new field: hegemony, specified by the new concept of hegemony machine, but it referred, most of all, to the dominant class's practices. More than this, while in the Notebooks 7 e 8 hegemony would gradually include the structures of the State, here the concepts of hegemony and hegemony machines were not directly associated to the problematic of the State, but to the class constitution, in a revolutionary process of transformation. (BUCI-GLUCKSMANN, 1980, p. 69-70).

This way, the concept of "hegemony" - and the practice of hegemony itself – recalls another fundamental concept for Gramsci: the "historical block", in other words, "the complex and contradictory gathering of super-structures is a consequence of the gathering of the social relations of production" (GRAMSCI, 2001, p.250). The concept of historical block, gathering the structural and super-structural dimensions, makes it possible to think the complex and contradictory relations that articulate the political and the civil society, or the State, and that define the wider society or State.

In this articulation, as a way to define and understand the historical block, the symbolic productions take part, along with the political and economical structures and institutions. "The material forces are the content and the ideologies are the shape, in a purely

didactic distinction between content and shape, since the material forces would not be historically conceivable without shape, while the ideologies, with no material forces, would be nothing more than individual fantasies." (GRAMSCI, 2000, p.238).

If the political and the symbolic are not isolated from the economy, the same can be stated about culture, under penalty of its reification. "May there be a cultural reform, or the civil elevation of the lowest social layers, without a previous economic reform? That is why an intellectual and moral reform cannot be unbounded to an economic reform program; precisely, the economic reform program is exactly the concrete way to every intellectual and moral reform" (GRAMSCI, 2001, p.19).

> A proper political initiative is always necessary to release the economic impulse from the obstacles of traditional politics, or to change the political direction of some forces that must be absorbed to allow the construction of a new and homogeneous economical-political historical block; and, since two similar forces may only become a single organism through a series of agreements or through war, it does not matter if they will be gathered by an alliance or by coercion, what is important is to know if this force is available, and whether applying it is productive or not.

This fragment explains the relationship between "hegemony" and "historical block" since the reciprocal transformations are historically operated, in these two spheres, through political fights, what allows thinking the role of Law in changing processes.

> A study on how the ideological structure of a dominant class is organized: in other words, the material organization designated to maintain, defend and develop the theoretical or ideological front. The most remarkable and dynamic part of this front is the editorial sector in general: editors (which have an implicit and explicit program and rely on certain ideology), political periodics, all kinds of magazines, scientific, literary, philological, for dissemination etc., a great variety of periodics and even clerical reports. (GRAMSCI, 2000, p. 78).

In this fragment, Gramsci's concern with Law is a part of the editorial production that reveals the complex and contradictory relationship which articulates the material and the ideological productions. Considering the study of Law in the Italy of his time, Gramsci asks himself about the interest which can stimulate the study of specific subjects among certain groups and the practical and political role played by these same subjects. "For example, the concepts of 'employee', 'sharecropper', 'chief-technical', etc., what do they mean to Italian jurisprudence?" (GRAMSCI, 2000, p. 238).

According to Gramsci, the essays written by experts who comment judicial decisions, for example, should be carefully examined "to find out when and why certain questions are brought up, how they are developed and to what systematization they get (if they do so), etc. In the end, this is also an aspect (and a really important one) of the labor history, a legal-juridical projection of the real historical movement: seeing how this projection happens means studying an aspect of the reaction of the State to the movement itself, etc." (GRAMSCI, 2000, p.38).

This concern with Law as a key to knowledge leads to the analysis of another fundamental category of the thought and the research program developed by Gramsci on the real and concrete struggles that aim at social transformations: the intellectual. As a tool for maintenance or change in the conception of world, the intellectual is described by Gramsci in a really broad way:

> There is no human activity with no intellectual intervention at all, it is impossible to dissociate the *homo faber* from the *homo sapiens*. In resume, every human being, out of his workplace, develops some intellectual activity, in other words, anyone is a 'philosopher', an artist, a man of taste, who takes part in a certain conception of the world, follows conscious moral principals, and, this way, cooperates with the maintenance or change in the conception of world, and brings up new ways of

> thinking. (GRAMSCI, 2000, p.52-53).

However, the intellectuals can be divided by their positions in the social capitalist organization:

> Every social group, born with an essential function in the world of economic production, creates for itself, at the same time, organically, one or more layers of intellectuals who make the group homogeneous and conscious of its own function, not only in the economic field, but also in the social and political fields: the capitalist businessman creates the industrial technical, the political economy scientist, the organizers of a new culture, of a new Law, etc. (GRAMSCI, 2000, p. 15).

This way, the Law expert is a specific kind of organic intellectual who produces a particular kind of knowledge or conception of world that is essential to the interpretation and operation of the social and economical order which had produced the intellectual himself. And Gramsci has considered the importance of Law to the construction of the Italian intellectual classes in the Early Medium Ages.

> The development of Canonical Law and its importance to the juridical economy of the new States, the construction of the imperial-cosmopolitan medieval mentality, the development of Roman Law being adapted and read according to the new way of life – it all leads to the rising and stratification of the cosmopolitan Italian intellectuals. (GRAMSCI, 2000, p. 85).

On the other hand, it is possible to find in Gramsci a conception of Law that is not related to the idea of subordination or hegemony maintenance:

> A conception of Law that must be essentially innovative. It cannot be integrally found in any previously existent doctrine (not even in the doctrine of the Positive School, and even less in Ferri's doctrine). If every State tends to create and maintain a certain kind of civilization and citizen (and, consequently, of coexistence and individual relationships), it tends to make certain habits disappear and spreads other ones, Law will be the way to achieve this aim (besides school and other institutions and activities) and it must be efficient to the maximum and produce positive results. The conception of Law must be released from any traces of transcendence or absoluteness, practically from all the moralist fanaticism, although it seems to me that it is impossible to admit that the State do not 'punish' (if this expression is reduced to its human meaning), but only fights against social dangerousness. Actually, the State must be understood as an 'educator', since it tends precisely to create a new kind or level of civilization. (GRAMSCI, 2000, p. 29).

3.2 State, Society and Law under the constitutional perspective in Brazil and Latin America (1998-2011)

> After the 1988 Constitution, Brazilian Law became constitutionalist in concrete. This statement has some benchmarks, specially related to the spectrum of Law, since the principals and the rights set by the Constitution are capable of changing the methods of interpretation, aiming at the Democratic State. Besides this, the role played by the State in trying to make constitutional rules as effective as possible is remarkable, together with the more human vision introduced by the Constitution (human dignity, as a foundation of Republic, clearly aiming at the construction of a more balanced and egalitarian society). […] In this field, the movement for the constitutionalisation of private Law is together with the softening of the division between public and private. […]. This way, a certain protectionism in Copyright can be observed, but it is not motivated by the idea of preserving fundamental rights, as set by the Constitution: it aims, actually, at pleasing the market and running away from the discussions about that subject. Because of the protectionist posture adopted until now, it is impossible for the State, through public policies, to improve the essential rights, such as education and culture. (PELLEGRINI, DIAS, 2010, p. 118).

This fragment is a part of the 30 doctrine texts studied during this research, which has

also incorporated, as empiric material, the intellectual production developed from 1998 to 2011, about the "private copy" subject. It must be recognized that, rejecting or supporting the non-profit full reproduction, all the authors who were studied presented arguments based on the thought which associates the constitutional rules to infra-constitutional acts, as demanded by the Democratic State.

The simultaneity and identification between human and fundamental rights are neither rare nor a coincidence. Both of them are frequently connected by national Law authors. Miguel Carbonell, professor at *Universidad Nacional Autónoma de México* (UNAM), briefly describes the development of constitutional studies in Latin America. According to Carbonell, for the last 30 years, the Latin-American constitutional doctrine has been through changes that included the interpretation of new legal devices about rights considered essential to the fulfillment of the normative directions set by the constitutions. These changes would have been caused after the United Nations Convention for Human Rights, which took place in 1948, in Europe.

The Latin-American constitutional theory, from the 1980's on, would incorporate the ideas of European authors, and, more recently, of the North-American ones, in a continuous search for a self identity. The historical aspects would justify the development of regional doctrines, inspired by foreign intellectual manifestations. For the last years, a line of constitutional studies has been progressively implemented, based on the reinterpretation of authors widely studied in many Latin-American Law Schools, both in graduation and post-graduation programs: this line names itself *neoconstitutionalism.* Names like Ronald Dworkin, Robert Alexy, Luigi Ferrajoli, Gustavo Zagrebelsky and Carlos Santiago Nino (as well as other autonomous neoconstitutionalists) are frequently mentioned. This way, Miguel Carbonell states that:

> […] Traditionally, we absorb the European doctrine as a source of inspiration, which is natural if we consider the high number of post-graduation students who have been at Spanish or Italian universities; these students have brought the references of their European professors, mostly after the 1970's decade. In the last years, a new tendency has been detected: we have started to observe, with no historical traumas or inferiority complex, the North-American constitutional theory. The translation work, intensively developed in Argentina, Colombia, Mexico and, not so strongly, in Peru, has been an important gateway for our students to become familiar with authors as John Rawls, Richard Posner, Ronald Dworkin, Owen Fiss, Bruce Ackerman, Duncan Kennedy, Geoffrey Stone, Sanford Levinson, Jack Balkin, Laurence Tribe, Mark Tushnet etc. Most of the translations from English keep being done in Spain, where the works of some of the mentioned professors, besides Jeremy Waldron, Cass Sunstein and Will Kymlicka, have been published. The influence of German doctrine has been equally remarkable, since it has been promoting – in direct and indirect ways – very important ideas to the Latin-American discussions on fundamental rights and democratic constitutionalism in general. The most repeated German names in Latin America have been, I believe, the ones of Robert Alexy and Peter Häberle. The direct reading of their texts became possible thanks to the translations that first came up in Spain, and short after in Brazil, Peru, Colombia, Equator and Mexico. Besides this, some important Latin-American theorists graduated in Germany and wrote great essays under the influence of the mentioned professors. This is the situation, for example, of César Landa, from Peru, Rodolfo Arango, Carlos Bernal, Gloria Lopera and Alexei Julio Estrada, from Colombia, Ingo W. Sarlet, from Brasil, and Laura Clérico, from Argentina. Some of them are great promises of Latin-American juridical theory, and, over time, must occupy the places of granted authors like Héctor Fix Zamudio, Carlos S. Nino, Germán Bidart, Allan Brewer Carías and other giants of our region's juridical thought. (CARBONELL, 2010, in press).

The context exposed by professor Carbonell is supported by Brazilian theorists like Ingo W. Sarlet, who understands that the fundamental rights occupy, in the constitutional order, a double perspective, that is both "objective-juridical" and "subjective-juridical", playing a numbers of roles in the juridical order. It must also be considered, once again, that

the 1988 Constitution writing was influenced by several different theories about the fundamental rights, which explains the ideal of "*multifunctional* rights" that, according to the whole modern doctrine, "are no longer restricted to the protection against public powers, and cannot be summarized by the notion of subjective public rights." (SARLET, 2001, p.12, our emphasis).

In these terms, in Brazil, even professor Humberto Ávila, who criticizes the neoconstitutionalist thought, recognizes that it is a projection of a moment in the contemporary Brazilian Constitutional Law which marks the main evolutions of Constitutionalism and National States Theory.

This way, the relationship between State, Law and Society still relies on the representation of autonomous institutions and on the interactions of State and Law, that turn the latter into a product of the former. However, the acting of Law as a social transformation agent, adapted to the social needs and dissociated from the exclusive image of a legalistic State, has been considered a problem. In the 1970's, already under the post-war constitutionalism, authors like Miguel Reale started admitting that Law should follow two apparently opposite forces: *stability* and *assurance of movement and progress* (REALE, 1977, our emphasis). This thought has brought some issues to the current Brazilian idea of Democratic State.

The institutional framework that has been built through the last decades in Brazil, under a conception of Democratic State, preserves the dialectical relation proposed by Miguel Reale in 1977. That is because, although it carries the idea of supremacy of Law over the public authority, and in spite of having been built, like the State, under a legal system (STRECK, MORAES, 2006), currently, the attention paid by doctrine to the "*movement and progress*" issue questions the very idea of a general constitutional theory, which could be universally applied, just like the historical construction designed to subdue the evolution of Law to a "generational" chronological order. In other words, the Constitution would depend on the specificities of each State, what would make the adoption of "o*ne only* constitutionalism" impossible, since there would be "*several* constitutionalisms" (STRECK, 1999). Therefore, the constitution theory must respect the historical-factual particularities of each national scenery, incorporating the core which embraces the cultural lines of the "Democratic (and social) State, based on the democracy and human-fundamental-social rights binomial." (STRECK, MORAES, 2006, p.107).

It is important to highlight that Brazilian 1988 Constitution gathers, in its contents, rules and principals. The former, under the hermeneutics view, are made of a closed content, which directly evaluates the conceptual construction of the rule and the conceptual construction of the facts (ÁVILA, 2005). Principals, on the other hand, may be classified as immediately finalistic, prospective rules, with an intention of partiality and complementarity, which application demands the analysis of the situation to be promoted and the effects of the action considered necessary to its protection. (ÁVILA, 2005, p.71). The open patterns or standards would be, such as the representation of the Democratic State, a "request from the nature of things, from the historical-social particularities of our time" (REALE, 1977, p.55). Hence, the idea of State would be found more in the teleological sense of its regulations than in the tools used or even in most of its contents (STRECK, MORAIS, 2006).

This way, the human rights effectiveness is demonstrated, for example, by doctrine research works. Considering their immediate efficacy (art. 7, 1988 Constitution), these rights support the Democratic State, in conformance with the factual frameworks and world vision performed by the Brazilian State over the last years. Before the abstract quality of the expressions "human rights" and "fundamental rights", their conception is flexible enough to admit several perceptions of the national reality, such as the relation between the fundamental right to education and the description of "If we consider that Brazil is a country with a

shameful high percentage of people living in poverty or under the poverty line, is it expected that the students from the poorest families will afford with the projects that will ensure their own education, just like any other students?" (BRANCO, 2007, p.150).

4. RELATION BETWEEN FACTS AND CONCEPTS

By articulating internalized conceptions of justice and reality, the civil society, through institutional and individual collaborations, on the first stage of the public consultation about the revision of the Copyright Act (Law number 9.610/98), has tried to design the framework of a current or future reality, limited by the behavior imposed by rules. Over the whole first consultation, an idea of generalization was present, with no concern about the context, and with no deeper, scientific social analysis. This can be proved by the opinions which have uncritically tried to adapt foreign tendencies to the Brazilian institutions, using those tendencies as a parameter to be followed. Agreeing or disagreeing with a certain rule, on this first stage of the public consultation, represented the defense of sectoral points of view. A strategy not so different from that one developed by the juridical doctrine.

Once it does not have to accomplish the task of "developing Law", the civil society feels freer to question, criticize and demand a better communication with "the Law world". Finally, it is interesting to notice that, in the middle of these strict evaluations and opinions, the collectivity does not question its own role in the construction of Law. Society projects over the "people related to Law" a trace of its own. Maybe the very word "consultation", by putting the society in a secondary position, helps enforcing this subjection.

In spite of being regular, the variety of arguments collected in the second consultation process was not as wide as that one found in 2010. While in 2010 most of the judgments came from the sector named "other segment", in the last collective evaluation the suggestions from lawyers or institutions were predominant. The only testimonial which pointed at problems with the research method did not bring enough data to identify its author's occupation.

The voluntary inclusion of personal data (name, ID and CPF) provided enough information to qualify this manifestation as an individual one. In the other situations, reality supported literalness as a predominant yearning in 2 institutional manifestations. In these ones, the justifications referred to existing and valid contractual species, which should be integrated by the legal text. Efficacy, on its turn, was associated to the idea of "juridical security". Security as a representation of justice and the preservation of authors' rights. This case illustrates the integration of the concept of "just" to the following Judiciary functions: interpretation of legal rules and enunciation of Law.

There is a single resemblance between the contents of the manifestations in the consultations and the technical-doctrinal related perspective. In both cases, State and Society are polarized by the Law production dynamics, which fundamental sources are, according to the conception observed, legal devices and, specially, the Constitution. This is the document where can be found the expressions "human dignity" and "fundamental rights", which, according to the most contemporary thought about the Brazilian Democratic State, goes beyond the formalism of subduing facts to legal rules, but associates State to alleged ethical and social contents, in a certain time and space. This affects the very ideal of a constitutional theory which, although has its foundations in historical universalized frameworks, finds in particular juridical interpretations the search for "equality", "social justice" and promotion of citizenship. The reference to 1988 Constitution as a source of values reached its maximum after an essay, which was favorable to the legalization of integral copies, had suggested the maintenance of the current article 46, II of the Copyright Act, taking into consideration the possibility of suspending the rule for the sake of human and fundamental rights. Even though it claims the recognition of a moving Law, the constitutional doctrine brings into its

intellectual field the function of re-translating social dilemmas, aiming at legitimizing itself as a representative of civil society in the "Law world". The fundamentals of the relationship between *structure* and *super-structure* consolidate the function of intellectual jurists as agents who organize, but also help the symbolic construction of State in a certain space and time. The speeches from both the civil society and the authorial and constitutional doctrine enforce an institutional organization which, considering written devices the prior key of Law, limits the seek for power to certain authorized social layers, such as selected groups of the civil society, which belong in the affinity and opportunities network (COSTA, 2011) underlying the directions developed before the announcement of the first step of the public consultation, in 2010.

5. CONCLUSION

The civil society as understood by the Ministry of Culture comprises the agents who were classified by the Executive Power as interested and interesting to the Copyright Act range. In spite of the wide invitations to take part in the consultations, the civil society idealized by the Ministry of Culture was similar to the idea of civil society developed by doctrine and reflected by the speeches of individuals and institutions that participated in the public consultations. No civil society direct action had its discourse recognized in the revision of that Act. The public consultations are not the same as the popular initiative described in the article 61, second paragraph of the 1988 Constitution. As far as the revision of the Copyright Act goes, the writing of a previous draft bill is an exclusive responsibility of the Executive Power, which is also supposed to reduce the list of agents who shall take part in the revision process. The term "consultation" does not mean that the Executive must accept every manifestation, which, in practice, consolidates the idea of habitual autonomous institutions that are submitted to paradigmatic theories on Rule of Law.

The most up-to-date constitutional theories give interpreters the role of authorized readers of society. However, as Gramsci had already pointed, the jurist or Law operator, intellectual of his time, placed in a free conceptual space, remains stuck in the constant tension between ideological production and material production. In the role of intellectuals, jurists become agents capable of elaborating and organizing the complexity of Law, conditioning the capacity of an effective historical re-elaboration of men. When they think Law in conformance with previously conceived paradigms, writers take the chance of reproducing, in practice, social roles which confirm the dichotomy subject-object in the relationship between State-Law and Society. In other words, the propagated transformation power associated to Law is actually restricted to a specific group of agents, turning the constitutional paradigm of a legalistic State into a constitutional paradigm which gives Law the function of, as already observed, building legal rules from an ethical perspective which, in the name of "human rights" and "fundamental rights", is capable of redesigning the traditional conception of Brazilian Law. Law does not only belong to the "State", to the "Civil Society" or to the "Law interpreter". It is a complex phenomenon, which elaboration, in spite of being related to the habitual social roles legitimized by so-called progressive and innovative speeches, goes far beyond them.