DIREITO.UnB

University of Brasília Law Journal
Revista de Direito da Universidade de Brasília

V. **01**, I. **01**

january – june 2014

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Journal of the Graduate Program in Law of
the University of Brasilia

january – june, 2014, volume 1, issue 1

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EDITORIAL
// NOTA EDITORIAL

DIREITO.UnB aims to be a new space for interdisciplinary studies and discussions of legal problems. It will be published annually in one volume consisting of two six-monthly issues, in accordance with the usual international practice for academic journals. The electronic edition, which will be available via Brazilian and international academic portals, will be in two languages: Portuguese and English, or Spanish and English. The print edition will be in Portuguese only.

The journal is divided into six sections: 1. Articles (regular); 2. Review Essays (occasional); 3. Case Notes & Commentaries (regular); 4. Replies & Rejoinders (occasional); 5. Book Reviews (regular); 6. News & Events (occasional).

This first issue publishes articles by three invited authors. Gunther Teubner sent us a thought-provoking piece entitled "The law before its law: Franz Kafka on the (im)possibility of law's self reflection", which is our opening article. Based on a highly creative analysis of Franz Kafka's parable Vor dem Gesetz ("Before the Law"), seasoned with references to Jorge Luís Borges, the author concludes paradoxically that the non-communi-cable aspects of law are made communicable only in the form of litera-ture or art, not in legal doctrine or the theory of law. Teubner's strikingly original reading of Kafka suggests it is not a specific individual who "stands before the law" in all its oppressiveness, but legal discourse itself, seeking compulsively to understand Law. The author appears to hint that the paradox inherent in the "mysterious relationship" between "Law and its law" (Recht and Gesetz) cannot be processed from the perspective of an immanent justice, but from that of justice as a "transcendence formula", which surpasses legal doctrine and mere formal legality.

In "New legal approaches to policy reform in Brazil", Marcus Faro de Castro presents an authoritative discussion of Public Capital Management, one of the approaches to analyzing the relations between law and economic development in Brazil. Based on his critique of this model, he offers instead his Legal Analysis of Economic Policy, which he considers appropriate to new state activism in the economic sphere. He distances himself critically from the naturalized forms of understanding of the relations between law and economics termed "economic analysis of law", according to which the rationality of law is evaluated via an abstract notion of the market, to which legal institutions must submit in order to be considered socially valid. On the contrary, with confidence and academic firmness, he asserts the flexible and provisional nature of legal ideas and institutions, which in their plasticity are well-suited to molding and conditioning a plurality of "market economies". In this way he stresses the contingent, rather than necessary or ontologically predefined, nature of the relations between law and economic development.

By my suggestion anthropologist Rita Laura Segato submitted the unpublished Portuguese and English translations of her article "*Que cada pueblo teja los hilos de su historia: el pluralismo jurídico en diálogo didáctico con legisladores*", which resulted from a public hearing to discuss a legislative proposal that would have "ultracriminalized" prac-tices of indigenous communities involving the killing of newborns with

physical disabilities or one twin. Segato's strong opposition to the bill led Brazil's lower house to amend it radically, removing its original punitive emphasis. The article raises anthropological questions that should alert us to the dangers of an ethnocentric approach to lawmaking and enable us to rearticulate our constitutional identity in light of the normative orders of Latin America's indigenous peoples. The intention is to disseminate the argument more widely both inside and outside Brazil.

Four articles were approved by blind peer review, out of a total of 38 submissions.

Hauke Brunkhorst's article, "The beheading of the legislator: the European crisis – paradoxes of constitutionalizing democratic capital-ism", deals with the European crisis in terms of the paradox between increasing constitutional development on the supranational plane and the prevalence of a "managerial mindset", oriented above all by the demands of the financial markets, over a "Kantian mindset", which would require fortification of democratic self-legislation. Brunkhorst proposes "a massive change against the lethal sickness of neoliberalism called austerity", suggesting a rise in taxes as an alternative and conclud-ing that "there is no way out of the crisis without renewed transnational democratic class struggle".

Ana Luiza Pinheiro Flauzina's critical reflection, "The racial boundar-ies of genocide", points to the eurocentric characteristics of international justice, especially in respect of the racial question. In her analysis, white European victims of the Holocaust have received extremely different international judicial treatment from the "black bodies" massacred in genocides elsewhere. After a careful exposition, she concludes that "the representatives of white elites in the diaspora do not fit the pattern of accused in the destruction of black communities because white suprem-acy systems must not be defied".

"*Criminal compliance*, control and actuarial logic: the relativization of the *nemo tenetur se detegere*" by Ricardo Jacobsen Gloeckner and David Leal da Silva is a study of the penal mechanism known as "criminal compliance", which in Brazil has gained relevance especially as a result of Laws 9613 (1998) and 12683 (2012). The authors question compliance duties, which they consider contrary to the right to remain silent and the privilege against self-incrimination, summed up in Brazil by the Latin tag nemo tenetur se detegere and designed to limit state action in obtaining evidence against the will of a suspect or defendant. In this perspective they argue that compliance duties submit criminal law to a culture of control, to actu-arial logic, and to economic reason. Based on Michel Foucault, the authors conclude that "compliance duties are merely one more security device immersed in post-disciplinary society's vast network of governamentali-ty", proposing research to find out "to what extent they are compatible with the Constitution of the Republic and what boundaries should be imposed".

In an article entitled "Human dignity, social security and minimum living wage: the decision of the *Bundesverfassungsgericht* that declared the unconstitutionality of the benefit amount paid to asylum seekers", João Costa Neto analyzes in detail the ruling mentioned in the title. He

clarifies the line of argument used by Germany's Federal Constitutional Court, stressing that the decision was based on the principles of human dignity and the right to a dignified minimum subsistence. He also notes that the Court modulated the effects of its ruling in time.

In "Moral theology for hedgehogs: Ronald Dworkin's theory of justice", the only review essay in this issue, also approved by blind peer review, Alexandre Araújo Costa presents a scathing critique of the arguments advanced by Dworkin in his last book, Justice for Hedgehogs. The author claims to have identified a tension between Platonic assumptions and Aristotelian methodology in Dworkin's universalist liberalism. He repudiates a model of objective morality that refuses to accept philosophical criticism or questioning of its assumptions, and concludes therefore that Dworkin's thesis is theological rather than philosophical.

In Case Notes & Commentaries, we invited three renowned constitutionalists — Luís Roberto Barroso, Lenio Streck and Leonardo Martins — to discuss the decision of Brazil's Federal Supreme Court (STF) in Direct Unconstitutionality Suit (ADI) 4277 and Breach of Fundamental Precept Suit (ADPF) 132, ruling in favor of the principle that a same-sex civil union is a family entity. While Barroso argues mainly from principles that the STF's decision was correct, Streck and Martins criticize the decision for lack of constitutional grounding. Streck takes a hermeneutical approach, objecting to the subjective and arbitrary nature of the judgment ("one cannot say anything about anything"). Martins focuses on what he sees as methodological and doctrinal inconsistency, concluding that the decision was rhetorical and theoretically unsustainable given its inappropriate recourse to German legal doctrine and case law.

Finally, we have three reviews of books by Brazilian authors: Luís Roberto Barroso's "A dignidade da pessoa humana no direito constitucional contemporâneo: a construção de um conceito jurídico à luz da jurisprudência mundial", reviewed by Gilberto Guerra Pedrosa; Marcus Faro de Castro's "Formas jurídicas e mudança social: interações entre o direito, a filosofia, a política e a economia", reviewed by Carina Calabria; and Juliano Zaiden Benvindo's "On the Limits of Constitutional Adjudication: Deconstructing Balancing and Judicial Activism", reviewed by Gabriel Rezende de Souza Pinto. This is the first step in the development of a regular practice of publishing reviews of books not only by foreign authors, but also by Brazilian scholars.

We hope this first issue marks the advent of a journal that serves as a means to internationalize Brazilian legal culture and facilitate a permanent debate among academics interested in law and related matters, especially in terms of interdisciplinarity, within the complex horizons of world society.

Brasília
January, 2014

Marcelo Neves
Editor-in-Chief

ARTICLES
// ARTIGOS

THE LAW BEFORE ITS LAW: FRANZ KAFKA ON THE (IM)POSSIBILITY OF LAW'S SELF REFLECTION

// O DIREITO DIANTE DE SUA LEI: SOBRE A (IM)POSSIBILIDADE DE AUTORREFLEXÃO COLETIVA DA MODERNIDADE JURÍDICA

Gunther Teubner

>> ABSTRACT // RESUMO

The article offers a novel interpretation of Franz Kafka's celebrated parable 'Before the law'. It is inspired by recent developments in European legal theory, particularly by the work of Jacques Derrida, Niklas Luhmann and Giorgio Agamben. It suggests a dual role change in the confrontation of the parable's protagonists - the 'man from the country' and the 'law'. According to this interpretation, it is not a specific individual that stands "before the law", but it is the legal discourse itself that is in a desperate search of its law, and the parable's 'law' for its part is not a generalized and distant authority (power, morality, religion etc), but the valid and positive law of our times. The article asks the question: What happens within the mysterious relationship between 'Law AND law' which has always preoccupied legal theory when that relationship is subjected to the nightmarish logic in Kafka's universe? // O presente artigo oferece uma nova interpretação da celebrada parábola "Diante da lei", de Franz Kafka. É inspirado pelos recentes desenvolvimentos na teoria do direito europeia, particularmente pelos trabalhos de Jacques Derrida, Niklas Luhmann e Giorgio Agamben, e sugere uma mudança dupla de papéis na confrontação dos protagonistas da parábola - o "homem do campo" e a "lei". De acordo com essa interpretação, não é um indivíduo específico que se encontra "Diante da lei", mas o discurso jurídico propriamente dito, que está em uma busca compulsiva pela sua lei; por sua vez, a "lei" da parábola não remete a uma autoridade generalizada e distante (poder, moralidade, religião etc), mas ao direito positivo e válido de nossos tempos. O artigo coloca a seguinte questão: o que acontece dentro da misteriosa relação entre "direito" E "lei", que tem sempre atormentado a teoria do direito, quando essa relação é sujeita à lógica opressiva do universo kafkiano?

>> KEYWORDS // PALAVRAS-CHAVE

Kafka; systems theory; law and literature // Kafka; teoria dos sistemas; direito e literatura.

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>> ABOUT THIS ARTICLE // SOBRE ESTE ARTIGO

Translated from the original text in German by Ricardo Resende Campos, master and PhD. candidate in Legal Theory and Global Law at the Goethe-University of Frankfurt am Main, under the supervision of the Professor Gunther Teubner. Proof-reading of the translation by Felipe Neves Caetano Ribeiro, master candidate in Law at the University of Brasília (UnB). // Traduzido do original em alemão por Ricardo Resende Campos, mestre e doutorando em Teoria do Direito e Direito Global na Goethe Universität Frankfurt am Main, sob a orientação do Prof. Gunther Teubner. Revisão da tradução por Felipe Neves Caetano Ribeiro, mestrando em Direito na Universidade de Brasília (UnB).

>> ACKNOWLEDGEMENTS // AGRADECIMENTOS

For critical suggestions I am grateful to the participants at a seminar given by Christoph Menke in Frankfurt in the summer semester 2011. // Sou grato aos participantes do seminário dirigido por Christhoph Menke pelas sugestões críticas no semestre de verão 2011.

1. THE MAN FROM THE COUNTRY

Let us imagine that the man from the country in Kafka's parable "Before the Law"[1] is not the human individual who has been delivered up to the force of institutionalised legalism (power, morality, religion etc.), as we find in numerous Kafka interpretations with their somewhat over hasty role fixation. Let us suppose instead that he is a judge "from the country", who – back there, in the country – has to deal with a legal case according to the law, and who now, in the torment of decision-making, cannot find what is right according to the law. Or to put it another way: let us imagine that it is the individual legal procedure itself, or more generally the decision-making practice of the legal process, in all the confusion of life, that stands before its own law and has no idea what it is doing.

In that case it would not be the accused person who has to give an account of himself before the law in criminal proceedings, or the party seeking its rights before the law, but the Law itself, in a desperate search for a law by which it can make its decision. If we now place the protagonists that emerge from this dual role change in confrontation with each other – i.e. it is not a specific individual that stands "before the law" but legal discourse, and the law for its part is not a generalised and distant authority, but (at a much more trivial level) the valid and positive law – then we have to address the question: what happens within the mysterious relationship between "Law and law" when that relationship is subjected to the nightmarish logic in Kafka's universe?

This does not mean that the individual perspective ought to be disputed in its own right. In a complementary sense, however, our institutional perspective allows very different things to come to the fore in Kafka's world. I am encouraged in my somewhat far-fetched interpretation by Jacques Derrida's whirlwind of associations concerning Kafka, in which he summons literature "before the law"[2]. And Kafka himself, who sends his observers through a wide variety of institutions, through power, the military, the circus and through medicine, always designates them not simply as outsiders, but as part of professional institutional life: the land surveyor, the country doctor, the researcher, the new lawyer, the bank clerk, the advocate. Last but not least, Kafka's own negative experiences as an insurance clerk dealing with the absurd internal laws of the insurance companies were certainly used by him in his literary output. It seems entirely reasonable, then, that in Kafka's parables not only are flesh and blood human beings racked before the gate ways to the law, but at the same time the legal institutions of our modern age are subjected to the torment of self-examination.

The legal discourse that seeks to assure itself of its law is tormented by nightmares that are different from those experienced by the person who is subject to the law and who is exposed to the arbitrariness of the judicial system. Kafka's parable renders visible the abysses that are faced by any collective self-reflection of the epistemic community of the Law. If the Law is standing "before" the law, then it is on a desperate search for its origin in time, for justification of its content, and for the social basis of

its norms and judgements. And the insoluble question of priority arises: does Law perhaps take precedence over law? So that law definitely does not take precedence over Law? Should the chain of events that constitutes legal procedure precede, in a temporal sense, the law or the norm that is supposed to assist that chain of events in reaching a decision? Should that chain of events be the origin of the law in a substantive respect also? And from a social perspective: should the decision in the individual case have hierarchical precedence, by departing from the general law? And in the triangular relationship that exists between the man, the doorkeeper and the law, the question becomes even more complicated: where does the precedence lie – with the law, or with the spokesman for the law, or with the legal procedure? With which of these three does the origin of the norms lie?

"The man from the country" – from an institutional perspective, the meaning of this indication of origin becomes multi-layered, and no longer simply refers to the peasant like layman who comes to grief when faced with the guiles of legalistic sophistry. The implied contrast between town and country opens up a wealth of different dimensions, which cannot all be entered into here, but only hinted at by means of the following distinctions: 1. law vs. life, more generally: culture vs. nature, 2. statutory norm vs. the process of norm application, more generally: structure vs. process, 3. statutory text vs. legal interpretation, more generally: norm vs. decision, 4. law vs. legal case, more generally: universality vs. singularity. "The man from the country" – this is no longer only a human being as a party in proceedings, but the entire complex process of the application of the Law, a process which is played out before the door, directly on the threshold that separates life from the law.

2. SELF-SLANDER

The "Someone" who must have slandered Josef K. in "The Trial" is none other than Josef K. himself. With this bold assertion, Giorgio Agamben makes a plausible case that it is not a separate outside authority that is accusing a person "before the law"; instead, the man from the country is accusing himself.[3] If we follow the role change that has been proposed, then the self-accusation of a person is transformed into the self-accusation of the Law. The Law is bringing itself to trial.[4]

The Law cannot escape its self-accusation, for if (as the man from the country "insatiably" asks the keeper of the law about the general law) it follows its implacable inner urge towards universalisation, then of necessity it is no longer asking the question "right or wrong?" solely in respect of the one legal case in the present instance, but also in respect of all human actions. It is asking – for all world events – the question concerning their legal position (*Rechtslage*). Indeed the Law in the modern age has historically (when it stopped thinking about actiones in a way that was fixated on legal procedures and started thinking about legal positions in a way that relates to every event in society) completed this transition towards

universalising its categorisations, and has "juridified" the entire world. Inevitably, then, legal procedure comes up against itself and asks the self tormenting question: is applying the difference between right and wrong actually right or wrong? But then the Law becomes caught up in the paradoxes of self-reference. As with the lying Cretan, whose true statements become false and vice versa, what we are faced with is no longer a simple contradiction, but an infinite oscillation within the paradox: if right, then wrong. If wrong, then right... This is the fundamental paradox of the Law, which in response to the question as to its foundation does not get a clear yes or a clear no, but an almost mocking interchange between positive and negative value of a viable justification. The fact of having actually brought the right/wrong distinction into the world in the first place, and thus of constantly producing anew not only right, but also wrong – therein lies the original sin of the Law. The Law is in a position of guilt vis-à-vis the world, because in the very creation of this distinction it does harm to the world, not only when it carries out punishment upon a condemned person, but also when it simply raises the quaestio juris, when it cuts through the world's innocence with its "either right or wrong" (no third way) binary code. The Law thus places all people, all events, and even itself under a "Kafkaesque" general suspicion which even the humanistic law of the Enlightenment, with its presumption of innocence, cannot remove. The inexorable compulsion to keep scanning the world according to this criterion produces more and more "wrong". And it is precisely the much-vaunted general nature of the law, which is supposed to do away with arbitrariness in individual cases, that in turn creates new "wrong", because with its violent abstractions it can never do justice to singularity in its infinite manifestations.

Kafka's law compels legal practice to generate life a second time, by generating a "legal reality" which is fictive, yet is very real in its fictivity, almost monstrous. The entire novel "The Trial", in which Josef K. in his imagination transforms the banal reality of his life as a bank clerk into a prosecution situation, bears nightmarish witness to the world of madness into which the modern-day juridification of life leads us.[5] Kafka's law palace is one of the many "iron cages of the slavery of the future" which Max Weber prophesied for modern society – Kafka's castle would be another such, also the penal colony, the circus, and America. The compulsion that is exercised in Law's palace reduces flesh and blood human beings to juridical persons acting on compulsion, whose characteristic quality consists exclusively in having rights and duties, whose activities are limited to only being able to commit a right or a wrong, whose sole quality is being either guilty or innocent. The propagating of this second world – that is the evil deed committed by the Law. It is an act of violence against life, in respect of which the Law (if it applies its own categories to itself) accuses itself. This is the curse of every wrong deed: that propagating still, it brings forth wrong.

But we shall have to go a step further. Not just self-accusation, but self-slander by the Law. This would be the third interpretation of the dispute in the cathedral between Josef K. and the court chaplain, concerning the

question as to whether the doorkeeper has deceived the man or whether the doorkeeper himself is the one who is deceived.[6] In its search for the law, legal practice in the modern age becomes a victim of self-deception – in its self-judgement it deceives itself, and does so not out of negligence or by dolus eventualis, but by dolus directus. For in the clear awareness that it is using false categories for its self-accusation, the Law slanders itself. Not only when the Law judges men, but also when the Law puts itself on trial, it cannot do otherwise than expose itself to its own slanderous categories. This is where Kafka's critique of modern Law, with its pride in its autonomy and formality, comes into play for the second time. This critique is now aimed not at the practice of application, but at its self-reflection. For by contrast with the Law of traditional societies, which was able to classify and assess their law in an all embracing cosmology in whose moral, religious and political connections it is indissolubly bound up, the highly specialised Law of our functionally differentiated society cannot comprehensively assess its law and decide whether it is true or untrue, good or evil, beneficial or damaging, beautiful or ugly, healthy or sick, just or unjust.

The loss of criteria of positive law, of our legal norms that are established only through decision – that is the disease from which Law in the modern age suffers. Modern Law only has its constricted, inadequate (for the purposes of describing the world), context-free, ultimately meaningless right/ wrong binary code – this "can't" of modern legality – at its disposal. And the Law can only reflect on itself with the aid of its own life-falsifying constructs. Its self-assessment is entangled within the limitations of its criteria, its processes, its forums. The original sin of the Law consists not only in the fact of its doing wrong to the legal subjects through the violence of its binary coding, but also in that even in its best moments, in the moments of critical self-reflection, it has done itself this wrong, the wrong of self-slander, and continues to do so over and over again. The way in which modern Law deceives itself – the doorkeeper deceives the man, the man deceives the doorkeeper and the law deceives both – is something that "you don't have to consider everything true, you just have to consider it necessary"[7], as the court chaplain in the cathedral rightly says, just as Josef K. is right when he says of the total juridification of the world: "Lies are made into a universal system."[8]

3. EXCESSES OF AMBIVALENCE

Yet the *Kalumnia* by which Agamben sees Josef K. as being for ever marked is not the whole story, for this attaches a strictly negative value to the Law. Agamben sees only the violence the Law does to human beings. Agamben's history of Law is a story of harm that starts with homo sacer and of necessity ends in the Konzentrationslagern and refugee camps of the modern age – Kafka's penal colony. But Kafka's parable "Before the law" has a more complex structure: not pure negativity, but excessive ambivalence. For the Law always produces both at the same time: it puts

some people in the wrong, others in the right. With its condemnations, it causes pain, suffering and torment, but it also simultaneously creates the certainty of expectation and trust, upon which people can construct their life plans. Kafka, in his own life, suffered under the absurdity of insurance law, but he made bold proposals as to how this absurd law could bring about more justice.[9] Because the Law is only able to generate legal fictions, it is permanently producing lies, but it is precisely legal lies that can be really helpful, as the well known Islamic legal parable of the twelfth camel shows. Kafka's Law causes the torments of the permanent awareness of guilt, and it arouses the hope of redeeming acquittal. In the success of modern Law lies its failure, and in its failure lies its success.

It is this simultaneity that makes the torment truly unbearable. For in the purely negative context that Agamben presents to us, the escape to freedom is open: (self) destruction of the Law. The man in the country would not remain sitting in front of the doorkeeper, not knowing what to do. He would – indeed he would have to – protest against the evident wrong, either by fighting it or by simply going away. Voice or Exit. In protest or in flight, "right" would finally free itself from the law. That was the message of the Free Law Movement: disregard the law when you give a judgement. Kafka's legal world has nothing to do with any such legal pietism. "Before the law", in response to the threatening question of whether it is doing right or wrong when it applies the law, the legal process gets the paradoxical answer: with the application of the law, you are always simultaneously doing right and wrong.

The self-evident certainty of Agamben's pre-judgement in regard to the Law – *Kalumnia* – is transformed by Kafka into an existential uncertainty: *Kalumnia* – or perhaps truth? If one observes the observer "Up in the gallery", the excessive ambivalence of Kafka's universe is made even more clear.

"If some frail, consumptive equestrienne were to be urged around and around" helplessly by the cruel rituals of the circus operation, "then, perhaps, a young visitor to the gallery might race down... and yell: Stop!" "But since that is not so", he "weeps without knowing it".[10] The horror is not simply the reality behind the beautiful appearance, neither do horror and appearance have the same "reality status". The appearance is expressed in the indicative mood for what is really happening, and the horror is expressed in the subjunctive mood for what is merely possible. This remarkably asymmetric ambivalence gives the lie to the negativism of Agamben, who can only see the horror in the law of the modern age. It is infinitely more difficult to deal with excessive ambivalence than with absolute horror.

The paradox makes it inevitable that even the self-accusation of the Law can never stop oscillating between the values of right and wrong. The accusation is never followed by a judgement, neither is it even followed by the judgement of the law by Agamben's higher Law. The judgement over the Law is always deferred. And it is always impossible to decide whether it is in the pure existence of the Law itself that its guilt lies – or, indeed, its merit. And this is what makes for the "Kafkaesque situation

par excellence" – not the certainty that the self-accusation is a deliberate slander, as Agamben would have it, so that the intrinsic guilt of the Law is established a priori, but instead the tormenting uncertainty as to whether the self-accusation is the slander of an innocent party or a self-reflection promising truth and justice.

And it is this paradox that first explains the remarkable activism/passivism of the man towards the doorkeeper. The paradox cripples legal practice, and robs it of the courage to decide in favour of resistance to the law, either to flee or stand, voice or exit. But that is only one side. The other side is that the paradox encourages the Law to try the de-paradoxification by means of more and more subsidiary distinctions, such as the legal "man from the country" almost submissively offers to the doorkeeper of the law. While Agamben's negativity calls for the abolition of law, Kafka's paradox is a provocation to "insatiably", in ever renewed attempts, propagate distinctions which are intended to get closer to the law "in thoughtful obedience". But what is the quality of these distinctions?

4. THE JUDGEMENT

The sheer bafflement of the man from the country in the face of the inaccessibility of the law (i.e., from the perspective we have adopted, the paralysis of the self-reflection of the Law that is triggered by the foundational paradox and by the decision-making paradox of the law) is not the end of the story. Like flashes of lightning, three sudden and devastating events happen to the man at the moment of his death. Firstly, an inextinguishable shining light breaks forth. Then, the entrance was intended only for him. Then, the entrance is closed. After such a Damascus-like experience, no one can hold out any longer in the suspension that has been triggered by the paradoxes.

"...this entrance was meant solely for you." (emphasys by me). With these words, a hard judgement is pronounced: he who stands before the law is condemned to decision-making freedom. This judgement sheds a new light on the earlier ambiguous answers given by the doorkeeper – that entrance is forbidden, but may be deferred until later; that the entrance is left open, but with a warning concerning the more powerful doorkeepers. Only the man can – and must – decide. Neither the universality of the law, from which he could get help in his decision-making, nor the support provided by others who are seeking access to the law, will give him any indications as to how he is to decide. This absolute decision-making compulsion means, as far as the individual perspective is concerned, that a radical switch is necessary from the objective law of an external legislator, whose commands have to be obeyed by the subject, to the subjective Law of the individual, i.e. to the violence of lawgiving, which is nonetheless subject to the law. In terms of the institutional perspective, this "only for you" means that the individual legal trial has no other recourse than itself in its decision-making. Only the singular legal trial itself which is actually proceeding, and no outside authority,

not even the general law that is held in such great esteem by all, can be responsible for establishing the norm on which the decision will be based. The law only has form as empty validity without any meaning. The law as a concrete structure, as a behavioural standard which is defined as binding, has absolutely no existence of its own in relation to the legal event. It exists only insofar as it is invoked by a legal event, and continues to exist only insofar as this legal event invokes the expectation of future legal events. The law has to be continually reinvoked by legal events. If the Law as a chain of events dies, then the door to the law will also be "closed". Law books themselves are not the law, they are at best doorkeepers, or in another form of words, they are only sediments of meaning that are only reawakened to new meaning by the invocation of the legal event. The invocation has to be continually renewed.

But this norm-setting autonomy is "before" the law, i.e. it remains bound by the law. For without the law and its infinite "worlds behind worlds", which provide the space for "normativity", there is no possibility of freedom to set norms, no possibility of continuing to build the Law, no possibility of justice. The freedom to which the law condemns the Law is not simply unstructured chaos, but freedom to set norms, a freedom which already has the structures of the law stamped upon it. As Derrida rightly says: it is only the conditions that make legal cognition possible, which are inherent in the law: "These possibilities give the text the power to make the law, beginning with its own. However, this is on condition that the text itself can appear before the law of another, more powerful text protected by more powerful guardians."[11]. The fact that this is circular or tautological does not have to be understood as a criticism. On the contrary. In Kafka's novel "The Trial", the tautology becomes autological, because the text in the "Cathedral" chapter applies the circularity of the normative to itself: the parable "Before the law" stands before the law of the entire "Trial" novel, just as the novel also stands before the law of the parable. Not only do the two works constitute a reciprocal interpretation of each other, but each is a precondition for the other. The specific "guilt normativity" of the two texts does not arise from any outside norm-setting authority which is independent of them, but from the self-referential, indeterminate, self-supporting interrelation between the two texts.

Yet there is a particular contradiction in this duty to establish norms. For the powerful doorkeepers forbid the man any entrance to the law. And at the same time the entrance is intended only for him. In this, he is exposed to the confusions of a "double bind": he is obliged to obey the law, and at the same time he is obliged to break it. Act in such a way that the maxim of your will is to obey the law at all times and simultaneously to break the law at all times. This "double bind" provides him with absolute freedom and at the same time entangles him in permanent guilt: decision-making compulsion and decision-making guilt.

Whichever alternative he chooses, every time he becomes ensnared in guilt. The individual either becomes guilty of having broken the law or becomes guilty of not rebelling against the law. Was it right to bribe the

first doorkeeper, or should the man have found the courage to take up the fight for the law?

The currently prevailing legal theory refuses to contemplate such paradoxical and unreasonable demands. The foundational paradox of the law, the decision-making par adox of the application of the law, the "double bind" of subjective Law are banned from legal theory. Some simply deny their existence, others forbid any paradoxical figures of thought on logical grounds, others again pour scorn on them and dismiss them as mere philosophical fancies. Against the background of the nightmarish suggestivity of Kafka's texts, however, all three responses are revealed to be mere helpless gestures. Only a few present-day legal theoreticians take these paradoxes seriously: Niklas Luhmann, Giorgio Agamben and Jacques Derrida.

5. CONTEXT OF DELUSION

Luhmann builds his legal theory upon the bold thesis that the place of the transcendental subject is now occupied by the paradox.[12] In exactly the same way as Kafka, Luhmann sees the Law, insofar as it has called forth an extreme autonomy in the process of modernisation, as being from the outset entangled in the paradoxes of self-reference, so that its self-observations are threatened with paralysis. For Luhmann also, the way out of this paralysis is: "... this entrance was meant solely for you". The doorkeeper's astonishing revelation leads us out of the paralysis, the suspension, the twilight. "Draw a distinction" – this is what Luhmann requires of legal practice, so that it can get around the paradoxes. That legal discourse itself, and only legal discourse, must draw a new distinction – that is the strategy by which the paradoxes will be removed, so that we will be saved from falling into their dark depths. Even if the new distinction is in turn necessarily founded on a paradox, nevertheless it has a self-supporting power which is based – even if only for a limited time – on its plausibility and its capacity to solve problems.

This is certainly an elegant solution, but it cannot do justice to what happens in the death scene. It does not react to the two other sudden events, indeed it has to disregard them. Luhmann's paradox resolving solution cannot close the door to the paralysing law, it must constantly expect the return of law's paradox. And Luhmann's "praise of routine" certainly does not cause any inextinguishable shining light to break forth from the door of the law. It only continues the previous routine of pedantic legalistic distinctions, the permanent recursiveness of legal operations. The new distinction only conceals the paradox in a not very secure place, from which it will soon re-emerge.

Agamben, on the other hand, does actually read two of the events together: "this entrance was meant solely for you. I'm going to go and shut it now". The closing of the door – this, for Agamben, is the key message. He gives us a surprising interpretation. The fact that the door to the law is closed is not a defeat, not a failure for the man, but on the contrary

is the result of his patient strategy of waiting, and the intensive, indeed intimate continuing encounter solely with the keeper of the law, rather than the impossible penetration to the law itself. The strategy was aimed at compelling the doorkeeper to lock the entrance to the law. It is precisely then that the man finds his freedom, when the entrance to the law is locked, when the law is cancelled, its empty validity interrupted, the law itself abolished.[13]

However, Agamben cannot come to terms with the shining light. In Agamben's reading, the shining light which the man recognises in the darkness plays almost no part at all. But this "radiance that streams forth inextinguishably from the door of the Law" is the moment of the greatest intensity in the parable, "outshining" the two other events in the death scene. In this light, everything is different. Derrida even speaks of the "most religious moment".[14] And what does the parable say about the origin and intensity of the light? The light comes "from the door of the law", i.e. its origin lies nowhere else than in the law itself, and it "streams forth inextinguishably", i.e. its intensity is linked to the permanent existence of the law. That is the exact opposite of the abolition of the law, as argued by Agamben. It is impossible to have the experience of the light without the law, without its empty claim to validity, without its lying, without its paradoxes, without its obscenity. No law – no light. The absence of law which Agamben hopes for will never be able to generate the light. For the desperation which Kafka evokes does not relate to the grand delusion of the law, which Agamben would like to destroy, because it hinders justice. That is too simple. The law can indeed be set aside, switched off, abolished. This possibility always remains open. On the contrary, the man makes the astonishing discovery that it is precisely the grand delusion of the law that is necessary in order to render the prospect of justice at least momentarily possible. Or to put it another way: justice is dependent upon the obscenities of the law. Justice cannot be had without the law.

It is only on the basis of the inseparable connection between all three events that the death scene can be interpreted – inextinguishable light, singular intention, closing of the door. In the shining light that appears, the closing of the door does not signify the abolition of the law, or its cancellation in any future community. Neither can the fact that the light appears simultaneously with the closing of the door be reduced to the opposition between a doom-laden present and the promise of a distant good future, as Agamben would suggest. That would be Manichaeism, which only hopes for the future community from the "Muslim" i.e. from the deepest humiliation[15]. And which makes the salvation of the "coming community" dependent upon the abolition of the law. But in the present event the light and the darkness coincide. In the darkness shortly before the closing of the door, the light appears as the momentary spark of a chance that in the failure of Law before the law, justice is possible.

In an individual perspective, this would mean that the man, at the end of his tor ments, experiences the subjective recognition of individual justice. An institutional perspective would go one step further, and could

relate (and restrict) this possibility to the single legal procedure. It is only for this singular conflict, and not for other conflicts, that this entrance to the law is determined, and it is only in respect of this singular conflict that a perspective of the justice which is intended solely for it is possible. A justice which is strictly limited to the individual case is possible, but there is no possibility whatsoever of any generalisation to other cases. The justice associated with the individual trial has no continuing effect; on the contrary the door of res judicata is closed, and must be opened anew in each trial, after which it is always closed.

These are two possible interpretations. We may ask, however, whether the text does not allow of a reading that takes Kafka's critique of modernity's Law to an extreme level. Autonomous legal discourse itself would then be the collective subject before the law, which is able to experience the shining light only in self-transcendence in the face of the law which is intended for it alone. In this self-transcendence there would be neither a future in which the Law is abolished nor any return to the embedded legality of traditional societies. The fact that Kafka is not in any way nostalgic about the Law of the pre-modern age is demonstrated by the experiences of the land surveyor in "The Castle", with the repressive structures of the village community, against which he is constantly rebelling. "Meant solely for you" would then mean the exclusively juridical justice of modern autonomous Law, a justice which can only develop such Law itself, from the overcoming of the law, and without having any recourse to any other institutions – not politics, not science, not morality, not religion. In the modern age, a justice that might apply to the whole of society is impossible, there is only a particular justice intended for the Law, a justice which is clearly distinct from other particular justices (those of politics, morality or economics). Self-transcendence of modern Law would then mean that for the Law as a singular institution there is a separate path to justice which only the Law itself and no other institution can follow. It is only in the blindness in which modern decontextualised Law is caught up that it is able to see the shining light of its self-transcendence. It is not the entrance of an individual conscience to transcendence that is intended, but a collective entrance to transcendence, although this entrance does not affect society as a whole, but the self-transcendence of legal discourse itself.[16]

6. BIFURCATION

If we think of the three events together in this way, then two mutually contradictory interpretations are revealed, by which the behaviour of the man is judged.

In one interpretation, it is precisely the mere fact of sitting there, this not particularly laudable "activism/passivism" of the man, that allows him to perceive justice. The man's patient waiting, and also his insatiable questions, have not been in vain. He obtains power of judgement in the final moment of his endeavours. And he does so because he has decided

not to penetrate into the infinite emptiness of the law and instead has tried, in one continuing endeavour, to establish a bridge between different worlds. He is not "in" the law, but remains outside, "before" the law, on the threshold, in the permanent confrontation with the doorkeeper, in order – from that position – to mediate between life and the law. Power of judgement is proved not simply in the subsumption of the particular within the general, but in the bridging of two irreconcilable worlds.[17]

Kafka radicalises the opposition that has to be bridged: not merely in the direction of reason versus emotion, but as legal argument versus irrational decision, the order of the law versus the chaos of life, and indeed ultimately immanence versus transcendence.

This interpretation approaches the sophisticated sleight-of-hand by which Jacques Derrida brings his impressive deconstruction of the Law to its conclusion.[18] After a radical transcendence of the positive law, after the passage through the wilderness, after the delirium of infinite justice, there must come about (as Derrida surprisingly demands) a "compromise", a compromise of infinite justice with the most trivial calculation of legal consequences, of banal subsumption under a rule of law. According to Derrida, the shattering experience of justice ought not to serve as an alibi for the composure with which a possible future is expected. "Left to itself, the incalculable and giving (donatrice) idea of justice is always very close to the bad, even to the worst for it can always be reappropriated by the most perverse calculation... And so incalculable justice requires us to calculate."[19]

To penetrate ever deeper into the paradoxes of the law, and to wish to remain there in post-structuralist quietism – this would then be the culpable error. Instead, the humiliating continuing compromise with the obscene doorkeeper must be demanded of him. The shining light appears only in the reclosing of the door, in the final refusal of entry. That would not simply be fulfilment in failure, but fulfilment only after the labours of the encounter, the compromise with calculation, the humiliation, the bribery, the Sisyphean work of legal discourse. It is not the praise of the mystic power alone, but the praise of the compromise between the mystic experience of justice and the banal calculation of legal consequences – that would be the only interpretation that would justify the man's waiting.

The other interpretation is revealed if the parable is read alongside another text of Kafka. This interpretation does not accept that the toilsome confrontation with the doorkeeper results in justice. On the contrary, the man is forced to realise in the shining light that he could have obtained justice if he had not allowed himself to become involved in the meaningless questioning of the first doorkeeper, and had instead only found the courage to do battle with the other more powerful doorkeepers and penetrate into the law as far as his strength would take him. This obedience that leads the man to remain sitting in front of the door, his fulfilment of duty, is his violation of duty. Instead of only bribing the first keeper, the man should have found the courage to break the entrance ban and to take up the fight for the Law. In this reading also, the

shining light is an experience that comes over him here and today. For he now "recognises" justice – but only as another justice, the opportunity represented by which he has failed to grasp.

But the question of how this other justice might be attained is only expressed nega tively "before the law", only as the disappointing experience of having missed the big opportunity. That the positive establishment of justice appears possible in Kafka's work, and the way in which this might come about, is more readily seen in "An Imperial Message". Here also, we have the triangular situation between a distant authority, a subject of that authority, and an intermediary, although in this case the direction of movement is reversed. Here also there is a go-between, not a doorkeeper but an imperial messenger who makes superhuman efforts to ensure that the message from the authority reaches the subject. And here too there is the bitter disappointment of discovering that any real mediation between the two worlds is impossible, and the communication via the messenger is a vain hope. Instead: "Nobody could fight his way through here even with a message from the dead man." Then, however, comes the all-deciding sentence: "But you sit at your window when evening falls and dream it to yourself."[20]

The question of which of the two readings is appropriate – whether justice is to be found in the patient, self-tormenting, humiliating confrontation with the obscene keeper of the law, or conversely in the collective imagination of the legal discourse that takes place before the law and absolutely wants to penetrate through to the law – must remain open. For both readings, however, the same applies: even when the shining light illuminates everything, there is no triumph of justice. Kafka's excessive ambivalence continues, even before the light that shines inextinguishably out of the law. Kafka refuses to answer the question as to "whether it is really getting darker or if his eyes are deceiving him". Is this really the shining light of justice? Of transcendence?

And if so, is it then a light that comes from outside – from God, from science, from politics, from morality or from natural law? Or does it come from within, as a self-transcending from the "arcanum" of the law itself? Or is it merely some kind of reflected light? A mere shimmering illusion concealing the dark emptiness? A hypocritical self-deception on the part of modern Law, which has become blind in its formal autonomy? It is impossible to escape from this ambivalence, because there is no criterion available to us by which we can distinguish between a collective imagination of justice and a collective self-deception.

7. LAW AND LITERATURE

All in all, Kafka appears to be a sensitive observer of modern Law, whose insights provide legal sociology and legal philosophy with much food for thought. The accuracy with which Kafka portrays the excessive ambivalence of the Law seems to be at a higher level than that of many social theoreticians who reveal to us the dilemmas of Law in the modern age. Max Weber defined this dilemma in terms of the internal "formal" rationality

of the Law being at risk from "material" irrational outside influences emanating from economic and political interests. Kafka's response is that it is precisely the inmost formal rationality of the Law that is most deeply irrational. Hans Kelsen's attempts to preserve the "purity" of Law's normativity against impure empirical influences fail in light of Kafka's observation that it is precisely from its purity that the obscenity of the Law springs. The conversation in the cathedral between Josef K. and the chaplain gives the lie to all attempts at a rational argumentation theory of the Law such as those of Habermas or Alexy. In terms of scholarliness, interpretative skill, equality of opportunities for articulation, honesty and authenticity of the participants in the discussion, this conversation certainly meets the requirements of rational discourse. And yet it does not end in a liberating consensus, but in uncertainty, paralysis, anxiety and a sense of oppression. And Luhmann has to concede to Kafka that his "de-paradoxification" strategies, which under the threat of the paradox quickly invent a new distinction, will never see the inextinguishable shining light breaking forth from the door of the law, because these strategies do not expose themselves to the paradox, but stop "before the law" and its paradoxes, and commence their withdrawal back into the routine as quickly as possible.

But why, then, the literary form? Why does the experienced insurance law practitioner Dr. jur. Franz Kafka not simply write a work of well-organised legal sociology? Is the whole point of Kafka's parable to provide legal theory or indeed legal practice with suggestions as to how they could deal with the paradoxes of the Law? Or does legal literature have an added value, over and above the benefits it provides for legal theory?

The key may be found in certain peculiarities of legal practice "from the country". In the long conversations between the man and the doorkeeper, and between Josef K. and the chaplain, the communication is at a much more complex level than could ever be post-construed by rational academic disciplines. It is true that legal doctrine, jurisprudence and the sociology of law describe in great detail the rational dimensions of the legal system, the ordering of the proceedings, the logic of argumentation, the construction of legal doctrine and the structure of "*stare decisis*". But they pay no attention to what they term the "non rational" elements of legal practice, and normally exclude these from analysis, indeed they have to do so. The dark urge for justice, the convoluted pathways of the sense of justice, the arbitrary elements in the judge's professional judgement, the decision-making torments of the jury trial, the obscene elements in legal procedure, the foundational and the decision-making paradoxes of the Law – generally speaking, the particular excesses of legal ambivalence – cannot be post-construed by the academic disciplines, or not in any depth. What can logical or theoretical analyses of the legal paradoxes say about the painful experience of the paralysis, and about its ecstatic resolution in the shining light, that are experienced by the man from the country at the moment of his death? In the intricacies of the court trial, in the arcana of administrative bureaucracies, and in the practitioners' complicated contractual constructions,

legal practice creates for itself a second version of reality, rather as art or religion create their own worlds, which can only be perceived to a limited extent by the rational approach of the academic disciplines that observe them. And even legal doctrine, which in turn represents a peculiar abstraction of legal practice which can not be regarded as academically legitimate, is not capable of controlling Law's arcana by means of its conceptual tools. Social science and legal doctrine can only qualify the deeply hidden areas of legal practice as irrational, and condemn them as such. The same happens when legal sociology investigates the pre-judgements of the judiciary, and when argumentation theory analyses judgements. This second reality is not just the legal trial with its various roles, its norms, concepts and principles, but also an entire propagation of a legal world, a world which looks completely different from the everyday world or the world of academic disciplines.

Yet literary reconstructions can attain an independent insight into the secret worlds of legal practice. Assuredly, they do not have any direct access to the inmost recesses of the law either, but literature's observation produces an added value that goes beyond the most highly advanced sociology of the legal paradox to date, such as is posited by Luhmann, for example. This added value can be indirectly described as the possibility for the paradoxes of the Law to be experienced, an affective re-enactment of the practice of judgement, the "mood content" of injustice. Art, in dealing with the Law, communicates messages about legal events that cannot be communicated in words (see Michelangelo's Moses). As far as the literature of the Law is concerned, this seems counter-intuitive, for ultimately of course it does communicate about law in words; in a way that is comparable to legal doctrine, it conveys a peculiar knowledge about the legal world. But its actual literary message is not made up of the content, but of something that is verbally non-communicable but is nevertheless communicated together with the words (see Kleist's "Michael Kohlhaas", Kafka's "The Trial", Borges' "Deutsches Requiem"). "Art functions as communication although – or precisely because – it cannot be adequately rendered through words (let alone through concepts)."[21] Thus the role of legal literature should by no means be reduced to the psychological sense of justice (*Rechtsgefühl*), to the fact of its merely giving rise to affects in the psychological event. On the contrary, the duplication of meaning production in consciousness and in communication has the effect that in legal literature there is genuine communication about what cannot be communicated in words. The added value of Kafka's parable lies in the non communicable aspects of the Law being made communicable by the literary form, and only by the literary form. It is not in legal doctrine, or in legal theory, that we experience some of the secret depths of the Law, but in the story "before the law".

>> NOTES

[1] **Before the Law.**
Before the Law stands a doorkeeper. A man from the country comes to this door keeper and requests admittance to the Law. But the doorkeeper says that he can't grant him admittance now. The man thinks it over and then asks if he'll be allowed to enter later. "It's possible" says the doorkeeper, "but not now." Since the gate to the Law stands open as always, and the doorkeeper steps aside, the man bends down to look through the gate into the interior. When the doorkeeper sees this he laughs and says: "If you're so drawn to it, go ahead and try to enter, even though I've forbidden it. But bear this in mind: I'm powerful. And I'm only the lowest doorkeeper. From hall to hall, however, stand doorkeepers each more powerful than the one before. The mere sight of the third is more than even I can bear." The man from the country has not anticipated such difficulties; the Law should be accessible to anyone at any time, he thinks, but as he now examines the doorkeeper in his fur coat more closely, his large, sharply pointed nose, his long, thin, blank tartar's beard, he decides he would prefer to wait until he receives permission to enter. And the dooerkeeper gives him a stool and lets him sit down at the side of the door. He sits there for days and years. He asks time and again to be admitted and wearies the doorkeeper with his entreaties. The doorkeeper often conducts brief interrogations, inquiring about his home and many other matters, but he asks such questions indifferently, as great men do, and in the end he always tells him he still can't admit him. The man, who has equipped himself well for the journey, uses everything he has, no matter how valuable, to bribe the doorkeeper. And the doorkeeper accepts everything, but as he does so he says: "I'm taking this just so you won't think you've neglected something." Over the many years, the man observes the doorkeeper almost incessantly. He forgets the other doorkeepers and this first one seems to him the only obstacle to his admittance to the Law. He curses his unhappy fate, loudly during the first years, later, as he grows older, merely grumbling to himself. He turns childish, and since he has come to know even the fleas in the doorkeeper's collar over his years of study, he asks the fleas too to help him change the doorkeeper's mind. Finally his eyes grow dim and he no longer knows whether it's really getting darker around him or if his eyes are merely deceiving him. And yet in the darkness he now sees a radiance that streams forth inextinguishably from the door of the Law. He doesn't have much longer to live now. Before he dies, everything he has experienced over the years coalesces in his mind into a single question he has never asked the doorkeeper. He motions to him, since he can no longer straighten his stiffening body. The doorkeeper hat to bend down to him, for the difference in size between them has altered greatly to the man's disadvantage. "What do you want to know now," asks the doorkeeper, "you're insatiable." "Everyone strives to reach the Law," says the man, "how does it happen, then, that in all these years no one but me has requested admittance." The doorkeeper sees that the man in nearing his end, and in order to reach his failing hearing, he roars at him: "No one else could gain admittance here, because this entrance was meant solely for you. I'm going to go and shut it now". Kafka, 1998: 215.

[2] Derrida, 2010: 45.

[3] Agamben, 2008: 13.

[4] Wiethölter, 1989: 794.

[5] Concerning the madness of the Law, careful diagnoses are to be found in Kiesow, 2004.

[6] Kafka, 1998: 215.

[7] Kafka, 1998: 223.

[8] Kafka, 1998: 223.

[9] Banakar, 2010: 463 ff., 467; Corngold (ed.), 2009: IX.

[10] Kafka, 1971: 40 (emphasis by me).

[11] Derrida, 2010: 78.

[12] "Paradoxes are (it can also be formulated thus) the only form in which knowledge is unconditionally available. They take the place of the transcendental subject to which Kant and his successors had attributed a direct access to knowledge which is unconditional, a priori valid, and intrinsically self-evident" (translation by Alison Lewis). Luhmann, 2000b: 132.

[13] Agamben, 1998: 55.

[14] Derrida, 2010: 70.

[15] Agamben, 1998: 185.

[16] For more detail on this subject see Teubner, 2009: 1.

[17] As is well known, Kant located the power of judgement not in the sphere of pure reason, nor in the sphere of practical reason, but defined it as a means of combining the two parts of philosophy to a single whole. Kant, 1790: 84.

[18] Derrida, 1990: 919, 969, 1044. This triggered great irritation in the deconstructivist camp: Vismann, 1992: 250–264.

[19] Derrida, 2010: 57.

[20] Kafka, 1971: 8.

[21] Luhmann, 2000a: 19.

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NEW LEGAL APPROACHES TO POLICY REFORM IN BRAZIL

// NOVAS PERSPECTIVAS JURÍDICAS SOBRE A REFORMA DE POLÍTICAS PÚBLICAS NO BRASIL

Marcus Faro de Castro

>> ABSTRACT // RESUMO

This article offers a description of recent arguments about the relations between the law and economic development in Brazil which have been conceived as congenial to a new state activism: the Public Capital Management (PCM) approach and the Legal Analysis of Economic Policy (LAEP) approach. Ideas deriving from relevant literature are discussed, as well as their proposed role in the articulation of policies that attempt to promote economic development in line with efforts to enhance the fruition of fundamental and human rights. A stylized account of works by authors engaged in the legal analysis of practices of allocation of financial resources (regulation of the commercial credit market, portfolio investment by a state-controlled development bank and the organization of a cash-transfer program) is provided. The analytical framework of the LAEP approach is also discussed, including its treatment of monetary value transmission in the context of contractual structures that organize different aspects of economic policy. // O presente artigo oferece uma descrição de argumentos recentes sobre as relações entre o direito e o desenvolvimento econômico no Brasil. Tais argumentos têm sido concebidos como apropriados a um novo ativismo estatal. São eles: os da perspectiva descrita como Gestão Pública do Capital (GPC) e o da Análise Jurídica da Política Econômica (AJPE). No trabalho, são discutidas as ideias dessas duas perspectivas, tal como aparecem na literatura relevante, bem como as concepções, igualmente elaboradas em obras recentes, acerca do papel do direito na articulação de políticas públicas que busquem a promoção do desenvolvimento econômico de modo alinhado com os esforços para tornar mais efetiva a fruição de direitos fundamentais e direitos humanos. É oferecida uma descrição estilizada de trabalhos de autores envolvidos com a análise jurídica das práticas de alocação de recursos financeiros (a regulação do mercado de crédito comercial, investimentos de portfólio de um banco de desenvolvimento estatal e a organização de um programa de transferência de renda). É também discutida a estrutura analítica da AJPE, incluindo seu tratamento da transmissão de valores monetários no contexto de estruturas contratuais que organizam diversos aspectos da política econômica.

>> KEYWORDS // PALAVRAS-CHAVE

legal analysis; economic development; economic policy; state activism; human rights; Brazil // análise jurídica; desenvolvimento econômico; política econômica; ativismo estatal; direitos humanos; Brasil

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>> ABOUT THIS ARTICLE // SOBRE ESTE ARTIGO

This article incorporates and elaborates on portions of a paper entitled "Economic Development and the Legal Foundations of Regulation in Brazil", which I presented in the 4th Biennial ECPR Standing Group for Regulatory Governance Conference on 'New Perspectives on Regulation, Governance and Learning' held in Exeter, UK, from 27-29 June 2012. // Tradução do original em inglês por Paulo Soares Sampaio, com revisão do autor. O presente artigo incorpora e amplia algumas partes do trabalho "Economic Development and the Legal Foundations of Regulation in Brazil", que o autor apresentou na 4th Biennial ECPR Standing Group for Regulatory Governance Conference on 'New Perspectives on Regulation, Governance and Learning', realizada em Exeter, Reino Unido, de 27 a 29 de junho de 2012.

1. INTRODUCTION

Discussions about regulation and the relationship between public and private interests in the economy and in the law are taking new twists in the aftermath of the 2007-2008 financial crisis that spread to several markets and affected public finances and policy-making in virtually all countries of the world. Thus, for example, in early 2012 social activists in favor of the renationalization of railway services in England, such as the Bring Back British Rail movement, gained visibility when news spread that significant fare rises were being adopted in the British railway system, with ticket prices for some routes being increased up to 11%, more than double the 4.2% rate of inflation for 2011. In a similar development, public debate about economic policy and regulation surfaced in Brazil in the end of 2011, when the National Confederation of Private Schools (*Confederação Nacional de Estabelecimentos de Ensino*) announced that an increase in school fees in 2012 would be in the range of 10% to 12%, much above the projected 6.5% inflation rate for 2011. And, in a more different setting, responding to concerns of the residents of the township of Phiri, also voiced by the Coalition Against Water Privatization, the High Court of Johannesburg ruled in 2008 that the forced installation of prepaid water meters in that community was unlawful and unconstitutional, although the Constitutional Court of South Africa set aside that decision in the following year.[1]

To these facts may be added what appears to be an increased concern of multilateral organizations, such as the World Bank, regarding the levels of dissatisfaction of public opinion with privatization of formerly state-owned firms in some regions of the world.[2]

The examples above illustrate the fact that unsettling criticism is being brought against official policy and business practices in countries that have, with varying degrees of success, adopted market mechanisms in several or most sectors of their economies. One relevant aspect in the changes involved in such developments is the role that the law – legal doctrines, ideas and practices, legal institutions, grounds and vocabularies – has in propelling or hindering important transformations that affect the way in which the economy, social demands and state institutions become interwoven to form current trends in policy reform.

In the case of Brazil, during most of the 20th century, policy reform relied extensively on "administrative law" doctrine adapted by Brazilian jurists mainly from French legal discourse.[3] In the decades spanning from the 1930s to the 1990s, the evolution of this administrative law provided legal language to policy reform agendas, including investment planning of old-style developmentalism.[4] Subsequently, from the 1990s until the onset of the 2007-2008 global economic crisis, far-reaching pro-market reforms have been carried out[5] with the help of institutional conceptions essentially inspired in American legal ideas and institutions.[6] Yet, alongside administrative law doctrines that were instrumental to the pro-market reforms of the 1990s and early 21st centuty, misgivings about such legal discourse have also grown in Brazil.[7]

More recently, a newer line of legal argument has developed which goes beyond criticisms of previous legal conceptions and seeks *alternatives* to the doctrinal and institutional setup that emerged since the 1990s. This most recent line of doctrinal and analytical elaboration has tended to gain more traction after the eruption in 2007-2008 of a global economic crisis.

This article offers a description of these more recent arguments about the relations between the law, policy reform and economic development in Brazil. Such arguments have been characterized by some of its authors as being congenial to a "new state activism" [8] in the field of economic policy. The main question addressed by the present article is: In the case of Brazil, what are the legal conceptions and strategies of legal analysis that have been developed in support of revived activist policy-making? This article therefore discusses legal ideas and strategies of analysis deployed in the context of the "new state activism" in Brazil,[9] as they appear in relevant legal literature. The work also addresses and explores the possible role of such ideas, arguments and analytical strategies in the articulation of policies and the conceptions they imply about the relationship between the law, economic institutions and policy reform.

Two main formulations of the more recent alternative views about the relationship between the law, economic institutions and policy reform are covered in the present article. The first formulation is an approach that bears significant relationship to the so-called "New Law and Development" perspective, which emerged in recent transnational academic work.[10] It is nonetheless distinct in that it tries to explore the potential of building regulatory policy around the legal crafting of *financial flows* while having also a clear doctrinal concern with respect to their economic and social *consequences*. This first kind of doctrinal elaboration and mode of legal analysis can be called the "public capital management" (PCM) approach[11] prime examples of which are found in Schapiro (2010-a), Schapiro (2010-b), Fabiani (2011) and Coutinho (2010).

The second perspective that seeks to advance towards alternative views about the law, policy reform and development is called the "legal analysis of economic policy" (LAEP)[12], which has been advanced in Castro (2007), Castro (2009), Castro (2010) and Castro (2011). The LAEP approach also focuses on the importance of the legal crafting of *financial flows* and on their economic and social *consequences*, but proposes to organize legal ideas around the notions of "contractual aggregates" and of "rights-in-fruition", as applied to human and fundamental rights, including the rights that relate to consumption and those that are at the core of the activities of economic production and commercial exchange.

Section 2 offers a stylized account of works by authors engaged in the legal analysis of practices of allocation of financial resources, namely, the practices concerning (i) the regulation of the commercial credit market, (ii) portfolio investment by a state-controlled development bank and (iii) the organization of a cash-transfer program. The analytical framework of the "legal analysis of economic policy" approach – including its treatment of monetary value transmission in the context of

contractual structures that organize different aspects of economic policy – is discussed in Section 3. Final remarks are offered in section 4.

2. THE 'PUBLIC CAPITAL MANAGEMENT' (PCM) APPROACH

As indicated above, legal scholars have developed a new analytical approach that seeks to respond to a revived "state activism" which has emerged in recent years in Brazil. These scholars intend to address activities of policy reform arising in such context. Much of the work elaborated by authors of this line of legal analysis falls under what can be characterized as the Public Capital Management (PCM) approach. One of the distinct traits of this approach is that it attempts to bring to the fore the importance of the structure of *financial flows* to the realization of legal ends by groups and individuals, thereby promoting both freedom and development.

2.1. DECONSTRUCTING THE REGULATION OF COMMERCIAL CREDIT

Fabiani's work, for instance, sheds light on legal rules and principles that organize credit markets in Brazil, in which commercial banks are central players. According to Fabiani, the credit market in Brazil is an attractive topic of legal research given the fact that it is the "chief source of finance to individuals and legal persons", and yet has offered extremely insufficient and very expensive credit.[13] It is implied that a low volume of credit and high bank spreads bar individuals and groups from seeking to accomplish cherished goals. Thus, due to their influence on both the volume and price of credit offered by commercial banks in Brazil, the structure of the legal rules and principles that support the existence of that market is seen as crucial to the realization of the aspirations of society. Reorganization of the credit market, by means of reforms of the legal rules and principles upon which it relies, is therefore considered a premise of social well-being and economic development. Regulation broadly conceived thus must include a concern with the structure and legal characteristics of the credit market. Also, an upfront concern with outcomes – in this case, effective expansion of credit in tandem with a significant contraction of bank spreads – and their relation to the law is very visible in the approach.

The thrust of Fabiani's work is his careful description and minute analytical deconstruction of the arguments that were offered as the rationale of reforms that have been carried out in the laws of commercial bank credit relations in Brazil, from 1999 to 2006, under the aegis of World Bank recommendations.[14] As Fabiani demonstrates, such recommendations were themselves based on analyses and prescriptions offered by the so-called "legal origins" literature.[15] Fabiani demolishes the whole set of ideas that was used by the World Bank to formulate recommendations, and subsequently by Brazilian monetary authorities to set up and implement reforms from 1999 to 2007. Important criticisms articulated by Fabiani,[16] some of which draw on Milhaupt and Pistor (2008), attack the

following features and justifications of the policy reform implemented under World Bank auspices:

- The building of special protection of creditor rights, including an overhaul of the law of bankruptcy, premised on the thesis (taken from the flawed "legal origins" literature) that such enhanced protection is part of a fixed "legal endowment" posited as necessary to promote economic growth.
- The thesis (also derived from the "legal origins" literature) of institutional convergence of the legal endowment of all market societies.
- The fact that the "legal origins" literature relies on a narrow basis of empirical data, neglecting relevant research according to which civil law jurisdictions may have more developed capital markets than common law jurisdictions.
- The depoliticization of the implementation of reforms, which were treated by policy makers as merely technical.
- The effort to shield policy implementation from judicial scrutiny, which included the drafting of several legislative bills aimed at expanding alternative dispute resolution mechanisms.
- The technical training of judges and attorneys, sponsored by a "technical assistance loan" provided by the World Bank, to insure "correct" implementation of the new bankruptcy law.
- The reductionist view which attaches to certain institutional variables single, necessary outcomes, without considering either (i) that such variables may, in different environments, yield diverse results, or (ii) that a given variable may produce unforeseen results.
- The flawed thesis that there is a necessary, fixed legal "endowment" for market economies, which presupposes that such endowment is "external" to, and never "constitutive" of, markets.
- The lack of attention to the role of informal institutions that in different contexts may exist, as opposed to formal ones, and affect the governance structure of markets.

Fabiani's arguments, therefore, lead him to suggest that the reform of the credit market in Brazil, implemented from 1999 to 2006, had a dimension that has not been openly recognized by Brazilian governments nor by the World Bank. Indeed, Fabiani suggests that it is not farfetched to consider that the World Bank's activity in influencing the reform of the credit market in Brazil was undue political interference, which is prohibited by the bank's own Articles of Agreement. In his comment on the technical assistance loans made by the World Bank in support of the reforms of the Brazilian credit market, Fabiani stresses that "the technicalist transference of legal know-how is intended to bypass the ban on political interference by the [bank] and to legitimize requirements for the granting of loans (...)".[17] The fact that the 1999-2006 reform of the credit market – an area that is crucial to promote the well-being and development of society – came as a result of undue political interference by the World Bank is therefore denounced as being based on slanted and restrictive notions about the role of law in the economy.

2.2. THE LEGAL SIGNIFICANCE OF PORTFOLIO INVESTMENT BY A STATE-CONTROLLED DEVELOPMENT BANK

The works by Schapiro[18] also illustrate the new kind of legal scholarship of the PCM approach. The importance of the analysis of the legal foundations of procedural arrangements that organize certain *financial flows*, and also a concern for the *consequences* of the structure of such flows upon economic and social development, are conspicuous characteristics of his works.

The central focus of the discussions in Schapiro[19] is the study of the relationships between law and finance in comparative perspective with the aim of exploring relatively recent institutional arrangements of financial flows oriented to promote investment and development in Brazil. Schapiro relies partly on the frame of reference established by Hall and Soskice,[20] and also by Gershenkron[21], to highlight relevant institutional differences in financial organization and governance of industrial capital in countries such as the United States, Japan, Germany and Brazil in the second postwar period of the 20th-century. Schapiro also draws on works that explore the evolution of patterns of industrial organization, in particular the shift from a fordist to a post-fordist knowledge-based pattern of industrial development. He points to comparisons of that transition in countries of the global North with the shift from developmentalist to a post-developmentalist style of industrial policy-making in less developed countries. Schapiro is particularly interested in providing legal arguments for the justification, specifically in the Brazilian case, of financial arrangements that serve a post-fordist, post-developmentalist type of industrial organization, described as typical of a knowledge-based economy oriented to "flexible specialization".

Schapiro[22] is then led to articulate legal-economic arguments that uphold certain financial practices chosen by policy-makers in Brazil in the last fifty years in order to boost industrial development policies. Those financial practices in the fields of finance and governance of industrial capital are presented as adequate to local "post-developmentalist" industrial organization. And, as shown by Schapiro, they do not fit orthodoxies prescribed by multilateral institutions which are typically articulated with theoretical backing of the "legal origins" (or "Law and Finance") literature. The innovations adopted since the 1970s and 1980s in Brazil in the areas indicated above involved the special role of the National Development Bank of Brazil (Banco Nacional de Desenvolvimento – BNDE) and were able to offer new ways to provide credit, assess risks and support industrial development. Schapiro sees such innovations as suitable to many developing countries. In his words:[23]

> *Once the narrow criteria of the Law and Finance approach are put aside, the development bank and the financial activity of the state cease to be seen as deviant [practices] and come to be perceived as (...) legal-institutional solution[s], capable of filling the gaps of the private credit market or of the erratic oscillations of the capital market, especially in developing countries.*

In Brazil, the new financial practices included basically institutions of *forced savings* as a source of funding to a powerful national development bank (the BNDE), as well as certain financial innovations that have characterized the strategies adopted by that bank to bolster industrial development since the 1970s. Such strategies are different modalities of credit provision and, above all, of *portfolio investment* and *portfolio management* which have constituted a distinct source of finance and development policies for several industries in Brazil in the last decades.

Therefore, Schapiro criticizes the so-called "institutional convergence" thesis[24] as much as does Fabiani. Moreover, in Schapiro, the refutation of the "institutional convergence thesis" extends to a rejection of the complementary "end of history thesis", applied to corporate law.[25] As explained by Schapiro, "the Brazilian example corroborates another thesis, that of the persistence and of path-dependency of institutional trajectories – which disprove bets on uniformization".[26] According to Schapiro, in the case of Brazil, path-dependence has led to the persistence of the financial innovations mentioned above, as part of a "dense institutional web" of policies that are mutually reinforcing and distinctly favorable to industrial growth.

Schapiro[27] also incorporates insights from Brian Tamanaha[28] and other scholars to add that the "dense institutional web" that influences the economy is the outcome of the multi-faceted processes deriving from the *social embeddedness* of institutions. Thus, Schapiro ends up replacing the notion of a necessary and fixed "legal endowment" of market economies, typically employed in top-down reforms, with the idea that policy-makers should engage in bottom-up institutional experimentation that involves *learning*. This would correspond to a process of change in which reformers would attempt to learn from the evolving relationship between legal institutions and the elements that emerge from their social embeddedness. These elements themselves are considered to result from the mutual influence occurring between the law and "other normative orders", including "cultural patterns, behavioral attributes" and so on.[29]

2.3. ANALYSIS OF A CASH-TRANSFER PROGRAM TO FIGHT POVERTY

Another set of legal ideas developed in the PCM perspective is found in Coutinho.[30] This author is interested in elaborating legal arguments that account for a legal apparatus – or what he calls "legal technology" – which he sees as a necessary mean to overcome high levels of inequality and poverty in Brazil. This "legal technology", according to Coutinho, must exist for any policy. As he puts it, "there is (...) a legal dimension and a wide range of legal tasks to be accomplished behind every public policy".[31] But he chose to explore, as an empirical example, the "legal technology" demanded by the design and implementation of a vast program of conditional cash transfers run by the federal government of Brazil, called *Programa Bolsa Família* (Family Stipend Program) – hereinafter PBF.[32] Coutinho's concern has to do with his claim that the law can be understood as a "regime" that "deeply influences economic production and

distribution, and also shapes macro-economic regulation". Therefore, in his view, the law "is everything but a neutral variable when it comes to inequality and poverty levels."[33]

Coutinho is intent on finding out how to avoid that the institutions and legal norms which comprise the "legal technology" of the PBF remain in practice a "straitjacket that replicates development barriers both from the perspectives of equity and efficiency". [34] The author indicates that building effectiveness of policy requires the ability of jurists to think of, and assess, broader outcomes of reforms carried out in the details of institutions. In order to overcome inequality "embedded" in the pension system, for example, he points to the importance of the re-design of caps, compensations, incentives, procedures etc. oriented to enhance effectiveness of efforts to promote equality. Thus, as much as Fabiani and Schapiro, Coutinho views the law not only as an instrument but also as a "constitutive element" of economic change and of development. But Coutinho offers a broader typology of the roles of law in distributive policies such as PBF.[35] His typology includes the following roles of the law: (i) law as a goal, (ii) law as a tool, and (iii) law as an institutional arrangement.[36]

The first notion ("law as a goal") requires that the jurist engage in the task of identifying qualitative and quantitative goals, explicit values, political economy conceptions and perspectives of development for a given policy. On the other hand, the role of law inherent in the "law as a tool" has to do with the way of determining the legal means which are to be used in the pursuit of goals. Coutinho stresses the fact that in Brazil laws establishing public policies do not always indicate the mechanisms by which they are to be implemented. Thus, he adds jurists have to provide answers to questions about the available possibilities of articulating such mechanisms, the best legal instruments and the most cost-effective solutions regarding the implementation of policies.

Finally, the idea of "law as an institutional arrangement" refers to the function of law in the context of reform of institutions accomplished by the state resulting in a process of organizational change. This implies the building of legal-institutional frameworks which lead to forms of collaboration between public and private actors, and also to intersectoral coordination. Coutinho elaborates on Ha-Joon Chang's views[37] about the functions of institutions in promoting development to suggest that development policies must be legally "managed" so as to ensure that goals become "actions through tools", avoiding overlaps, gaps and rivalries that may frustrate the attainment of legal and economic ends.[38]

2.4. GENERAL CHARACTERISTICS OF THE PCM APPROACH

In sum, Coutinho's view about the relations between law, the economy and development has much in common with those of Schapiro and Fabiani (see above). In thinking about the law and its connections to development, all these authors highlight the importance of the analysis of *financial flows* – be it in the market of short-term credit provided by commercial banks, in policies of incomes transfer to fight poverty

and inequality, or in longer-term industrial credit and industrial capital management and corporate governance arrangements. The three authors are also concerned with the economic and social *consequences* of the legally determined structure of financial flows. Furthermore, all three authors not only admit the instrumental dimension of the law in its relationship to development, but also stress the "constitutive" role of the law in the organization and reform of markets. Finally, they all point to multiple open-ended possibilities of experimentation with institutional reform crafted by legal analysis in the different policy fields they chose to address.

3. THE 'LEGAL ANALYSIS OF ECONOMIC POLICY' (LAEP)

3.1. CONSUMPTION RIGHTS, PRODUCTION RIGHTS AND OTHER NEW LEGAL IDEAS

The characteristics of the law as conceived by the PCM approach and the conceptions about the relation of legal structures to economic outcomes are also present in the LAEP approach. But this latter perspective has also its own distinguishing formulations.

The LAEP approach proposes that all market economies can be legally analyzed as different combinations of "contractual aggregates" that organize production, exchange and consumption. While the economy is viewed as a set of practices by means of which these three kinds of economic activity are structured, economic policy is understood to be the set of legally instituted rules and principles that organize many crucial aspects of such practices.[39] Even if some portions of economic institutions result from private negotiations and contracts, according to the LAEP approach they interact with, and to varying degrees depend on, the existence of norms and organizations shared by the wider community under the form of legal rules and principles that reflect the wider public interest. Moreover, under the LAEP perspective, public interest may generate legal prescriptions that are added to private contracts by means of the legal process, as will be discussed below.

In the LAEP perspective, contractual aggregates are analytical tools, not fixed, unchanging facts. As much as lawyers specializing in antitrust law can refer to "relevant markets" [40] as analytical constructs, jurists engaged in the legal analysis of economic policy may consider legally and economically relevant "contractual aggregates". Moreover, under the LAEP approach it becomes important for regulation to describe and manage intellectually what is conceived as "contractual architectonics" and its social and economic impacts in given empirical contexts. Intercontractual relations, being selected by reference to the definition of an empirical field of economic activity which the jurist chooses to examine, become relevant to the legal analysis of regulation.

The LAEP approach also rejects notions of rights taken either as metaphysical entities (e.g., natural rights) or as normative conceptions

definitely established by positive law. Neither does the LAEP approach accept as useful any notion of abstract, decontextualized right. The LAEP view develops, instead, a special focus on "rights-in-fruition", a term which refers to the enjoyment of rights as an experience occurring in a specific context. Rights-in-fruition, therefore, always presuppose different patterns of contextualized social and institutional relations, many of which in the form of contractual interaction. This does not mean that the LAEP approach addresses only forms of small-scale, communal economy, for the "context" of economic action and rights enjoyment may vary from a small village to cross-border institutional platforms (such as international regimes) and even the cyberspace. In the latter case, the "context" would imply choice of information architecture, internet governance and so on.

According to the LAEP perspective, economic production and commercial exchange revolve around the enjoyment, by economic actors, of "production rights", which refer to rights as legal footholds of activities related to economic production and exchange. "Consumption rights", on the other hand, are a legal reference for practices that acquire meaning (cultural, moral, religious etc.) from the activities by which actors *expend*, and are not purposefully engaged in the production or commercial exchange of, economic goods and services. Thus "production rights" are always equivalent to some form of "commercial property", whereas "consumption rights" may take the form of several kinds of noncommercial (individual or shared) property and also of what are often called "social rights" or "economic, social and cultural rights" (ESCRs). Both production rights and consumption rights, of course, are forms of fundamental and human rights addressed by national constitutions and international treaties.

Two main analytical strategies are developed by the LAEP approach. The first is called "positional analysis" and refers to the empirical analysis of "rights-in-fruition" in a given empirical context. The second analytical strategy is the "new contractual analysis". In what follows, positional analysis will be described. Subsequently, an account will be given of the "new contractual analysis" and some of its implications with respect to the role of legal analysis in different legal fields.

3.2. POSITIONAL ANALYSIS

As mentioned above, "positional analysis" aims at characterizing and assessing the enjoyment of a legal right in a circumscribed empirical context. Positional analysis therefore addresses what the LAEP approach calls "rights-in-fruition". As already noted, this term designates the empirical experience of the enjoyment of rights. Rights-in-fruition come into existence in intersections of more or less stabilized patterns of social and institutional action performed by individuals, groups and authorities crisscrossing over one another. Such patterns of social and institutional action are legally expressed in contractual aggregates, which are analytical constructs designed by the jurist in light of a defined research

interest. A contractual aggregate is also typically complemented by a "social compact", which articulates commitments by governments to implement a certain policy reform agenda.[41] Examples would be the reform of the public health system, the overhaul of a tax system or the reform of financial regulation. In democracies, social compacts express several aspects of the public interest, articulate political trust and are often an ingredient of general social cooperation.

A "position" is an intersection of social and institutional action where the enjoyment of a right is brought into existence, or is partially or completely impeded. Property is itself a "position" where the enjoyment of a right is in some measure experienced. In so far as it enables economic action, a right-in-fruition involves the enjoyment of either a production right or of a consumption right. One such right must be chosen by the jurist as an analytical target. Positional analysis proceeds by accomplishing several analytical tasks that are described as follows:[42]

(1) *Referring public policies to rights as their legal renderings.* Health policy, for example, may be referred to the "right to health" (a consumption right), and/or to the right of intellectual property (such as a patent, which is a production right), that may underlie the provision of certain health services. Similarly, a housing policy may and should be legally connected to the "right to housing" (a consumption right) and/or to the "right of property" of real estate developers (a production right). Depending on the analytical interest of the jurist, he or she will select which connections to make between "rights" and "policies"[43] in light of a defined research interest.

(2) *Analytical breakdown of the relational contents of rights.* In this analytical task, the jurist is called upon to indicate what relevant patterns of social and institutional action are deemed necessary to the effective enjoyment of a right. In the case of the "right to housing", for example, the provision by the community or by the state (or even by hired private businesses) of security, public utilities infrastructure (energy, water/sewage, telecommunications), the monitoring of local environmental and sanitary conditions, and maintenance of roads and bridges near to one's dwelling – in sum, the provision of several combined services – may be considered essential to the enjoyment of the right by an individual or family or residents of a city district. In deciding what should be counted as actions or services deemed necessary for the enjoyment of a right, the jurist may work with a community of right holders and/or look for guidance in legal materials, including relevant judicial argument[44] and documents drawn from the international law of human rights.[45]

(3) *Quantification of empirical rights-in-fruition in a narrowly circumscribed empirical situation.* Overall, quantification can profit from recent discussions on the measurement of human rights compliance and further innovations brought to this field.[46] Here some hypothetical examples of exercises in quantification are offered. Again, in a situation involving the "right to housing" in a given

neighborhood, empirical research can measure the provision to the right holder of services of security, public utilities, maintenance of roads etc. In order to accomplish this part of the analysis, the jurist may produce original data by direct measurement and/or may cooperate with government agencies or civil society or professional organizations[47] to use existing data and databases. A quantified "index" of empirical effectiveness (IEE) referring to the enjoyment of a legal right may then be generated. Castro[48] suggests a hypothetical example of an IEE for the right to housing in Brazil that would factor in the measured provision of clean water, energy, sewage, security services and the like.[49] The formal representation of such index could be

$$H = \frac{3S + 2W + X + Y + Z}{8}$$

where H refers to the right to housing, S stands for security services, W stands for the supply of clean water, X, Y and Z represent any other services focused by the research (such as the supply of energy, sewage etc.). The formal representation of each service may be weighted (as can be seen in the above example), with the weights being derived from recorded perceptions of rights holders. It may also be convenient that the IEE be elaborated as a composite, resulting from the aggregation of sub-indices. Thus in the example above, H would be a composite of other measurements expressed in formal representations such as

$$S = \frac{P + O + I + S + C}{U}$$

where S stands for "security services", P represents the number of police stations in a defined city area, O stands for the number of police officers working in the service, I stands for the quantity and quality of information technology infrastructure of the police in the city area covered by the research, W represents the average wage paid to each police officer (again, in the city area covered by the research), C stands for the number of police cars employed by the police and U represents the number of residential and business units covered (or the population served) by the security services in question. Similar detailed measurements of water and energy supply etc. (indicating amounts and quality of supply per household and per business unit) could be elaborated in order to generate the final composite index H.

(4) *Quantitative definition of a "right fruition benchmark" (RFB)*. Such definition results from incorporation of rights-holders' claims and opinions about shortfalls in the enjoyment of a legal right under a participatory research project or and under an experimentalist governance arrangement.[50] The RFB elaborated as part

of the exercise of legal analysis may also be developed from benchmark indications contained in statutes or other legal or technical materials,[51] including those produced by international bodies. IEEs generated in comparative empirical research conducted in different districts of a city, and indicating drastic inequalities between districts in the fruition of a right, may also provide the basis for the elaboration of an RFB designed to diminish or suppress such inequality.

(5) *Elaboration of mutually complementary policy reform proposals.* If there is significant discrepancy between the RFB and the IEE in a given, narrowly circumscribed situation, the jurist must propose reforms to the legal framework that underlies the relevant policies, aiming at insuring the effectiveness (empirical fruition) of the analytically targeted legal right. This would be equivalent to the production of what Coutinho[52] would call an appropriate "legal technology". Since reforms are aimed at insuring rights effectiveness in the specific sense of empirical fruition, which always occurs locally, they must be planned from the bottom-up and may offer a chain of projected reforms at "higher" levels of normative references. Thus, for example, reform of a local statute intended to ensure the empirical fruition of the right to health, or the right of commercial property underlying the economic activities of small enterprises, may entail reform of a central government statute, a different interpretation of the national constitution, and even require amendments to international trade law. Similarly, the reform of a local law aimed at securing the effectiveness of the right to food in a circumscribed community may require the reform of laws and regulations adopted by the central government, and even of rules and principles regarding international cooperation in the area of financial regulation. The latter situation would be one in which food prices in consumer markets are affected by swings of prices of financial assets. This would be the case, for example, of international cooperation regarding schemes such as the World Bank's Agriculture Price Risk Management (APRM).[53]

Positional analysis, comprising the analytical steps described above, is intended to generate a picture of "shortfalls" in the enjoyment of fundamental and human rights by individuals and groups. However, the "mutually complementary policy reform proposals" (step 5 above) taken as an outcome of the analysis certainly benefits from, and should incorporate, insights generated by the "new contractual analysis", also developed by the LAEP approach.

3.3. THE NEW CONTRACTUAL ANALYSIS

Indeed, the second major analytical strategy of the LAEP approach is called the "new contractual analysis".[54] Whereas conventional contractual analysis tends to focus on the adherence of a given transaction to the "law of

contracts", jurists engaging in the new contractual analysis will be interested above all in intercontractual relations and in analyzing "contractual architectonics" formed within or among analytically selected contractual aggregates. The main concern of the jurists working in the LAEP perspective will be with the social and economic *consequences* of the current structure or architecture of contractual aggregates, including impacts that tend to "freeze" certain individuals or groups – or, for that matter, the inhabitants of whole regions – into certain "positions" within the national or the global economy. The freezing of individuals or groups into unwanted "positions" is viewed as an outcome – perhaps an unintended consequence – of "shortfalls" in the enjoyments of legal rights. Therefore, those contractual architectures that offer special incentives to certain disadvantaged social or economic groups are a matter of interest to jurists working under the LAEP approach, in so far as such incentives are aimed at securing the fruition of fundamental and human rights in light of a proposed RFB. And this must take into account both real-economy and monetary contractual contents, as explained in the paragraphs below.

The new contractual analysis proposes that jurists must concentrate on the description of the mix of contractual contents present in contractual aggregates, as revealed by resort to an ideal-typical set of contractual clauses used as an analytical tool. This means to say that, under the LAEP approach, economically relevant contracts are deemed to combine two kinds of contractual clauses that are treated as ideal-typical:

- the utility clause (U clause), and
- the monetary clause (M clause).

The content of the U clause refers to goods or services produced in the real economy, while the content of the M clause will always be an amount of money or financial asset transacted in consideration of the content of the U clause. Moreover, the difference between real-economy contracts and financial contracts lies in that, in the latter type of contract, the content of the U clause will not be real-economy goods or services, but will be transacted money or a transacted financial asset. Thus, for example, a real-economy contract by means of which a gallon of milk is sold to a consumer, the milk itself is the U content, whereas the price paid for that good is an M content. But in a *financial* contract whereby money is lent by a bank to a borrower, the M content is the interest (plus other possible fees) charged to the borrower, while the sum of money lent (not a real-economy good or service) is the U content.

Another feature of the new contractual analysis is the distinction between private interest contents and public interest contents of both the U clause and the M clause. Private interest contents are those chosen by contracting parties through private bargaining. Public interest contents, by contrast, are those established by institutionalized "negotiations" legally required to follow procedures that intrinsically promote broad publicity of all aspects of content determination. Such public procedures are typically those of the legislative process, the judicial process and the administrative and regulatory processes. Thus, any economically relevant contract and contractual aggregate may be analyzed by reference to

the template of Figure 1 (see below), where U' and M' are "public-interest contents" of the general U clause and the general M clause respectively.[55]

	U CLAUSE	M CLAUSE
Private interest	U	M
Public Interest	U'	M'

Figure 1: The new contractual analysis
Source: Castro, 2011: 42

Now, it is a contention of the LAEP approach that all contemporary market economies are mixed economies, since a vast majority of contracts combine both private-interest and public-interest contents in both the general U clause and in the general M clause.[56] Indeed, in contemporary market economies no business can produce or sell, say, pharmaceutical drugs, automobiles, smart phones or television sets without a host of regulations (in areas such as public health, environmental protection, consumer protection and so on) coming into play. All such policies add public-interest contents to the U clause of contracts. They are therefore U' contents and can only be suppressed or modified by means of public procedures subject to public legal oversight: they cannot be changed or cancelled by means of private contractual bargaining.

But there are M' contents as well. Indeed, another crucial aspect of market economies, shown by the new contractual analysis, is that taxes and interest rates must appear as M', which is distributed – sometimes quite randomly, but ideally they should follow an overall policy plan – across contractual aggregates. Assessing such distribution of M' contents in terms of their impact on the ability of rights holders to effectively enjoy their rights thus becomes a matter of interest to jurists working under the LAEP approach. Hence such jurists must develop an analysis of the distribution of M', including what may called "strategic M' contents", throughout relevant contractual aggregates, as will be described below.

In fact, under the LAEP approach, it becomes easy to understand that, in principle, all economically relevant contracts carry an interest rate (the so-called base rate) as M'.[57] Since, in their ordinary operation, banks engage in transactions in the interbank market and decide where to allocate funds – whether in government securities carrying a given interest rate or some other asset, such as short-term interbank debt etc. – the base rate is contractually transmitted to all other contracts banks engage in and thus to consumer credit, corporate credit and so on. In practice, of course, the base rate ends up being gobbled up into the price expressed as M in virtually all contracts, including financial contracts and real-economy contracts, but it must be analytically set apart.

In a manner similar to the analytical treatment of interest rates, tax charges and tax credits must also be regarded as M' contents. Moreover, it must be expected that the magnitude of such tax-related M' contents will vary from contract to contract depending on tax policy. It is tax policy that attaches tax charges or tax credits to what may otherwise be characterized as the enjoyment of a right. As in the case of interest rates, tax charges and tax credits are scattered throughout contractual aggregates. Moreover, as also occurs in the case of interest rates, due to business practices, tax charges usually end up being incorporated into the price (M) of contracts and are intercontractually transmitted, but for purposes of legal analysis they must be indicated separately so that possible policy reforms may benefit from accurate accounts of allocation of financial resources and M' liabilities, as well as their impacts in terms of fundamental "rights fruition" in the context of given contractual architectures.

Major exceptions to this structural condition of contracts, by which the base interest rate and tax charges are intercontractually transmitted throughout contractual aggregates, can be found in two instances that are also constant features of contemporary market economies. The first exception has to do with interest rate transmission in those contractual transactions that are benefited by contracts carrying "strategic" interest rates, such as in the case of industrial or agricultural policies, below-market interest rates offered by export-credit agencies and many other instances. Strategic interest rates, of course, offer special incentives to production, exchange or consumption by groups that otherwise would not be able to enjoy important (in some cases, fundamental) rights, resulting in a situation of economic injustice. From the standpoint of rights fruition, the adoption by the government of strategic tax incentives or disincentives (e.g., tax breaks or surcharges etc.) has consequences analogous to those of intercontractually transmitted interest rates.

The second major exception to the structural condition of contracts, mentioned above, is the fact that, in some markets – most prominently in labor markets and in consumer markets – the game of incorporating M' contents into the price (M) of contracts is relatively or completely obstructed. This happens either because of slanted legal rules that allocate more power to one type of stakeholder (e.g., the employer vis a vis the employee in determining how the cost structure – including wage costs – of investment is to be organized) or because of the fact that the interest in consumption, rather than in exchange, defines a closure point to price signals transmission in a given contractual aggregate.

In the latter case, which is that of final consumption, consumers cannot carry M' over to M contents of whatever further contracts they engage in, since the goods or services consumed are *expended*, not exchanged. In fact, the ordinary final consumer can only attempt to incorporate M' into the M content of one kind of contract: his or her employment or labor contract, since labor is the only commodity an ordinary final consumer is able to sell. However, as already noted, legal rules in labor markets tend to be slanted in ways that will enable employers in many instances to effectively resist wage increases. The laws of collective

bargaining, as is well known, tend mitigate this structural disadvantage of workers in many contemporary market economies. Wage earners typically engage in collective bargaining in order to attempt to transform part of the M content of their employment contract in an M' content (they also often seek to establish U' contents of their liking). The so-called minimum wage (an M' content in employment contracts), in turn, typically results from demands channeled directly through the legislative process of democracies and cannot be bargained down privately.

3.4. CONSEQUENCES FOR THE ANALYSIS OF DIFFERENT LEGAL AND ECONOMIC FIELDS

The development of both the positional analysis and the new contractual analysis, briefly described above, allow for the formation heightened awareness of the legal significance of facts and circumstances in diverse fields of law and economic policy, including exchange rate policies, different kinds of financial regulation, antitrust law and international trade law.

Thus, for example, the influence of exchange rate fluctuations on different contracts of the economy will become clear under the new contractual analysis. An important focus of legal analysis in this case will have to do with choices made by public finance policy-makers in the crafting of regulations bearing on foreign exchange contracts (i.e., contracts by which foreign currencies are bought and sold). Therefore, exchange rate-based policies that promote certain interests become visible. Hedges against exchange rate volatility in certain contracts, which may in some cases be mandated by law, may begin to be perceived as a "strategic" financial policy, depending on the general goals in light of which such policy comes to be developed.

On the other hand, financial regulations (U' in financial contracts) affecting different kinds of real-economy contracts and more generally the impacts of such regulations on prices of financial contracts – e.g., the impact of the so-called "capital requirements" of the Basel Accords[58] on bank spreads in different financial environments, as well as the possible "procyclicality" of the adopted Accord rules[59] – all become subject matters of great interest to jurists concerned both with development and human rights effectiveness, since U' in financial contracts can positively or adversely affect the ability of individuals or groups to negotiate, through contractual bargaining, their way out of unwanted positions within the economy. In themselves, unwanted positions, in which individuals or groups may become economically "trapped" or into which they may become "frozen", can be analyzed by means of "positional analysis" and usually are an indication of "defective" enjoyment of fundamental and human rights by affected right holders.

The LAEP approach also has implications for legal analysis in the fields of antitrust law and competition policy. Indeed what is conspicuously absent from the dominant style of antitrust law analysis are concerns with equity resulting from regulation of business. Equity in

this case can be understood as the quality of a set of policies that enables a right holder, given his or her current "position" within relevant contractual aggregates, to "move" into other preferred positions, merely by means of contractual bargaining.

In should not be neglected that, in its late 19th-century context, antitrust law was developed in the United States against a background of debates that opposed Jeffersonian and Hamiltonian views of society and economy.[60] Included in the concerns addressed by policy makers in that context were distributional and equity considerations bearing on the effects of economic concentration.[61] Subsequently, antitrust analysis influenced by microeconomic analysis has by and large marginalized what was called above "intercontractual relations" connecting U' and M' contents within and among contractual aggregates. The point is that, given its adherence to microeconomic premises, the dominant analytical style in competition policy tends to exclude the possibility of explicitly associating this policy with industrial policy, development policy or social policy and their relation to fundamental and human rights fruition. Competition policy and antitrust law therefore tend to miss opportunities to articulate the promotion of *fair business practices* with policy reforms that enhance the enjoyment of fundamental and human rights, including both production rights and consumption rights. These would be the kinds of policy reform that could result from the LAEP approach to the relationship between law and the different mixed economies existing in the world.

Similarly, in the field of international trade law, the LAEP approach yields some general and unorthodox perceptions. They have to do with the fact that international trade law, as developed on the basis of the General Agreement on Tariffs and Trade of 1947, has grown around the so-called "principle of non-discrimination".[62] Such principle, being projected in the "most favored nation principle" and in the "national treatment principle", mandates that economic agents be treated equally even when they are radically unequal. Indeed, less developed countries often have less capacity to foster technological innovation, have little or no access to international credit, lack institutions or a culture adequate to promote the growth of capital markets and so on. They are, in short, not equal to the rich and more developed countries. In reality, many less developed countries are unwillingly cornered into unwanted "positions" within contractual aggregates. The laws of international trade, therefore, should not be built on the principle of non-discrimination, which sidetracks notions such as "special and differential treatment", relegating them to the status of mere exceptions to the core principle of the normative system governing international trade relations. By giving a central role to the requirement that economic policy must be organized so as to promote the enjoyment of both consumption rights and productions rights, positional analysis combined with the new contractual analysis could help policy makers view many trade policy issues in a new light.

The LAEP perspective also has some bearing on what can be envisaged as legal aspects social policy design and interest rate setting. Indeed,

according to the LAEP perspective, given the existence of growing international competition and increasing cross-border capital flows, the adoption of RFBs for "consumption rights" in countries eager to promote social justice by drastically and quickly expanding the enjoyment of ESCRs may take a toll on the ability of the local economy to compete internationally.[63] Thus reforms in the policy areas concerning "production rights" should require that the M' component of RFBs must be pegged to an interest rate index that compounds selected yields of financial markets (e.g., markets for financial derivatives) and capital markets (stock exchanges).[64] This results from the fact that, in the context of open economies, a persistent lag between the return to productive investment and interest rates may negatively affect capital formation and even cause disinvestment and capital flight. According to the LAEP approach, the contractual architectonics of the national economy must "balance" the protection of consumption rights with the ability of commercial property holders to keep a competitive edge in the global economy. For this reason, an index or "basket" of interest rates taken from the most important financial markets around the world must remain an important reference for the formulation of RFBs applied to the enjoyment of "production rights" and for the conduct of international commercial or monetary cooperation. Moreover, in the reform efforts oriented to enhance the protection of consumption rights, interest rates prevailing in relevant public finance arrangements attendant to such reforms must also be considered in legal analysis.

The upshot is that, in elaborating RFBs applied to the enjoyment of "consumption rights", jurists must not neglect macroeconomic relations between consumption and production. However, in doing so, jurists do not need to – they certainly had better not – rely on existing macroeconomic models. After all, such models cannot accurately anticipate what the aspirations and strategies are of people acting through contractual aggregates. Nor are such models able to represent intellectually the potentially infinite possibilities of reform and revision of private-interest and public-interest contractual contents. Jurists working in the LAEP perspective therefore accept the post-Keynesian view according to which expectations matter and the future cannot be fully anticipated.[65]

Nonetheless, for jurists working under the LAEP approach, some relations between statistical data representing economic facts are worth paying attention to. An important example is that of international differentials among base interest rates. Indeed, under the LAEP perspective, large international disparities among base interest rates become a prominent topic of legal research and debate since such disparities are indications that the capability of businesses in high-interest rate economies to compete internationally is impaired by the inability of local investors to enjoy "production rights" with M' contents of local contractual aggregates that are commensurate with M' contents of foreign contractual aggregates. Thus disparities as those that prevailed in 2011 among the interest rates of countries such as Brazil (11%), Argentina (9.98%), South Africa (5.5%), the Euro Area (1.75%), the United Kingdom

(0.52%) and the United States (0.12%)[66] are not legally acceptable and must be criticized.

All this leads to the view that "good" regulation does not have to do with whether there is "more" or "less" state intervention in the economy. In the LAEP perspective, good regulation is not a matter of *quantity* of state intervention, but of the legally determined *quality* of policy design, as reflected in the structure public-interest contents (U' and M') of contractual aggregates. It is the legally appropriate mix of U, M, U' and M' contents in contractual aggregates, leading to balanced and full enjoyment of both production and consumption rights, that yield "good" regulation and thus also "fair" policy reform.

In sum, the work carried out under the LAEP approach must combine both "positional analysis" and the "new contractual analysis" in order to assess regulatory frameworks and propose reforms that may promote overall improvements in the balanced and effective enjoyment of consumption rights and production rights in a given sector or even in a national or regional economy. The LAEP approach also provides new legal language that may be useful in raising issues that are relevant both for legal and economic (including macroeconomic) aspects of the regulatory process. Finally, work developed under the LAEP approach also offers new legal ideas and analytical arguments that may be useful in negotiations taking place in several international bodies and policy network.

4. FINAL REMARKS

In the last few years, new legal conceptions have emerged in Brazil. They came in a context of a far-reaching global economic crisis that has affected many economies, but somewhat less the so-called emerging markets. Although they stress the need for the state to have an active role in the provision of legal means of development, the new arguments and analytical strategies in recent Brazilian legal discourse are realistic enough to recognize the utter limitations of the doctrinal constructs that provided legal grounds to the old developmetalist style of policy-making. In a world of international capital mobility and fluctuating exchange rates, the gist of the old developmentalism – its emphasis on the virtues of investment planning, as exemplified in the II National Development Plan launched in the late 1970s – no longer makes sense. The old developmentalism also expected too much from technocratic knowledge, which excluded the possibility of dealing with the unknown and trying out new policy and governance arrangements. The more recent legal discourse in Brazil is working to develop new ideas and analytical strategies in the field of law and its connections to economic outcomes in contexts about which complete knowledge is not possible, given that fact that the motivations and actions of individuals and groups cannot be fully anticipated.

On the other hand, in contrast to the bodies of legal literature that came in support of the pro-market reforms of the 1990s and early 21st-century in Brazil, the more recent formulations are concerned with

developing analytical means for assessing both the economic structure and the outcomes of policy reform. The most influential legal literature that came is support of pro-market reforms of the 1900s and early 2000s in Brazil was formalist. It never developed a consistent concern for empirically verifiable economic and social consequences of policy reform.

The new legal perspectives – the PCM and the LAEP approaches – are resolutely consequentialist and have an interest in incorporating empirical analysis into the work legal analysis. They seek to shed light on the development consequences of the legal organization of public and private finance. Both look at how the legal foundations (rules and principles) of public and private finance may offer new ways to shape policies that may serve production and exchange under normative frameworks that prod international competitiveness of local economies while also legally safeguarding forms and levels of consumption resulting in enhanced "social inclusion".

Ultimately, both the PCM and the LAEP approaches refuse to take as a valid analytical category an abstract concept of "market", which is widely used by economists. The PCM and the LAEP approaches instead take the law with its richness of principles, rules, procedures, institutions, to be a constitutive element of economic relations. They also adamantly reject the notion that only those institutions that serve markets abstractly conceived should be deemed legally valid. As is revealed by the criticism leveled by the PCM approach against the "legal endowment" thesis propagated by international legal literature, and as is clear from the insistence of the LAEP approach on the idea that "potentially an infinite number of different 'market economies' may be made to exist at will"[67] – both of the newer perspectives of legal analysis view legal institutions and ideas being essentially conventional, pliable, provisional. The corollary of this view of legal institutions and ideas is that, given their extreme plasticity, such institutions and ideas should unhesitatingly be molded by the desire of the human spirit to be free.

>> ENDNOTES

[1] See *The Guardian*, 2012, Jan 2, "Rail fare rises take effect"; Clark, N., "Help fight fare rises and push for railway renationalization". *In*: *The Guardian* (2012a), Jan 2; Bom Dia Brasil (2011), "Aumento da mensalidade escolar ultrapassa índice da inflação"; *Lindiwe Mazibuko and Others v City of Johannesburg and Others*, Case CCT 39/09, 2009.

[2] See Bonnet *et al.* , 2012.

[3] On the French origins of Brazilian administrative law, see Castro, 2012:174-177 and Castro (forthcoming 2013).

[4] For an example of the view that Brazilian administrative law must be oriented to aid investment planning and economic development, see the lecture on the transformations of legal education originally published by Caio Tácito in 1970 and republished in Tácito, 2007.

[5] For a comprehensive description of such reforms, see Organisation for Economic Co-Operation and Development (OECD), 2008. For an analysis of the political process underlying such reforms, see Castro/Carvalho, 2003: 478-482.

[6] Cf. Schapiro/Trubek, 2012: 36. See also Nunes *et al*., 2007: 20-49.

[7] See, for example, Faria, 1993; Grau, 2002; Nusdeo, 2002; Coutinho, 2002; Salomão Filho, 2002; Faria, 2008; Aranha, 2010; Carvalho, 2010.

[8] Trubek/Coutinho/Schapiro, 2013.

[9] Sometimes such new state activism is called neodevelomentalism. See, e.g., Morais/ Saad-Filho, 2011.

[10] The main reference here are the works published in Trubek/ Santos, 2006. See also works published in Schapiro/ Trubek, 2012. For an overview of the Law and Development literature, see Prado, 2010.

[11] The appellation "public capital management" is not in the literature. It is a descriptive shorthand used in the present article.

[12] Castro, 2007; Castro 2009; Castro 2010; Castro, 2011.

[13] Fabiani, 2011: 17-18.

[14] Fabiani, 2011: 97-124.

[15] The "legal origins" literature (also called "Law and Finance" literature) emerged since the 1990s. One of the basic tenets of that body of literature has been that common law jurisdictions are more market-friendly than civil law jurisdictions, being the latter characterized as inherently prone to more interventionist forms of economic governance. For a summary of the literature, its main arguments and empirical work, see LaPorta/Lopes-de-Silanes/Schleifer, 2008. For a critical appraisal, see Roe, 2006. The arguments of the "legal origins" literature have been relied upon by the World bank to justify some of its policies. Cf. Santos, 2006: n. 90/280.

[16] Fabiani, 2011: 97-124.

[17] Fabiani, 2011: 117-118. Unless otherwise indicated, translations appearing in the text and taken from works originally published in Portuguese are mine.

[18] Schapiro, 2010-a and Schapiro, 2010-b.

[19] See Schapiro, 2010-a

[20] See Hall/Soskice, 2001.

[21] See Gerschenkron, 1962.

[22] See Schapiro, 2010-a: 169 *et seq*.

[23] Schapiro, 2010: 264.

[24] See Schapiro, 2010-a: 281-290.

[25] See Schapiro, 2010-a: 282-284. The "end of history thesis" applied to corporate law can be found in Hansmann/ Kraakman, 2004.

[26] See Schapiro, 2010-a: 286.

[27] See Schapiro, 2010-b.

[28] Tamanaha, 1995.

[29] See Schapiro, 2010-b: 241.

[30] Coutinho, 2010.

[31] Coutinho, 2010: 4.

[32] The *Programa Bolsa Família* was instituted by a 2004 statute, the Law no. 10836/2004, which revamped, and consolidated several previously existing incomes transfer programs.

[33] Coutinho, 2010: 6.

[34] Coutinho, 2010: 17.

[35] Coutinho draws on Rittich, 2004, to elaborate his typology of the roles of the law.

[36] See Coutinho, 2010: 23-24.

[37] See Chang (2001). Understanding the Relationship between Institutions and Economic Development - Some Key Theoretical Issues. WIDER Discussion Paper No. 93, UNUWIDER. This work has been republished as Chang, 2007.

[38] See Coutinho, 2010: 23-24.

[39] See Castro, 2007 and Castro, 2009.

[40] About which see Pitofsky, 1990.

[41] See Castro, 2009: 34-40.

[42] The analytical tasks are specified in Castro, 2009.

[43] Establishing analytically relevant linkages between public policies and legal rights may be commonplace in common law jurisdictions, but it is not so in civil law jurisdictions, where the categories of policy analysis, surprisingly until the present day, tend to remain quite separate from legal discourse. This separation is so strong that it has justified special but still limited efforts by jurists to overcome it. An example of such effort to explicitly establish a "legal concept" of public policy in Brazil can be found in Bucci, 2006. See also Bucci, 2002.

[44] The Constitutional Court of South Africa, for example, in its landmark *Grootboom* case, considered the provision of services such as sewage and refuse removal as part of the "right to housing". In the language of the court, "housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling." See *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

[45] An example in the area of the "right to housing" would be U.N. Doc. E/1992/23, annex III at 114 (1991). As indicated therein, "both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: 'Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost'".

[46] For an overview of relevant debates, see Rosga/Satterthwaite, 2009. See also United Nations Development Program, 2006 and Landman/ Carvalho, 2009.

[47] Examples in point would be: the Federation of Women Lawyers – Fida-Kenya, in the Republic of Kenya, British Nepal Medical Trust and the Women's Global Network on Reproductive Rights (WGNRR) acting in the Netherlands. These three organizations have engaged in the

practice of Human Rights Impact Assessment (HRIA) related to health rights of women in local contexts. See Bakker *et al*., 2009.

[48] Castro, 2009.

[49] Examples in point would be: the Federation of Women Lawyers – Fida-Kenya, in the Republic of Kenya, British Nepal Medical Trust and the Women's Global Network on Reproductive Rights (WGNRR) acting in the Netherlands. These three organizations have Human Rights Impact Assessment (HRIA) related to health rights of women in local contexts. See Bakker *et al*., 2009.

[50] See, e.g.„ experiences of policy reform described in Sabel/Zeitlin, 2012.

[51] In Brazil, for example, the National Education Plan, introduced in 2001 by a federal statute (Law no. 10172/2001) established a goal that placed all public schools under the formal obligation to have its internal bodies approve, in a period of three years, a detailed "Pedagogical Plan". See Castro, 2009: 45.

[52] Coutinho, 2010. See discussion in section 2.3 above.

[53] See the announcement of the APRM program in The World Bank Group, 2011. The announcement made explicit reference to the launching of a "debut facility" in partnership between the International Finance Corporation (IFC), which belongs to the World Bank Group, and the J. P. Morgan banking corporation. For a discussion of cooperation initiatives that promote the adoption of hedging techniques using derivative markets and private actors in the derivatives industry, see Bush, 2012.

[54] See Castro, 2007 and Castro, 2011.

[55] The designation "general" applied to the "U clause" or to the "M clause" covers both private and public interest contents of such clauses.

[56] See Castro, 2010.

[57] See Castro, 2011: 43-44.

[58] The original 1988 Basel Accord on banks' capital requirements have been revised twice. The latest version (Basel III) was published in 2010. See Basel Committee on Banking Supervision, 2010.

[59] For an argument that the rules of Basel II were "procyclical" (by which is meant that they tended to reinforce the movements of the business cycle), see Drumond, 2009. In legal terms, procyclicality of course adversely affects the enjoyment of rights both by holders of consumption rights and holders of production rights. The downward swing of the business cycle may throw individuals and groups into unwanted "frozen" positions. With the help of the LAEP approach, what to do about perceived procyclicality of some policies becomes not only an economic but also a *legal* issue.

[60] This paragraph draws on Castro, 2010.

[61] See Sullivan/ Harrison, 2003. In this sense, these authors stress that "Jeffersonianism found expression in the congressional debates culminating in the passage of the Sherman Act". See idem, p. 3.

[62] See Trebilcock/House, 1995: 26-30.

[63] This point is articulated in Castro, 2009: 52-60.

[64] Idem, ibidem.

[65] As put by Paul Davidson: "[E]conomic decisions are rarely made on anything like a clean slate. As different individuals or groups approach the same economic circumstances with different 'slates,' so their expectations and hence their decisions may also differ. Post Keynesians, therefore, emphasize the role played by this heterogeneity of expectations, as well as the importance of the fact that future events cannot be fully anticipated." See Davidson, 1980:158.

[66] Figures are for short-term interest rates percent per annum. Source: Principal Global Indicators (PGI) published by the International Monetary Fund (IMF), available at http://www.principalglobalindicators.org/. Visited on May 5, 2012.

[67] See Castro, 2010: 36.

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MAY EVERY PEOPLE WEAVE THE THREADS OF THEIR OWN HISTORY: JURIDICAL PLURALISM IN DIDACTICAL DIALOGUE WITH LEGISLATORS

// QUE CADA POVO TEÇA OS FIOS DA SUA HISTÓRIA: O PLURALISMO JURÍDICO EM DIÁLOGO DIDÁTICO COM LEGISLADORES

Rita Laura Segato

>> ABSTRACT // RESUMO

The article examines all the elements brought together by the author to build a contention for a Public Hearing at the Brazilian House of Representatives against the passing of a law criminalizing the presumed practice of infanticide by indigenous people in Brazil. It also includes the speech delivered at the Public Hearing. Critical of cultural relativism, the argumentation defends instead historical pluralism and proposes the idea of a *restitutive State*, devolutionary of communitarian rule and guarantor of community internal deliberation. Devolution of ethnic jurisdiction amounts to a devolution of command over indigenous own historical project. // O artigo examina todos os elementos que a autora considerou para construir sua arguição contra um projeto de lei de criminalização da suposta prática de infanticídio indígena apresentada em Audiência Pública reunida no Congresso Nacional. Inclui também a sua fala nessa Audiência Pública. Crítico do relativismo cultural, seu argumento defende, em seu lugar, o *pluralismo histórico*, e propõe a ideia de um *Estado restituidor*, devolvedor do foro étnico e garante da deliberação interna na comunidade. A devoluçao da jurisdição étnica equivale à restituição do controle sobre as rédeas da própria história.

>> KEYWORDS // PALAVRAS-CHAVE

Legal Pluralism; indigenous law; indigenous infanticide; "historical pluralism"; "restitutive State". //Pluralismo jurídico; direito indígena; infanticídio indígena; "pluralismo histórico"; "Estado restituidor"

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>> ABOUT THIS ARTICLE // SOBRE ESTE ARTIGO

This is a revised and modified version of an article published in Spanish in Victoria Chenaut, Magdalena Gómez, Héctor Ortiz y María Teresa Sierra (Coords), *Justicia y diversidad en América Latina. Pueblos indígenas ante la globalización*, México D.F, CIESAS/FLACSO-Ecuador. // Esta é uma versão revisada e modificada de um artigo publicado em espanhol em Victoria Chenaut, Magdalena Gómez, Héctor Ortiz y María Teresa Sierra (Coords), *Justicia y diversidad en América Latina. Pueblos indígenas ante la globalización*, México D.F, CIESAS/FLACSO-Ecuador.

>> EDITOR'S NOTE // NOTA DO EDITOR

It is necessary to make a comment on the difference between the anthropological meaning of infanticide as used in the text and the technical meaning of the Brazilian criminal law, as laid down in article 123 of its Criminal Code: "To kill, under the influence of puerperal state, the own child, during childbirth or right afterwards". // É preciso fazer uma ressalva em relação a diferença entre o sentido antropológico de infanticídio, aqui empregado, e o sentido técnico do direito penal brasileiro, exposto no artigo 123 do código penal "Matar, sob a influência do estado puerperal, o próprio filho, durante o parto ou logo após".

1. SUPPORTS AND LIMITS FOR THE CONSTRUCTION OF A DIFFICULT ARGUMENT.

In August 2007, I was invited by the Human Rights Commission of the Brazilian House of Representatives to present an anthropological view on the issue of the infanticide supposedly practiced by some indigenous groups in Brazil. The Public Hearing represented a necessary step for them to take their positions before the imminent voting of a federal law criminalizing such practice. In this paper I will detail the set of considerations and data that informed the preparation of my argument, present the text with which I questioned the approval of the bill, and expose the theoretical conclusions that emerged in the process of its elaboration. In fact, as I will propose, to conclude the rhetorical exercise whose crafting I describe here, the categories of *people* and *history* emerged as the only ones capable of supporting the defense of a process of giving back the practice of justice to the indigenous community by the national State. When I received the invitation I realized I would have to build my considerations in a complex way, loyal to the principle which I had settled to guide my practice as an anthropologist: to remain responsive to the demands of those habitually in the position of being "studied"[1].

The first problem I faced was that I found myself divided between two contradictory discourses, both coming from indigenous women, and both being familiar to me. The first discourse was the rejection of the bill by the indigenous Gender, Childhood and Youth Subcommittee, manifested in the first Extraordinary Meeting of the newly established National Commission of Indigenist Policies - CNPI, that took place in March 12 and 13 of 2007[2]. The second one was the complaint expressed by one indigenous woman, Edna Luiza Alves Yawanawa, from the border between Brazil and Peru, in the state of Acre, who, during the Human Rights workshop for women which I advised and supervised in 2002 for the National Indian Foundation (FUNAI), described the mandatory infanticide of one of two twins among the Yawanawa as a source of intense suffering for the mother – therefore also a victim of the violence of this practice. This was, in her experience, one of the hardest cases to solve contradictions between the right to cultural autonomy and women's rights[3]. I had before me, therefore, the hard task of arguing against this law, but at the same time making a hard bet in the transformation of the indigenous custom.

Setting aside these two references – and at the same time contentions – for my argument, I should also build it in such a manner that it could be deemed acceptable by the Congress members of a national State of strong Christian influence, heir of a colonial State, formed in its large majority by white men, many of them landowners in regions with indigenous presence and, in the case of the law, represented by the aggressive group of evangelical members of parliament, well-articulated and active in Brazilian politics. It was precisely one member of the "Evangelical Parliamentary Front" – Henrique Afonso, member of the House of Representatives for PT (Partido dos Trabalhadores – the Labour Party) and member

of the Presbyterian Church of Brazil - who proposed the Bill 1057 (2007), debated at the Hearing.

If, on the one hand, I was backed by the Brazilian Constitution of 1988 and the ratification in 2002, by Brazil, of ILO's Convention 169; on the other, the defense of life presented itself as the inviolable limit of any attempt to relativize law. In fact, the Constitution of 1988, especially in its articles 231, 210, 215 and 216, recognizes and safeguards the existence of cultural diversity within the nation and the right to the plurality of particular forms of social organization. From this pluralist constitutional view in the cultural order, analysts such as Marés de Souza Filho[4] and Fernando Antônio de Carvalho Dantas[5] state that the Constitution of 1988 sets the grounds for the progressive exercise of indigenous communitarian justice in Brazil. The ratification of ILO's Convention 169 in 2002 was also a step forward in the path to the recognition of indigenous law. Yet, the customary indigenous norms – despite acquiring legal status by the incorporation of the Convention to Brazilian legislation – are still limited by their mandatory subjection to the norms of the "national juridical system" and to the "internationally recognized human rights." For reasons that I cannot fully analyze here, even though the Brazilian state encompasses approximately 220 indigenous societies and a total amount of 800.000 indigenous inhabitants (0,5% of the population), it is very far from a real institution of pluralism and even farther from the elaboration of agendas for the articulation between National State law and indigenous law, like the ones found in Colombia or Bolivia. Indigenous communities themselves do not demand from the Brazilian State the restitution of the right to exercise justice with the same effort as they demand the identification and demarcation of their territories, nor is there a clear idea of what this restitution, within the process of reconstitution of their autonomies, would mean. There is not enough research on the topic, but this underdeveloped field of indigenous justice could be explained by the inexistence, in Portuguese colonial law, of the figure of the indigenous *cabildos*, bearer, in all Hispanic America, of the administration of justice when the violation did not interfere with the interests of the metropolis or its representatives. There have been great advances in Brazil in the identification and demarcation of indigenous territories. However, these territories do not function as true jurisdictions, for the return of land has not been followed by an equivalent process of consideration and reconstruction of local instances of conflict resolution, increasing degrees of institutional autonomy in the exercise of local justice and gradual recuperation of the procedural practice. The image of tutelage, still operating in the "Indian Statute", despite its partial withdrawal from the new constitutional text, contributes to reducing every indigenous person, in their individuality, to the ambivalent regime of subordination/protection by the National State.

To the cautions presented so far, I should add that my argumentation here could not be concentrated on an analysis of the several cosmological, demographic, hygienic or practical reasons that apparently could lead to the continuity of the practice of infanticide in several different societies,

or to invoke the depth of the difference of such concepts as "person", "life" or "death" in Amerindian societies. The relativist paradigm in anthropology, in its century of existence, has not impacted the public consciousness, including that of members of Parliament, so as to allow the debate being held in these terms in the national juridical field. This placed me directly before the central question of my task: *with what arguments those of us who defend the deconstruction of a State of colonial roots can dialogue with its representatives and defend autonomy, when this entails practices as unacceptable as the killing of children?* We found ourselves, beyond any doubt, facing a extreme case for the defense of the value of plurality.

This difficulty was made worse by the amount of journalistic material of different kinds that religious organizations were broadcasting, about children who were saved from death – a strategy that culminated in the interruption of the Public Hearing to allow the entrance of ten people from these organizations. Some mothers and several people with special needs, in many degrees of gravity, gave tokens of gratitude to the organization that had saved them from death at the hands of their respective societies. "Atini, Voice for Life", a local evangelical NGO, but with international ramifications in radios and websites in English[6], was behind this surge of social communication and media power, and even produced a small guidebook called "The Right to Live". (Series "Os Direitos da Criança", chapter "O direito a viver"). The pamphlet, "Dedicated to MUWAJI SURUWAHA, the indigenous woman that confronted the traditions of her people and the outside world bureaucracy in order to safeguard the right to life for her daughter Iganani, who has cerebral palsy" (my translation), includes the following subtitles, representative of the cases in which several indigenous societies make use of the practice of infanticide: "No child is like another, but all of them have the same rights", "The right of the child is more important than their culture"; "It is the obligation of the community to protect their children"; "Twins have the right to live"; "Children with mental problem have the right to live"; "Special children, that are born with some form of problem, have the right to live"; "Children whose mothers do not want to raise them, or cannot raise them, have the right to live"; "Children whose father is from another indigenous group have the right to live"; and also informs about the current legislation for children's protection (The Convention on the Rights of the Child of the United Nations; The Statute of the Child and the Adolescent of Brazil; and the second clause of Article 8 of the ILO's Convention 169, that establishes limits to local customs).

Both news planted by this organization in newspapers and magazines of national circulation and the touching entrance of mothers and children into the Congress hall in which the session was taking place naturally produced an image of indigenous societies as barbarous, homicidal and cruel towards their own defenseless babies. Opposed to this image emerged a religious movement that claims to "save the children" from people who murder them. The legitimate defense of the life of each child and the desire of a good life for all thus turned into an anti-indigenous campaign voicing the need to increase supervision of life in indigenous

villages. The main claim was the supposed need to protect indigenous children from the cultural incapacity of Indians to care for life. From the particular aspects of each case there was a movement towards a general policy, from a Christian perspective, of vigilance of indigenous life and the depreciation of its standards and values, together with the cosmological bases that support them. The mission thus presented itself as indispensable to the wellbeing of these incapable "primitives" and the eradication of their savage customs – in other words, to their celestial and mundane salvation. The law that was thus proposed was the result of a project from churches that promoted themselves as "saviors of the indigenous child" (I intentionally paraphrase the ironic title of Anthony M. Platt's classic[7]).

In July 2008 the interests and forces represented by the evangelical parliamentary front were neither able to approve this act nor to stop the liberalization of other legislation concerning the management of human life. The legislative attacks against abortion, same-sex marriage, stem-cell research, etc. allow us to see the biopolitical dimension of the contemporary religious intervention in the public sphere[8]. As part of this biopolitical interventionism, Hollywood director David Cunningham (whose father Lauren Cunningham is one of the founders of the missionary institution Youth with a Mission / YWAM – JOCUM in Portuguese) released the film Hakani: Buried Alive – A Survivor's Story. This film offers the erroneous impression that it is a documentary record of the burial of children alive, already grown, by indians at a Suruwaha village. The film, interpreted by evangelized indigenous actors of the Karitiana society and shot inside a property of the Mission, is severely damaging to the image of indigenous people in Brazil, and to the Suruwaha in particular[9]. To the distress of its producers, the film, which was broadcasted in a variety of large audience Brazilian TV programs as if it were a documentary, was, at a Sunday evening program, watched by its very actors in their Karitiana village of the Rondônia State. They were shocked to discover that the script did not show them representing ancient indigenous life, as they were told by the production. Instead, they realized the film pretended to represent contemporary life of Indians burying children alive. They resorted to the Public Prosecutors of the Rondônia State, and sued the production. The process is still running. However, nothing less than the headquarters of the prestigious Order of Brazilian Lawyers (OAB), in Brasília, offered, in 2012, a course on the theme of indigenous infanticide during which, to my astonishment, the organizers showed, despite my voiced objections, the film Hakani as if it were a documentary.

2. THE BILL DRAFT, ITS INSPIRATION AND THE COINCIDENCE OF AGENDAS IN THE INTERNATIONAL SPHERE.

The authors of the law draft 1057 (2007) called it Muwaji bill, honoring a Suruwaha mother said to have saved her child with cerebral palsy from infanticide[10]I will not focus here on building a critique of the

proposed piece of legislation in juridical terms. It is enough to say that I have repeatedly indicated that this law "ultra-criminalizes" indigenous infanticide because, on one hand, it repeats the sanctions over actions already framed in the Constitution and the Penal Code and, on the other, includes in the accusation not only the direct authors of the act but all of the actual and potential witnesses, which is to say, the whole village in which the act occurs, and other witnesses such as, for instance, the representative from FUNAI (National Indian Foundation), the anthropologist, or health agents, among other possible visitors. The main arguments supporting the law came from Edson and Márcia Suzuki, a couple of active missionaries among the Suruwaha that appeared in written media and in high audience television channels for having rescued from death the girl Ana Hakani, sentenced to death due to a severe hormonal genetic dysfunction, and that now attends primary school in an elite private school in Brasília. In two consecutive full page articles in the main newspaper of the Brazilian capital (*Correio Braziliense*[11]), respectively entitled: "Hakani's second life" and "Hakani's laughter", several photographs showed the girl in her new environment and used her image as propaganda for missionary action. After an appalling manipulation of the story, the chronicler affirmed that Hakani's reception by her colleagues of primary school "throws away any suspicion of prejudice" as, according to the testimony of one of them, Hakani is "just like us. I don't even remember she is Indian" (my translation). The newspaper recounted what supposedly was the process of rejection suffered by the girl in the environment where she came from, but does not offer any kind of contextual information capable of turning the story comprehensible for the readers.

Coincidently, shortly after I was summoned to deliver my speech in the Public Hearing, I received an indignant message from my colleague Vicki Grieves, activist, anthropologist and aboriginal college professor. In her letter, Vicki tried to inform the international community about a new law promulgated in her country of origin, Australia, saying: "Dear friends: you are probably aware of the very offensive incursions in aboriginal communities of the Northern Territories under the disguise of 'saving the children'." The motto of the supposed salvation of children was simultaneously invoked in Australia, claiming the necessity of protecting them from abusive parents. We thus became aware that the intervention in the Australian Northern Territories was being justified in the name of fighting against a supposed epidemic of "child abuse". Precisely on August 17 of 2007, 19 days before the Public Hearing in which I took part, the Commonwealth Parliament "approved without restrictions a set of measures that implemented nationally the urgent response of the federal government to the *Ampe Akelyernemane Meke Mekarle*, the report 'small children are sacred'." The new legislation made all kinds of possible interventions in the territories, reducing rights and freedoms, and the suspension of customary law[12]. In an excellent conference address, Jeff McMullen reveals the flaws and interests behind the actions "in defense of the children"[13]:

> *This dramatic assault by the Federal Government on more than 70 remote communities that are property of the aboriginal people of the Northern Territory started with the wrong words and without consultation to their traditional owners. Every indigenous leader will affirm that it is one of the most serious forms of offense...*

The parallel between the interventionist alibi in Brazil and in Australia is revealing. The counter-arguments, therefore, will have to be of the same kind: the only possible solution is consultation, respect for the autonomies and the delegation of responsibilities to the peoples with the necessary means to solve the problems. In subsequent conversations with activists from that part of the world, we were agreed about the coincidences between the agendas attempting to open the indigenous territories, in both continents, to interventionist and colonizing States and State-allied corporate groups in the field of agribusiness and mining. A new surprise came when we discovered that the Brazilian bill, still in its condition of a draft law not yet approved, had been translated to English and was available on the Internet – something very unusual even for sanctioned current legislation[14].

3. BRIEF PANORAMA OF THE PRACTICE IN BRAZILIAN INDIGENOUS SOCIETIES.

I will take some information that allows us to understand the Hakani case, invoked by the Evangelical Parliamentary Front to publicize the bill, from the final essay to the UNESCO Chair of Bioetics at the University of Brasília presented by Saulo Ferreira Feitosa[15] (ex-Vice-President of the Missionary Indigenous Center– CIMI). In order to build their very elucidatory synthesis, the authors make use of studies that are probably the only bibliographical source on the matter in Brazil that look into the subject of indigenous infanticide[16]. According to these sources, the Suruwaha, from the Arawak linguistic family, that inhabit the Tapauá District, in the Amazon State, 1228 km away from the capital, Manaus, by the river, kept themselves in voluntary isolation up until the end of the 1970s. They had their first contact with Catholic missionaries of a team from CIMI ("Missionary Indigenous Council"), that realized they were "a people capable of assuring their sustainability and keeping their culture alive, as long as they remained free from the presence of invaders" understood that "they should adopt a strategy of no direct interference in the life of the community", just fighting for the demarcation and protection of their territory – which did not take long to happen. This team then limited itself to follow the group at a distance, keeping an inoculation schedule and respecting their voluntary isolation. But four years later, the YWAM Evangelical Mission of the Suzuki missionaries decided to settle among the Suruwaha permanently[17].

The group that suffered such intrusion from the two teams of YWAM missionaries had the following characteristics, succinctly: they had a

total population of 143 people; between 2003 and 2005 "there were 16 births, 23 deaths by suicide, 2 infanticides and one death due to illness"; "the average age of the population, in 2006, was 17.43 years old"[18]. The authors, expanding their synthesis, also inform us that, among the Suruwaha, "behind living or dying, there is an idea, an understanding about what life and what death is", which is to say, of which is the life "that is worth living or not". Because of this, citing Del Poz, they add: "the consequences of this thinking are perceived in numbers. 'The reason for mortality among Suruwaha are eminently social: 7,6% of the total number of deaths are caused by infanticide and 57,6% by suicide'"[19]. In that environment it makes sense to live when life is enjoyable, without excessive suffering, for the individual and for the community. That is why it is thought that the life of a newly born child with impairments or without a father to help the mother in their protection is one too burdened to be lived. In the same way, "in order to avoid future pain and abandonment in old age, the child grows up accustomed with the possibility of committing suicide".

With these references in mind we are able to comprehend that at the core of the issue there are local ideas about death among the Suruwaha, significantly different from the meanings ascribed by Christian thinking. We also apprehend that these ideas are conformed to a complex, sophisticated vision, of great philosophical depth, that is not lesser than Christianity, by any measure. An evidence of historical inefficacy of anthropology is precisely that it was not able to create, in the West, a convincing image of the quality and respectability of different ideas about fundamental issues[20]. For this reason, the ways in which this group is depicted by the missionaries in the media generates the impression of ignorance and barbarism, as well as the certainty that they are incapable of aptly taking care of the lives of their children.

As I mentioned earlier, ethnographies dealing with the subject of infanticide are scarce, in the first place because reliable first hand reports are totally absent in literature, and there are no second hand reports of the practice in the last decade. In earlier times, the practice, when in fact occurred, was rare, never realized under the eyes of ethnographers and there was, apparently, a general consensus that the mere mention of the possibility of its existence could be damaging to the communities and expose them to police intervention and even more intense harassment on the part of greedy missionaries from several Christian churches. Nevertheless, it is known, from various ethnologists' oral reports, that, within the category "infanticide" there are a variety of practices which, when subjected to closer scrutiny, appear to be very diverse, both in their meaning and role within the group as in the meaning they could get in the field of Law and Human Rights. For example, in some societies, there is a rule derived from cosmology, which, when and if obeyed by the community, would determine the elimination of the newborn twins. In others, the community, the family or the mother, depending on the people in question, is in charge of the decision, subject to considerations on the infant's health, or the material conditions of the mother or the group to guarantee its life in the short or medium time span; or considering the absence of a

fatherly figure for physical and symbolic care in an environment where resources for subsistence are tight and there is no surplus. Anyhow, from the many testimonies gathered when I was preparing, in 2010, a report for UNICEF on the subject, it is possible to state that neither the cosmological rule nor any other of the supposed causalities properly determine obedience; that is, they do not produce effectively and in an automatic fashion the compliance with the execution of the practice. Recurrent reports convincingly lead to understand that there are maneuvers and strategies to avoid compliance with the rule, for example, by circulating the infant for its care by another family within the network of relatives, neighbors, acquaintances or wider community. For the reasons explored so far, we should therefore examine this subject having in mind, then, only the rule or prescription of infanticide – cosmological or related to the infant's health or to scarcity of resources –, leaving aside any consideration of effective practice, in case they do exist, always remembering that for no society the rule, as any norm, maintain a causal relationship with actual practices[21].Depending on who may hold the decision, the ways in which human rights can be summoned to intervene may change. If it is the community who decides, the mother may feel harmed in her right to preserve the child. When the decision belongs to the mother, the harm to individual rights may be perceived as concerning the child. In different societies, cosmological reasons or pragmatic considerations about the infant's or group's needs for survival judged by the mother or by close relatives guide the decision to welcome a new life. Let us observe some characteristics and meanings that affect the prescription of infanticide in two different societies that I was acquainted with by oral communication with two anthropologists.

In November 2005, during the Seminário Interamericano sobre Pluralismo Jurídico (Interamerican Seminar on Juridical Pluralism) that I organized in Brasília in collaboration with the Sixth Chamber of Minorities of the General Prosecutor of the Republic's Office (Procuradoria Geral da República) at the School for Advanced Studies of the Union's General Public Prosecutor (Escola Superior do Ministério Público da União – ESMPU), the anthropologist Iván Soares, acting then at the State Prosecutor's Office in Roraima, in the Northern frontier of Brazil, with large indigenous population, disclosed important details about Yanomami conceptions related to what we would understand asinfanticide. His goal was to answer one public attorney who was defending the application, in all cases, of the universal rule of Human Rights. With this objective, he shared that Yanomami women have a complete power of decision with regard to the life of the newborns. Birth happens in the forest, outside the village; in this secluded environment, outside the context of social life, the mother has two options: if she does not touch the baby, nor lift him in her hands, leaving him in the ground where it fell, that means that he has not been welcomed in the world of culture and of social relations, and, therefore, will not turn human, because, in the native's point of view, the "humankind attribute" is a collective construction, without which no organism may become human. Humanity, therefore, is no other thing

than the outcome of a humanization effort invested on the new being by the collectivity. Thus, in the native perspective, it is not possible to say that a homicide is in question, since that what would remain in the soil does not constitute a human life. As it becomes clear, among the Yanomami, biological birth is not, by itself, entrance to humanity, as, for this to occur, there will have to be a "postpartum birth", which is produced in culture and inside the social fabric. Such conception is found among many other first Brazilian populations[22], and allows us to oppose the Amerindian conceptions with the biopolitics of Human Rights, leading to dilemmas such as the ones examined by Giorgio Agamben in his work about the Homo Sacer[23].

A second example is what Patricia de Mendonça Rodrigues[24], ethnographer among the Javaé, inhabitants of the Bananal Island in the State of Tocantins, in Central Brazil, reported to me she believed was behind the prescription of infanticide in this group. For the Javaé, the newborn baby enters the world as a radical otherness, a non-human "other" that must be ritually humanized through care and nurture by his relatives. The baby arrives contaminated and with an open body as his matter is made of a mixture of substances from his parents. The social task is to humanize him, which is to say, to work so that his body is closed and may constitute him as a social and individual subject. In this sense, his extinction would not be understandable as a homicide.

> *The fact that he is born as a complete stranger, as I understand it, justifies the practice of infanticide. The Javaé don't say it openly, but everything indicates that the conscious justification for infanticide, in most cases, is that the baby does not have someone to provide for him (because the mother does not know who the father is, or because the father abandoned the mother, or due to another reason), not only to provide for him economically but above all to assume the responsibility of what is necessary for the long and complex rituals that would identify him again with his magical ancestors, giving him his public identity of a closed body. It belongs to the father, primarily, the social responsibility of the public transformation of the open-bodied son into a closed-body relative, that is, a social being. A child without a social father is the worst possible insult for a Javaé, and a perfectly acceptable motive for infanticide (from Mendonça Rodrigues, oral communication. My translation).*

We notice once more that it is not ignorance that hides behind the difference in treatment of the newborn life in aboriginal societies of the New World, but rather a different understanding of how and when it becomes human, and of what are the social obligations that shape the process of humanization. Even though we, anthropologists, by one way or another, have known this for a long time, when we engage in a dialogue with the State through its representatives, we cannot simply cite it. At some moment we will have to deeply ponder over the reasons for this, and over why other conceptions of life, in their radical difference and in the intelligence of their terms, do not enter the State mental horizon,

whose strategy of control falls daily into what Foucault calls biopolitics or biopower[25] and thus progressively distances itself from the indigenous and communitarian notions of human life.

Even though there should not be a lack of arguments in favor of human life as a social, not biological, responsibility, Esther Sánchez Botero assumes – and it could not be otherwise – that, when dealing with the State, it is necessary to speak the language of the State, since it does not open itself to radical difference. In her last work, *Entre el juez Salomón y el dios Sira. Decisiones interculturales e interés superior del niño*, she clearly identified the classical juridical strategy: it is necessary to deeply acknowledge the code of Law, in order to argue from the inside[26]. This impressive work, which brings favorable arguments to the preservation of indigenous jurisdiction in disputes that threaten it, extracts and systematizes the accumulated experience in an array of judicial cases under the light of a thorough conceptual discussion, both in the fields of law and anthropology.

The author confirms that it is not the juridical minimum – a strategy chosen by the Colombian legal system to confront the dilemmas of juridical pluralism – that must orient the judgment of what in the West is perceived as a breach of the principle of the "superior interest of the child", established by the International Convention on the Rights of the Child. For the author, this principle "is an extension of the principles of the West and does not necessarily constitute an achievable ideal in all cultures and for all cases", because the "superior interest" refers to the child as an "individual subject of rights" and does not encompass the "constitutional recognition of the indigenous societies as collective subjects of rights". For this reason, the "generalized, non discerning and mandatory application of this principle, besides being unconstitutional, can be ethnocidal, as it eliminates cultural values that are indispensable to the biological and cultural life of a people"[27].

Thus we learn that each decision must comply with a "test of proportionality" and only "the ends admitted by the Constitution and recognized by the interpretation of the Constitutional Court as of a greater level could limit the fundamental right of the indigenous people" to being a people. In short: for the author, the rights of the child "do not prevail over the right of the indigenous people to be ethnically and culturally distinct"[28]. It follows that, in cases that entail a breach of the superior interest of the child, it is fundamental to consider and evaluate the rights that are placed in contradiction: the right to life of the individual subject and the right to life of the collective subject, as well as the right to life of the mother and the right to life of the newborn. Before these contradictory pairs, it will have to be decided which of the terms will be harmed, in favor of the greater right. If the mother cannot fulfil the responsibilities of protecting the new human life, as it happens in the medical field, priority must be given to the life of the mother instead of that of the baby, because other children also depend on her. In the same way, if the inclusion of a child in certain conditions puts at risk the survival of the community as such, it is the community that will have the priority, as

all of its members depend on its ability to continue existing. For Sánchez Botero, only the sociocultural context of each particular case allows this judgment to be made.

4. DECISIONS ABOUT THE STRUCTURE OF MY ARGUMENT.

Despite the fact that the reading of Sánchez Botero's work offered me certainties about the defensible nature of an extreme practice such as infanticide, always in regard to certain circumstances, it still did not solve the problem of how to argue about it before the legislators. In part because in Brazil there has not been yet an official debate about indigenous jurisdictions or autonomy that could orient my argumentation; in part because those to whom my arguments were addressed were not judges interested in solving cases of infraction of the interest of the child, but rather members of a House that found themselves on the brink of voting a general bill about the subject. Thus, I would have to take *sui generis* decisions that would allow me to deem convincing the central point of my lecture: that criminalizing indigenous infanticide, specifically, was in no way desirable to the Nation and its peoples.

Some data was necessary for the exposition, as well as finding a language that would make it efficacious: 1) the demographic growth of indigenous societies post-military dictatorship had been noticeable, and that proved the capacity of indigenous groups to care well for their children; 2) the State that attempted to frame indigenous societies in the law was itself, susceptible to framing and judgment[29]; 3) the penal efficiency and emphasis of the State on criminalization as form of control – resources to which the law appealed – had been questioned by respected specialists; 4) the law was not necessary because it legislated that which was already legislated; 5) by emphasizing the individual rights to life of the children, the law did not focus on considering the equally necessary respect and protection to the rights of the collective subjects – a result of many obligations contracted by Brazil in the field of Human Rights; 6) the National Congress had no legitimacy to vote a law of intervention in indigenous villages without the presence of representatives of the people affected by this deliberation – that was confirmed days later, on September 7, 2007, when Brazil became one of the signatories of the UN's Declaration of Rights of Indigenous Peoples[30]; 7) similar experiences showed that the pretension of legislating super-criminalizing infanticide and its witnesses, which is to say, the village and all of the people present in it, was dangerous, as the reaction, in a time beset by fundamentalist strategies, could be the transformation of this practice in an emblem of ethnic identity[31].

It was also fundamental to ponder carefully over what could be said about the role of the State, as well as to evaluate the options that could replace the examined law, since opposing its approval did not necessarily mean to approve the practice of infanticide – in respect to the complaint of the Yawanawa woman already mentioned. Despite the constant

demands of lands, health, education – among other things – by indigenous populations to the State, and considering the enormous unbalances brought by its disruptive, colonial action, it was not desirable the State to retire itself, leaving, for instance, internal powers inside the villages – in many cases inflated precisely by their role as mediators between villages and State institutions – to control the decisions about customs. On the contrary, the State would have to transform its role and focus on protecting and warranting internal deliberation in villages.

This was one among many tasks of retrieval that a reparatory State should ensure for indigenous people, within a pluralist national project. What would have to be restituted in this case, I concluded, was the capacity of each people to deliberate internally. *With the return of communal indigenous law and the institutional reformulation that this entails, naturally there would occur a retrieval of command over indigenous own history – because deliberation is nothing else than path, course, movement of transformation in time. With the devolution of history, the categories of "culture" (due to its inherent inertia) and "ethnic group" (that necessarily refers to cultural patrimony) would lose their centrality and give way to another discourse, whose subject would be the "people", as a collective subject of rights and collective author of a history – even though this may be narrated in the shape of a myth, that is nothing but a different style of decantation and condensation of the historical experience accumulated by a people.* I will show, next, the result of these considerations.

5. MY PRESENTATION IN THE HOUSE OF REPRESENTATIVES: "EVERY PEOPLE SHOULD WEAVE THE THREADS OF THEIR OWN HISTORY. IN DEFENSE OF A STATE THAT RESTORES AND GUARANTEES THE DELIBERATION IN ETHNIC FORUM (READ AT THE PUBLIC HEARING HELD ON SEPTEMBER 5, 2007 BY THE HUMAN RIGHTS COMMISSION OF THE HOUSE OF REPRESENTATIVES ON THE DRAFT LAW NO. 1057 (2007), PRESENTED BY REPRESENTATIVE HENRIQUE AFONSO, ON THE PRACTICE OF INFANTICIDE IN INDIGENOUS AREAS) [32].

Distinguished Representatives, ladies and gentlemen, advisers, and respected public:

The State scene and the Indian scene. From two scenes in visible contrast I begin this presentation. Two scenes compose a vignette of the nation where we live and reveal the State's role and meaning of the law. The first scene was selected from the newspaper I read every morning, *Correio Braziliense*, the leading journal of the Federal Capital, although it could have been found in the news in any other media, any day. This is the scene of the State, Public Health, Public Safety, protection and guarantees for life:

> *Brasília, Tuesday, August 28, 2007. Brazil Section:*
> *In five days, 11 infants dead in [the public maternity of] Sergipe.*

And today, as I wake up:

> *Brasilia, Wednesday, September 5, 2007. Holders and Cities Sections (referring to the cities surrounding the Federal District): Vera Lúcia dos Santos [...] had two sons murdered. Still mourning the death of Franklin, 17, when the younger, Wellington, 16, was executed with two shots on the neck [...] Nobody was arrested [...] According to a research from the Police Office, none of the 41 murders of adolescents aged 13 to 18 years, occurred this year, has been resolved yet.*

The second scene is the scene of the Indian, taken from a book that I strongly recommend: *The Massacre of the Innocents. The child without childhood in Brazil*. The organizer of this work, José de Souza Martins, summarizes in the following emotional words the first chapter of the volume, "The Indians Parkatejê 30 years later," by Iara Ferraz:

> *[...] it was the white society, in its cruel and voracious expansion, who led to the destruction and death of the Parkatejê Indians of southern Pará. Not only physically eliminated a large number of people, but also sowed within the tribe social disaggregation, demoralization, disease, hunger, and exploitation - terms of unconditional surrender of the Indian to the "civilized" society. The white society brought demographic imbalance to the tribe, compromising their bloodlines and social organization. The Parkatejê heroically surrendered, giving their orphaned children to the white people, so that they at least survive as foster children. Later, when the tribe was reorganized, it went in search of the scattered children, now adults, spread to distant regions, so that they could return to the tribe and share the Parkatejê people's saga. Even those who were not even aware of their indigenous origin, because the white people had denied them this information, were caught in the middle of a day in foster homes, by the visit of an old Indian chief announcing that he had come to pick them up and take them back to the village and to their people, who were waiting for them*[33].

Given the contrast of the scenes mentioned, confirmed by many others we know, I wonder and ask the audience: what State is this that now intends to legislate on how indigenous peoples should care for their children? What authority does this State have? What are its legitimacy and prerogatives? What credibility this State has to issue this new law that intends to criminalize peoples who where, here, weaving the threads of their history when they the greed and violence of Christians disrupted them and interrupted their path? In view of the evidence, which increases each day, of the absolute failure of the State in fulfilling its obligations and of its inability to perform what is nothing more than its own project as a Nation, I am forced to conclude that the only prerogative of this State is to be the custodian of the booty of conquest, the direct heir of the conqueror. We should, on the contrary, criminalize this same State that

intends to legislate today, and take it to court for the crimes of insolvency, default, omission and even homicide through the hands of many of its officers and agents vested with police power. When comparing the severity of its offenses, we have no choice but to acquit the people who are today criminalized here, and return the aim of Law toward the ones who try to blame them: an elite that each day demonstrates its inability to manage the Nation and sees dismantled in public its claim to moral superiority, the main instrument of all domination enterprises. The strength of that initial vignette speaks for itself. I could end here my presentation and it would already be convincing. However, much more needs to be said about the Bill whose discussion brings us here today. Starting with two clarifications that should be made before proceeding: the first one refers to what we are debating in this Hearing, as it should be clear that the discussion of the proposed law on infanticide in indigenous areas should not be focused on the individual right to life, which is already fully guaranteed by the Brazilian Constitution, the Penal Code and various Human Rights instruments ratified in Brazil. Instead of duplicating laws, already abundant, for the defense of individual lives, it would be more urgent to propose ways to enable the State to better protect and promote the continuity and vitality of the peoples that give so much wealth to the Nation in terms of diversified solutions for life. Children's lives depend on the welbeing of their societies!

The second clarification refers to the meaning of the expression "right to life". This expression can indicate two different types of right to life: the individual right to life, or the protection of the subject individual rights; and the right to life of the collective subjects, or the right to protection of life of peoples in their condition as a people. Precisely because the latter is much less developed in the Brazilian legal discourse and public policy, we should devote most of our efforts to reflect and figure out how to provide better legislative, legal and governmental protection to collective rights - the most vulnerable - such as promoting and strengthening collective and communitarian social fabric. I argue here that the priority is to save community where there still is community and to save a people where a people still persist. A fundamental right of every person is belonging to a people and to a community. The State needed to make this possible is not a predominantly punitive and interventionist State. It is a State able to return and restore the legal and material means, autonomy and guarantees of freedom within each community so that its members can deliberate about their own morality on a path of historical transformation, and build from within an idiosyncratic dialogue with the standards of Human Rights internationally established.

A critique of the punishing State. There are several authors, sociologists of violence and Law, jurists and political scientists who are concerned about the progressive intensification of the punishing aspect of the State, until the advent of an eminently criminalizing State, which concentrates its tasks and responsibilities on punitive efforts, relegating its other, higher priority obligations, to a second level. This law that we came here to discuss fits the profile, criticized and lamented, of a punitive State,

which restricts its activities to acts of force over and against those who should protect and promote. In his recent book *El Enemigo en el Derecho Penal*[34], the great Argentinean jurist Eugenio Raul Zaffaroni [...] examines the essence, the consequences and the sub-text [...] of the punishing State throughout history and especially in the contemporary context. What emerges is that, through criminal discourse, the idea of the enemy is designed – unfolding from the *hostile* category of Roman law. [...] (So) the criminal law profiles always inevitably [...] represent the figure of an alien who postulates, through the same maneuver, as the enemy.

In the case of the law that we debate today in this Public Hearing, the enemy of Criminal Law is each indigenous people, in the radicalism of their difference and in the right to build their own history, that is, the right to decide internally on the course of their tradition. This is clear, and would become evident for every inhabitant of Mars that, by a cosmic accident, landed here and read the text of the proposed law: it criminalizes the village and wants to punish the other for being the other. It cannot stand the idea of the existence of a community that chooses not to be a part of "us".

Therefore, this law is, first and foremost, anti-historical, since one of the central concerns of our time is to value and preserve difference and allow the reproduction of a plural world. This requires, unavoidably, the development of collective rights. Caring for such collective subjects' rights is also central because, despite the constant assaults suffered by communities in the course of these 500 years, these peoples not only survived by means of their own internal logic and strategies, but mainly because it is possible to imagine that they will surpass us in their future capacity to survive. Many of them refugees in places unreachable by what we pretentiously consider to be "Civilization", free from the greed to concentrate and accumulate, free from the heavy baggage that we carry, they will have, perhaps, an opportunity that we will not have, in a world that goes every day further in what many believe to be its final phase due to resource depletion.

The meaning of legislation. Julita Lemgruber, the prestigious Brazilian scholar on Public Safety and criminal efficacy, in her article "Truths and lies about the Criminal Justice System"[35], reveals the limited impact of Criminal Law not only among us, but also in the most scrutinized countries in the world. Using quantitative research on Public Safety in countries where monitoring is conducted regularly, the author warns that in England and Wales, in 1997, only 2.2% of the offenses had condemned those responsible, and in the United States, according to the 1994 survey, of all violent crimes committed - homicides, assaults, rapes, robberies, etc.., whose investigation, clarification and punishment seem more relevant - only 3.7% resulted in convictions. In light of these data, the author describes as a "First Lie" the assertion that the criminal justice system can be considered an effective inhibitor of crime. In Brazil, the reduced power of the law is even more extreme. In the state of Rio de Janeiro (as monitored by periodic surveys on violence) authors who conducted their research during the 90s as Ignacio Cano, Luiz Eduardo Soares and Alba Zaluar concluded, respectively, that

only 10%, 8% or 1% of all homicides reported to have reached some kind of conviction. In the words of Alba Zaluar: "In Rio de Janeiro only 8% of the investigations [...] are turned into processes and brought to trial. Of these, only 1% reach a verdict"[36]. These data lead us to wonder about the motivations that lawmakers could entertain when pushing for a law criminalizing indigenous peoples. Such punitive law, besides being contrary to ILO's 169 Agreement, fully in force in Brazil since 2002, hinders indian communities even further from restoring their own internal laws, ethnic rule and logics for the resolution of their conflicts and the promotion of internal deliberation... It should then be asked: if the law does not construct reality among us, how could it construct reality among other peoples who live in places hardly accessed by agents of the State? And if the law does not make it happen, then what would be the meaning of such insistence on passing this new bill by some lawmakers when, in fact, in addition to hinder a legitimated and legally validated right to difference, it enlarges, in redundant and unnecessary ways - because it enunciates rights already fully guaranteed in more than one article of the current legislation - the already too innocuous criminal law? Where does this legislative passion come from, this truly legislative fever that, once again, will only worsen the often criticized "legislative inflation"?

I can only find one answer to this question: what this proposed law actually does, and does it very efficiently, is to affirm, publicize, make patent before the nation, who are the ones who write the laws, which are the sectors within national society that have access to the offices in which this task is performed. In fact, we should not forget that the Law speaks, first, about the figure of their authors. It undoubtedly contains a signature. Whoever wants to write a law, wants to leave his/her signature on the nation's most eminent set of texts. But this is certainly not a valid, sufficient or fully acceptable motivation in the eyes of everyone. Especially because, in this Congress, there are no seats for Indians nor any other type of reserved places that can guarantee the participation in the making of the laws of the many peoples that compose the great Nation.

The future of the State. What then could be the work of the State, in order to overcome a scenario as disheartening as I have just presented? It should be a *State that returns and guarantees ethnic rule* and communitarian rights in general. With that, I mean that in view of the disorder that European and Christian metropolitan elites imposed to the continent during the process of conquest and colonization, disorder which was later aggravated and deepened by the administration of an Eurocentric national elite that inherited the control over the territories, today we have an opportunity. And that is the opportunity to allow those people who up until now have not had the chance, to restore their internal institutional order and resume the threading of their own history. Perhaps it is indeed possible to redo what was undone in terms of the cultural, legal, economic and environmental orders within a Nation now conceived as plural. If there is no perfect law, instead of insisting on an increasingly remote perfection of a deficient legal system, we can pave the way for other models. I refer here to the project of juridical pluralism.

It is not, as has been the understanding of lawyers and anthropologists to date, to oppose the relativism of cultures to the universalism of Human Rights or the universal validity of the constitution within the Nation. What the project of a pluralist state and the legal pluralism platform propose is to draw the idea of Nation as an alliance or coalition of peoples, allowing each of them to resolve their conflicts and develop their internal dissent in their own way. In every human village, however small, divergence is inevitable, and when it comes to the prescription of infanticide, dissent is often present. In face of this, the role of the State in the person of their agents will have to be available to oversee, mediate and intercede for the sole purpose of ensuring that the internal process of deliberation can take place freely without abuse by the most powerful within society. This is not a defense of the withdrawal of the State, because, as evidenced by the multiple demands for public policies placed by the very indigenous peoples since the Constitution of 1988, after the intense and pernicious disorder installed by ultramarine and later republican colonial interventions, the State can no simply withdraw itself. It must remain available to provide assurance and protection when its intervention is demanded by members of the communities, provided that such intervention occurs in dialogue between its agents and the representatives of the community in question. Its role, in this case, cannot be other than to promote and guarantee the dialogue between the powers of the village and its weakest members.

Caution in regard to legislative activity and commitment to ensure the freedom of the group to internally deliberate and self-regulate itself are particularly wise and sensible gestures in a multicultural globalized world like the one we have today, in which there is a very large risk of appropriation of elements of tradition to convert them into emblems of identity by groups who see in the political culture and fundamentalist strategy a way to defend their greed for power and influence within society. They are many the practices that, far from waning, when reppressed by modernizing and westernizing legislation, get reaffirmed as banners of identity against authority envisaged as culturally alien. By remembering this possibility, we are convinced that further discussion of this law is impractical and even dangerous for two reasons that we must consider. First, because it can generate forms of reaction that, on the basis of fundamentalist notions of identity and culture, might transform the practice of infanticide, now in progressive disuse with the improvement of living conditions of indigenous peoples after the end of Brazilian military dictatorship and with the hopes brought about by the 1988 Constitution, into an emblem of difference crystallized as an icon in ethnic heraldic. Second, because the sanction of this type of law demands its quite unattainable application, which inevitably relies on the intrusion and interference of State Security forces within villages, obstructing their autonomy and intimacy. This could lead to disastrous consequences, in view of police's lack of training to work across boundaries of difference and from a pluralistic perspective.

***People and history*: fundamental categories to transcend the binomial relativism/universalism**. The most appropriate and efficient way to think about the set of problems that arise here is not to enter the minefield of unsolvable dilemmas posed by the opposition relativism – universalism. When confronted with the principle of pluralism, the idea of culture as crystallized customs should be avoided and replaced by the idea of histories in plural – the multiple histories running through our nations. All people dwell in the flow of historical times, in dynamic interweaving with others. Every nation contains this very engine of history that is dissent within, so that costumes are changed in the course of constant internal deliberation, which is nothing else than the fluent and constant dialogue among its members. The problem of the peoples of our continent is not to preserve culture as heritage crystallized - after all, culture is nothing more than the result of the constant and unrelenting sedimentation of historical experience – but, on the contrary, desintrude – or resign intervention – in the threading of their history, which was intersected and sectioned by the outbreak of colonization by the agents of European metropolitan powers first and of eurocentric autochthonous eleites in control of national States later. It is not, as often believed, the repetition of a past what constitutes and validates the identity of a people, but their constant task of joint deliberation. In that sense, many a people have already deliberated and abandoned the practice of infanticide. This happened, for example, with the people Kaxuyana-Tyrio, as reported by Valeria Paye Pereira, who preceded me in this Hearing.The idea of history itself moves in precisely the opposite direction of what the law debated here intends to do. This law endorses a State that makes decisions about the direction of all the peoples that constitute the nation, and does so through punitive intervention. Quite on the contrary, it should stress the principle of respect for the agency and deliberative capacity of each collective subject preserving its right to keep its historical course free flowing and differential. Therefore, *the fact that societies transform themselves, abandoning customs and adopting and installing new ones is precisely an argument against the law, and not in its favor.* By saying that societies change at their own will as a result of internal dissent and in contact with the epochal discourses that circulate around and across them – precisely such as the international discourse of Human Rights – we are saying that the State is not the agency to prescribe and enforce, through threat and coercion, outcomes for the plot of all people's histories within the Nation. His only role is to protect the unique historical route of each people in its idiosyncratic and particular unfolding, ensuring that it can flow without authoritarian impositions neither from internal groups - *cacicatos* - empowered by their role as mediators with the State and the so called national society, nor from external constraints, as the one coming from this law. *The devolution of justice itself is nothing else than the return of history itself.*

From this anthropological and legal perspective that I propose, the State's role is therefore to restore to the peoples the material and legal means for them to recover their usurped ability to weave the threads of their own

history, and assure that the internal deliberation can occur in freedom, in accordance with legal guarantees of jurisdiction or ethnic forum. Accordingly, the kind of *garantism* invoked here refers to the legal commitment assumed by the national State to fulfill the demands of collective subjects and collaborate with the effort they invest in reproducing their existence. *The principle of protection of a history of their own is opposed to the relativist classic perspective, since this latter will never get to avoid referring indigenous internal law to a conception of culture as crystallized, a-historical and timeless. To affirm and oppose history instead of culture is the only efficient way to guarantee the progress of justice in the life of peoples through internal deliberation and the constant production and revision of their own logics and systems of legality. Such deliberation is no other thing than the engine of historical movement and transformation, in its own course and in constant dialogue with other peoples.*

6. SEVEN COROLLARIES

Seven corollaries follow from the argument presented here in support of the agenda of the Right to Difference and the values of pluralism against the limiting case that indigenous infanticide represents to Legal Pluralism:

1. It is more appropriate to the purposes of the defense of rights, to speak of "people" instead of "ethnic group", because people is a living collective and a dynamic subject, while ethnicity is a objectifying category, which serves the purposes of classification and anchors the group to a ethnicity based on a fixed cultural heritage.
2. *People* is the collective that is perceived plotting the web of a common history, coming from a shared past and going to a common future, including the drama of conflicts surmounted along the way. The loom warp of this tapestry collectivelly weaved is continuous, though it presents tears and ruptures in some of its threads; the design of its weaving reveals consensus and dissent among the people threading such fabric of history.
3. It is more appropriate to speak of "history" than of "culture, because, unfortunately and unavoidably, the idea of culture, due to the inherent inertia of its conception, often involves the removal of custom from historical flow - even well -intentioned actors condemn cultures to a museum-like existence. Culture is nothing else than the sediment left by the historical experiences of a collectivity, while myth and customs are the result of the condensation and symbolization of this historical process.
4. A good State should have a replacer/returner/restoring profile regarding justice, among other features to be reinstated.
5. To restore justice, that is to say, to restore internal law or ethnic rule is to promote the repairing of community tissue - the return of the territory is necessary but not sufficient for this purpose.
6. To restore inner rule also means giving back to the community the

reins of their history, since deliberation in inner ethnic jurisdiction of their own and the consequent unfolding of inner discourse inherent in the very practice of doing justice within the community constitute the engine pushing the historical path of a collective subject.

7. Yet, the State cannot withdraw suddenly and completely, due to the disorder installed in communities as a result of the long intervention of the white world over them. Its role, nevertheless, should be to ensure internal deliberation when hampered by established powers - *cacicatos* - within communities (usually men, elders and rich members, political leaders) whose power gets fed from outside the group, either as a reactive effect resulting from external interpellations or or due to alliances with segments of the national society (traders, agents of the State, politicians, farmers) that reinforce or even originate internal powers within communities.

>> ENDNOTES

[1] Segato, 2006: 228.

[2] "[...] a draft law dealing with the practice of infanticide in these communities is in discussion in the National Congress, and two hearings have already been held without the participation of indigenous women that are being criminalized. There is also a national campaign against infanticide and the Subcommission can take a position and demand participation in the hearings" (Ministry of Justice, FUNAI, 2007:35. My Translation).

[3] Segato, 2003: 31.

[4] Marés de Souza Filho, 1998.

[5] Carvalho Dantas, 1999.

[6] See <http://voiceforlife.glorifyjesus.com>.

[7] Platt, 1969.

[8] Segato, 2008.

[9] According to information sent by David Rodgers to the list <http://br.groups.yahoo.com/group/Nuti_Pronex>, this film can be downloaded through the page <http://www.hakani.org/en/premiere.asp> and the trailer is loaded in <http://br.youtube.com/watch?v=RbjRU6_ZjoU>.

[10] To read the bill, see the webpage <http://www.camara.gov.br/sileg/MostrarIntegra.asp?CodTeor=459157>.

[11] Wednesday, October 3rd, 2007 and Thursday, October 4th, 2007, <http://www.correioweb.com>.

[12] Davis, 2007: 1.

[13] McMullen, 2007: 4.

[14] See <www.voiceforlife.blogspot.com/>.

[15] Feitosa *et al*, 2006.

[16] Kroemer, 1994; Dal Poz, 2000.

[17] Feitosa *et al.*, 2006: 6; my translation.

[18] Feitosa *et al.*, 2006: 6.

[19] Feitosa *et al.*, 2006: 7. Dal Poz, 2000: 99.

[20] See, on the complexity of differences that surround infanticide practice and a critique of the very name "infanticide", Holanda, 2008.

[21] Segato, 2010.

[22] Viveiros de Castro, 1987.

[23] Agamben, 1998.

[24] Mendonça Rodrigues, 2008.

[25] Foucault, 2000, 2006 and 2007.

[26] Sánchez Botero, 2006.

[27] Sánchez Botero, 2006: 156.

[27]

[28] *Idem*: 170.

[29] Abdullahi Ahmed An-na'im, in his search for points of convergence between the Human Rights discourse and the Islamic perspective on rights, noted that, though cruel to the Western eyes, "Coranic law requires that the State fulfills its obligations of assuring social and economic justice and guarantees a decent life standard for all citizens before it applies punishments (to offenders). (1992:34. My translation).

[30] Two days after my presentation, exactly on September 7th of 2007, the adoption of the Declarations on the Human Rights of Indigenous Peoples by the General Assembly of the United Nations came to confirm this line of reasoning: "Article 18 – Indigenous peoples have the right to participate in the decisions of matters that could affect their rights, by means of

representatives elected by themselves in accordance to their own methods, as well as to maintain and develop their own institutions for the reaching of decisions".

[31] Segato, 2007.

[32] I appreciate the cooperation of Esther Sánchez Botero, Xavier Albó, Patrícia Rodrigues de Mendonça, Ernesto Ignacio de Carvalho, Saulo Ferreira Feitosa, Rosane Lacerda, Eli de Lima Passos, Leia BezerraWapichana, Suzy Evelyn de Souza e Silva, Marianna Hollanda and Danielli Jatobá.

[33] Martins, 1991: 10.

[34] Zaffaroni, 2006.

[35] Lemgruber, 2001.

[36] Cano, 2005; Soares, 1996; Zaluar, 2002.

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MAY EVERY PEOPLE WEAVE THE THREADS OF THEIR OWN HISTORY: JURIDICAL PLURALISM IN DIDACTICAL DIALOGUE WITH LEGISLATORS

// QUE CADA POVO TEÇA OS FIOS DA SUA HISTÓRIA: O PLURALISMO JURÍDICO EM DIÁLOGO DIDÁTICO COM LEGISLADORES

Rita Laura Segato

>> ABSTRACT // RESUMO

The article examines all the elements brought together by the author to build a contention for a Public Hearing at the Brazilian House of Representatives against the passing of a law criminalizing the presumed practice of infanticide by indigenous people in Brazil. It also includes the speech delivered at the Public Hearing. Critical of cultural relativism, the argumentation defends instead historical pluralism and proposes the idea of a *restitutive State*, devolutionary of communitarian rule and guarantor of community internal deliberation. Devolution of ethnic jurisdiction amounts to a devolution of command over indigenous own historical project. // O artigo examina todos os elementos que a autora considerou para construir sua arguição contra um projeto de lei de criminalização da suposta prática de infanticídio indígena apresentada em Audiência Pública reunida no Congresso Nacional. Inclui também a sua fala nessa Audiência Pública. Crítico do relativismo cultural, seu argumento defende, em seu lugar, o *pluralismo histórico*, e propõe a ideia de um *Estado restituidor*, devolvedor do foro étnico e garante da deliberação interna na comunidade. A devoluçao da jurisdição étnica equivale à restituição do controle sobre as rédeas da própria história.

>> KEYWORDS // PALAVRAS-CHAVE

Legal Pluralism; indigenous law; indigenous infanticide; "historical pluralism"; "restitutive State". //Pluralismo jurídico; direito indígena; infanticídio indígena; "pluralismo histórico"; "Estado restituidor"

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>> ABOUT THIS ARTICLE // SOBRE ESTE ARTIGO

This is a revised and modified version of an article published in Spanish in Victoria Chenaut, Magdalena Gómez, Héctor Ortiz y María Teresa Sierra (Coords), *Justicia y diversidad en América Latina. Pueblos indígenas ante la globalización*, México D.F, CIESAS/FLACSO-Ecuador. // Esta é uma versão revisada e modificada de um artigo publicado em espanhol em Victoria Chenaut, Magdalena Gómez, Héctor Ortiz y María Teresa Sierra (Coords), *Justicia y diversidad en América Latina. Pueblos indígenas ante la globalización*, México D.F, CIESAS/FLACSO-Ecuador.

>> EDITOR'S NOTE // NOTA DO EDITOR

It is necessary to make a comment on the difference between the anthropological meaning of infanticide as used in the text and the technical meaning of the Brazilian criminal law, as laid down in article 123 of its Criminal Code: "To kill, under the influence of puerperal state, the own child, during childbirth or right afterwards". // É preciso fazer uma ressalva em relação a diferença entre o sentido antropológico de infanticídio, aqui empregado, e o sentido técnico do direito penal brasileiro, exposto no artigo 123 do código penal "Matar, sob a influência do estado puerperal, o próprio filho, durante o parto ou logo após".

1. SUPPORTS AND LIMITS FOR THE CONSTRUCTION OF A DIFFICULT ARGUMENT.

In August 2007, I was invited by the Human Rights Commission of the Brazilian House of Representatives to present an anthropological view on the issue of the infanticide supposedly practiced by some indigenous groups in Brazil. The Public Hearing represented a necessary step for them to take their positions before the imminent voting of a federal law criminalizing such practice. In this paper I will detail the set of considerations and data that informed the preparation of my argument, present the text with which I questioned the approval of the bill, and expose the theoretical conclusions that emerged in the process of its elaboration. In fact, as I will propose, to conclude the rhetorical exercise whose crafting I describe here, the categories of *people* and *history* emerged as the only ones capable of supporting the defense of a process of giving back the practice of justice to the indigenous community by the national State. When I received the invitation I realized I would have to build my considerations in a complex way, loyal to the principle which I had settled to guide my practice as an anthropologist: to remain responsive to the demands of those habitually in the position of being "studied"[1].

The first problem I faced was that I found myself divided between two contradictory discourses, both coming from indigenous women, and both being familiar to me. The first discourse was the rejection of the bill by the indigenous Gender, Childhood and Youth Subcommittee, manifested in the first Extraordinary Meeting of the newly established National Commission of Indigenist Policies - CNPI, that took place in March 12 and 13 of 2007[2]. The second one was the complaint expressed by one indigenous woman, Edna Luiza Alves Yawanawa, from the border between Brazil and Peru, in the state of Acre, who, during the Human Rights workshop for women which I advised and supervised in 2002 for the National Indian Foundation (FUNAI), described the mandatory infanticide of one of two twins among the Yawanawa as a source of intense suffering for the mother – therefore also a victim of the violence of this practice. This was, in her experience, one of the hardest cases to solve contradictions between the right to cultural autonomy and women's rights[3]. I had before me, therefore, the hard task of arguing against this law, but at the same time making a hard bet in the transformation of the indigenous custom.

Setting aside these two references – and at the same time contentions – for my argument, I should also build it in such a manner that it could be deemed acceptable by the Congress members of a national State of strong Christian influence, heir of a colonial State, formed in its large majority by white men, many of them landowners in regions with indigenous presence and, in the case of the law, represented by the aggressive group of evangelical members of parliament, well-articulated and active in Brazilian politics. It was precisely one member of the "Evangelical Parliamentary Front" – Henrique Afonso, member of the House of Representatives for PT (Partido dos Trabalhadores – the Labour Party) and member

of the Presbyterian Church of Brazil - who proposed the Bill 1057 (2007), debated at the Hearing.

If, on the one hand, I was backed by the Brazilian Constitution of 1988 and the ratification in 2002, by Brazil, of ILO's Convention 169; on the other, the defense of life presented itself as the inviolable limit of any attempt to relativize law. In fact, the Constitution of 1988, especially in its articles 231, 210, 215 and 216, recognizes and safeguards the existence of cultural diversity within the nation and the right to the plurality of particular forms of social organization. From this pluralist constitutional view in the cultural order, analysts such as Marés de Souza Filho[4] and Fernando Antônio de Carvalho Dantas[5] state that the Constitution of 1988 sets the grounds for the progressive exercise of indigenous communitarian justice in Brazil. The ratification of ILO's Convention 169 in 2002 was also a step forward in the path to the recognition of indigenous law. Yet, the customary indigenous norms – despite acquiring legal status by the incorporation of the Convention to Brazilian legislation – are still limited by their mandatory subjection to the norms of the "national juridical system" and to the "internationally recognized human rights." For reasons that I cannot fully analyze here, even though the Brazilian state encompasses approximately 220 indigenous societies and a total amount of 800.000 indigenous inhabitants (0,5% of the population), it is very far from a real institution of pluralism and even farther from the elaboration of agendas for the articulation between National State law and indigenous law, like the ones found in Colombia or Bolivia. Indigenous communities themselves do not demand from the Brazilian State the restitution of the right to exercise justice with the same effort as they demand the identification and demarcation of their territories, nor is there a clear idea of what this restitution, within the process of reconstitution of their autonomies, would mean. There is not enough research on the topic, but this underdeveloped field of indigenous justice could be explained by the inexistence, in Portuguese colonial law, of the figure of the indigenous *cabildos*, bearer, in all Hispanic America, of the administration of justice when the violation did not interfere with the interests of the metropolis or its representatives. There have been great advances in Brazil in the identification and demarcation of indigenous territories. However, these territories do not function as true jurisdictions, for the return of land has not been followed by an equivalent process of consideration and reconstruction of local instances of conflict resolution, increasing degrees of institutional autonomy in the exercise of local justice and gradual recuperation of the procedural practice. The image of tutelage, still operating in the "Indian Statute", despite its partial withdrawal from the new constitutional text, contributes to reducing every indigenous person, in their individuality, to the ambivalent regime of subordination/protection by the National State.

To the cautions presented so far, I should add that my argumentation here could not be concentrated on an analysis of the several cosmological, demographic, hygienic or practical reasons that apparently could lead to the continuity of the practice of infanticide in several different societies,

or to invoke the depth of the difference of such concepts as "person", "life" or "death" in Amerindian societies. The relativist paradigm in anthropology, in its century of existence, has not impacted the public consciousness, including that of members of Parliament, so as to allow the debate being held in these terms in the national juridical field. This placed me directly before the central question of my task: *with what arguments those of us who defend the deconstruction of a State of colonial roots can dialogue with its representatives and defend autonomy, when this entails practices as unacceptable as the killing of children?* We found ourselves, beyond any doubt, facing a extreme case for the defense of the value of plurality.

This difficulty was made worse by the amount of journalistic material of different kinds that religious organizations were broadcasting, about children who were saved from death – a strategy that culminated in the interruption of the Public Hearing to allow the entrance of ten people from these organizations. Some mothers and several people with special needs, in many degrees of gravity, gave tokens of gratitude to the organization that had saved them from death at the hands of their respective societies. "Atini, Voice for Life", a local evangelical NGO, but with international ramifications in radios and websites in English[6], was behind this surge of social communication and media power, and even produced a small guidebook called "The Right to Live". (Series "Os Direitos da Criança", chapter "O direito a viver"). The pamphlet, "Dedicated to MUWAJI SURUWAHA, the indigenous woman that confronted the traditions of her people and the outside world bureaucracy in order to safeguard the right to life for her daughter Iganani, who has cerebral palsy" (my translation), includes the following subtitles, representative of the cases in which several indigenous societies make use of the practice of infanticide: "No child is like another, but all of them have the same rights", "The right of the child is more important than their culture"; "It is the obligation of the community to protect their children"; "Twins have the right to live"; "Children with mental problem have the right to live"; "Special children, that are born with some form of problem, have the right to live"; "Children whose mothers do not want to raise them, or cannot raise them, have the right to live"; "Children whose father is from another indigenous group have the right to live"; and also informs about the current legislation for children's protection (The Convention on the Rights of the Child of the United Nations; The Statute of the Child and the Adolescent of Brazil; and the second clause of Article 8 of the ILO's Convention 169, that establishes limits to local customs).

Both news planted by this organization in newspapers and magazines of national circulation and the touching entrance of mothers and children into the Congress hall in which the session was taking place naturally produced an image of indigenous societies as barbarous, homicidal and cruel towards their own defenseless babies. Opposed to this image emerged a religious movement that claims to "save the children" from people who murder them. The legitimate defense of the life of each child and the desire of a good life for all thus turned into an anti-indigenous campaign voicing the need to increase supervision of life in indigenous

villages. The main claim was the supposed need to protect indigenous children from the cultural incapacity of Indians to care for life. From the particular aspects of each case there was a movement towards a general policy, from a Christian perspective, of vigilance of indigenous life and the depreciation of its standards and values, together with the cosmological bases that support them. The mission thus presented itself as indispensable to the wellbeing of these incapable "primitives" and the eradication of their savage customs – in other words, to their celestial and mundane salvation. The law that was thus proposed was the result of a project from churches that promoted themselves as "saviors of the indigenous child" (I intentionally paraphrase the ironic title of Anthony M. Platt's classic[7]).

In July 2008 the interests and forces represented by the evangelical parliamentary front were neither able to approve this act nor to stop the liberalization of other legislation concerning the management of human life. The legislative attacks against abortion, same-sex marriage, stem-cell research, etc. allow us to see the biopolitical dimension of the contemporary religious intervention in the public sphere[8]. As part of this biopolitical interventionism, Hollywood director David Cunningham (whose father Lauren Cunningham is one of the founders of the missionary institution Youth with a Mission / YWAM – JOCUM in Portuguese) released the film Hakani: Buried Alive – A Survivor's Story. This film offers the erroneous impression that it is a documentary record of the burial of children alive, already grown, by indians at a Suruwaha village. The film, interpreted by evangelized indigenous actors of the Karitiana society and shot inside a property of the Mission, is severely damaging to the image of indigenous people in Brazil, and to the Suruwaha in particular[9]. To the distress of its producers, the film, which was broadcasted in a variety of large audience Brazilian TV programs as if it were a documentary, was, at a Sunday evening program, watched by its very actors in their Karitiana village of the Rondônia State. They were shocked to discover that the script did not show them representing ancient indigenous life, as they were told by the production. Instead, they realized the film pretended to represent contemporary life of Indians burying children alive. They resorted to the Public Prosecutors of the Rondônia State, and sued the production. The process is still running. However, nothing less than the headquarters of the prestigious Order of Brazilian Lawyers (OAB), in Brasília, offered, in 2012, a course on the theme of indigenous infanticide during which, to my astonishment, the organizers showed, despite my voiced objections, the film Hakani as if it were a documentary.

2. THE BILL DRAFT, ITS INSPIRATION AND THE COINCIDENCE OF AGENDAS IN THE INTERNATIONAL SPHERE.

The authors of the law draft 1057 (2007) called it Muwaji bill, honoring a Suruwaha mother said to have saved her child with cerebral palsy from infanticide[10]I will not focus here on building a critique of the

proposed piece of legislation in juridical terms. It is enough to say that I have repeatedly indicated that this law "ultra-criminalizes" indigenous infanticide because, on one hand, it repeats the sanctions over actions already framed in the Constitution and the Penal Code and, on the other, includes in the accusation not only the direct authors of the act but all of the actual and potential witnesses, which is to say, the whole village in which the act occurs, and other witnesses such as, for instance, the representative from FUNAI (National Indian Foundation), the anthropologist, or health agents, among other possible visitors. The main arguments supporting the law came from Edson and Márcia Suzuki, a couple of active missionaries among the Suruwaha that appeared in written media and in high audience television channels for having rescued from death the girl Ana Hakani, sentenced to death due to a severe hormonal genetic dysfunction, and that now attends primary school in an elite private school in Brasília. In two consecutive full page articles in the main newspaper of the Brazilian capital (*Correio Braziliense*[11]), respectively entitled: "Hakani's second life" and "Hakani's laughter", several photographs showed the girl in her new environment and used her image as propaganda for missionary action. After an appalling manipulation of the story, the chronicler affirmed that Hakani's reception by her colleagues of primary school "throws away any suspicion of prejudice" as, according to the testimony of one of them, Hakani is "just like us. I don't even remember she is Indian" (my translation). The newspaper recounted what supposedly was the process of rejection suffered by the girl in the environment where she came from, but does not offer any kind of contextual information capable of turning the story comprehensible for the readers.

Coincidently, shortly after I was summoned to deliver my speech in the Public Hearing, I received an indignant message from my colleague Vicki Grieves, activist, anthropologist and aboriginal college professor. In her letter, Vicki tried to inform the international community about a new law promulgated in her country of origin, Australia, saying: "Dear friends: you are probably aware of the very offensive incursions in aboriginal communities of the Northern Territories under the disguise of 'saving the children'." The motto of the supposed salvation of children was simultaneously invoked in Australia, claiming the necessity of protecting them from abusive parents. We thus became aware that the intervention in the Australian Northern Territories was being justified in the name of fighting against a supposed epidemic of "child abuse". Precisely on August 17 of 2007, 19 days before the Public Hearing in which I took part, the Commonwealth Parliament "approved without restrictions a set of measures that implemented nationally the urgent response of the federal government to the *Ampe Akelyernemane Meke Mekarle*, the report 'small children are sacred'." The new legislation made all kinds of possible interventions in the territories, reducing rights and freedoms, and the suspension of customary law[12]. In an excellent conference address, Jeff McMullen reveals the flaws and interests behind the actions "in defense of the children"[13]:

> *This dramatic assault by the Federal Government on more than 70 remote communities that are property of the aboriginal people of the Northern Territory started with the wrong words and without consultation to their traditional owners. Every indigenous leader will affirm that it is one of the most serious forms of offense...*

The parallel between the interventionist alibi in Brazil and in Australia is revealing. The counter-arguments, therefore, will have to be of the same kind: the only possible solution is consultation, respect for the autonomies and the delegation of responsibilities to the peoples with the necessary means to solve the problems. In subsequent conversations with activists from that part of the world, we were agreed about the coincidences between the agendas attempting to open the indigenous territories, in both continents, to interventionist and colonizing States and State-allied corporate groups in the field of agribusiness and mining. A new surprise came when we discovered that the Brazilian bill, still in its condition of a draft law not yet approved, had been translated to English and was available on the Internet – something very unusual even for sanctioned current legislation[14].

3. BRIEF PANORAMA OF THE PRACTICE IN BRAZILIAN INDIGENOUS SOCIETIES.

I will take some information that allows us to understand the Hakani case, invoked by the Evangelical Parliamentary Front to publicize the bill, from the final essay to the UNESCO Chair of Bioetics at the University of Brasília presented by Saulo Ferreira Feitosa[15] (ex-Vice-President of the Missionary Indigenous Center– CIMI). In order to build their very elucidatory synthesis, the authors make use of studies that are probably the only bibliographical source on the matter in Brazil that look into the subject of indigenous infanticide[16]. According to these sources, the Suruwaha, from the Arawak linguistic family, that inhabit the Tapauá District, in the Amazon State, 1228 km away from the capital, Manaus, by the river, kept themselves in voluntary isolation up until the end of the 1970s. They had their first contact with Catholic missionaries of a team from CIMI ("Missionary Indigenous Council"), that realized they were "a people capable of assuring their sustainability and keeping their culture alive, as long as they remained free from the presence of invaders" understood that "they should adopt a strategy of no direct interference in the life of the community", just fighting for the demarcation and protection of their territory – which did not take long to happen. This team then limited itself to follow the group at a distance, keeping an inoculation schedule and respecting their voluntary isolation. But four years later, the YWAM Evangelical Mission of the Suzuki missionaries decided to settle among the Suruwaha permanently[17].

The group that suffered such intrusion from the two teams of YWAM missionaries had the following characteristics, succinctly: they had a

total population of 143 people; between 2003 and 2005 "there were 16 births, 23 deaths by suicide, 2 infanticides and one death due to illness"; "the average age of the population, in 2006, was 17.43 years old"[18]. The authors, expanding their synthesis, also inform us that, among the Suruwaha, "behind living or dying, there is an idea, an understanding about what life and what death is", which is to say, of which is the life "that is worth living or not". Because of this, citing Del Poz, they add: "the consequences of this thinking are perceived in numbers. 'The reason for mortality among Suruwaha are eminently social: 7,6% of the total number of deaths are caused by infanticide and 57,6% by suicide'"[19]. In that environment it makes sense to live when life is enjoyable, without excessive suffering, for the individual and for the community. That is why it is thought that the life of a newly born child with impairments or without a father to help the mother in their protection is one too burdened to be lived. In the same way, "in order to avoid future pain and abandonment in old age, the child grows up accustomed with the possibility of committing suicide".

With these references in mind we are able to comprehend that at the core of the issue there are local ideas about death among the Suruwaha, significantly different from the meanings ascribed by Christian thinking. We also apprehend that these ideas are conformed to a complex, sophisticated vision, of great philosophical depth, that is not lesser than Christianity, by any measure. An evidence of historical inefficacy of anthropology is precisely that it was not able to create, in the West, a convincing image of the quality and respectability of different ideas about fundamental issues[20]. For this reason, the ways in which this group is depicted by the missionaries in the media generates the impression of ignorance and barbarism, as well as the certainty that they are incapable of aptly taking care of the lives of their children.

As I mentioned earlier, ethnographies dealing with the subject of infanticide are scarce, in the first place because reliable first hand reports are totally absent in literature, and there are no second hand reports of the practice in the last decade. In earlier times, the practice, when in fact occurred, was rare, never realized under the eyes of ethnographers and there was, apparently, a general consensus that the mere mention of the possibility of its existence could be damaging to the communities and expose them to police intervention and even more intense harassment on the part of greedy missionaries from several Christian churches. Nevertheless, it is known, from various ethnologists' oral reports, that, within the category "infanticide" there are a variety of practices which, when subjected to closer scrutiny, appear to be very diverse, both in their meaning and role within the group as in the meaning they could get in the field of Law and Human Rights. For example, in some societies, there is a rule derived from cosmology, which, when and if obeyed by the community, would determine the elimination of the newborn twins. In others, the community, the family or the mother, depending on the people in question, is in charge of the decision, subject to considerations on the infant's health, or the material conditions of the mother or the group to guarantee its life in the short or medium time span; or considering the absence of a

fatherly figure for physical and symbolic care in an environment where resources for subsistence are tight and there is no surplus. Anyhow, from the many testimonies gathered when I was preparing, in 2010, a report for UNICEF on the subject, it is possible to state that neither the cosmological rule nor any other of the supposed causalities properly determine obedience; that is, they do not produce effectively and in an automatic fashion the compliance with the execution of the practice. Recurrent reports convincingly lead to understand that there are maneuvers and strategies to avoid compliance with the rule, for example, by circulating the infant for its care by another family within the network of relatives, neighbors, acquaintances or wider community. For the reasons explored so far, we should therefore examine this subject having in mind, then, only the rule or prescription of infanticide – cosmological or related to the infant's health or to scarcity of resources –, leaving aside any consideration of effective practice, in case they do exist, always remembering that for no society the rule, as any norm, maintain a causal relationship with actual practices[21].Depending on who may hold the decision, the ways in which human rights can be summoned to intervene may change. If it is the community who decides, the mother may feel harmed in her right to preserve the child. When the decision belongs to the mother, the harm to individual rights may be perceived as concerning the child. In different societies, cosmological reasons or pragmatic considerations about the infant's or group's needs for survival judged by the mother or by close relatives guide the decision to welcome a new life. Let us observe some characteristics and meanings that affect the prescription of infanticide in two different societies that I was acquainted with by oral communication with two anthropologists.

In November 2005, during the Seminário Interamericano sobre Pluralismo Jurídico (Interamerican Seminar on Juridical Pluralism) that I organized in Brasília in collaboration with the Sixth Chamber of Minorities of the General Prosecutor of the Republic's Office (Procuradoria Geral da República) at the School for Advanced Studies of the Union's General Public Prosecutor (Escola Superior do Ministério Público da União – ESMPU), the anthropologist Iván Soares, acting then at the State Prosecutor's Office in Roraima, in the Northern frontier of Brazil, with large indigenous population, disclosed important details about Yanomami conceptions related to what we would understand asinfanticide. His goal was to answer one public attorney who was defending the application, in all cases, of the universal rule of Human Rights. With this objective, he shared that Yanomami women have a complete power of decision with regard to the life of the newborns. Birth happens in the forest, outside the village; in this secluded environment, outside the context of social life, the mother has two options: if she does not touch the baby, nor lift him in her hands, leaving him in the ground where it fell, that means that he has not been welcomed in the world of culture and of social relations, and, therefore, will not turn human, because, in the native's point of view, the "humankind attribute" is a collective construction, without which no organism may become human. Humanity, therefore, is no other thing

than the outcome of a humanization effort invested on the new being by the collectivity. Thus, in the native perspective, it is not possible to say that a homicide is in question, since that what would remain in the soil does not constitute a human life. As it becomes clear, among the Yanomami, biological birth is not, by itself, entrance to humanity, as, for this to occur, there will have to be a "postpartum birth", which is produced in culture and inside the social fabric. Such conception is found among many other first Brazilian populations[22], and allows us to oppose the Amerindian conceptions with the biopolitics of Human Rights, leading to dilemmas such as the ones examined by Giorgio Agamben in his work about the Homo Sacer[23].

A second example is what Patricia de Mendonça Rodrigues[24], ethnographer among the Javaé, inhabitants of the Bananal Island in the State of Tocantins, in Central Brazil, reported to me she believed was behind the prescription of infanticide in this group. For the Javaé, the newborn baby enters the world as a radical otherness, a non-human "other" that must be ritually humanized through care and nurture by his relatives. The baby arrives contaminated and with an open body as his matter is made of a mixture of substances from his parents. The social task is to humanize him, which is to say, to work so that his body is closed and may constitute him as a social and individual subject. In this sense, his extinction would not be understandable as a homicide.

> *The fact that he is born as a complete stranger, as I understand it, justifies the practice of infanticide. The Javaé don't say it openly, but everything indicates that the conscious justification for infanticide, in most cases, is that the baby does not have someone to provide for him (because the mother does not know who the father is, or because the father abandoned the mother, or due to another reason), not only to provide for him economically but above all to assume the responsibility of what is necessary for the long and complex rituals that would identify him again with his magical ancestors, giving him his public identity of a closed body. It belongs to the father, primarily, the social responsibility of the public transformation of the open-bodied son into a closed-body relative, that is, a social being. A child without a social father is the worst possible insult for a Javaé, and a perfectly acceptable motive for infanticide (from Mendonça Rodrigues, oral communication. My translation).*

We notice once more that it is not ignorance that hides behind the difference in treatment of the newborn life in aboriginal societies of the New World, but rather a different understanding of how and when it becomes human, and of what are the social obligations that shape the process of humanization. Even though we, anthropologists, by one way or another, have known this for a long time, when we engage in a dialogue with the State through its representatives, we cannot simply cite it. At some moment we will have to deeply ponder over the reasons for this, and over why other conceptions of life, in their radical difference and in the intelligence of their terms, do not enter the State mental horizon,

whose strategy of control falls daily into what Foucault calls biopolitics or biopower[25] and thus progressively distances itself from the indigenous and communitarian notions of human life.

Even though there should not be a lack of arguments in favor of human life as a social, not biological, responsibility, Esther Sánchez Botero assumes – and it could not be otherwise – that, when dealing with the State, it is necessary to speak the language of the State, since it does not open itself to radical difference. In her last work, *Entre el juez Salomón y el dios Sira. Decisiones interculturales e interés superior del niño*, she clearly identified the classical juridical strategy: it is necessary to deeply acknowledge the code of Law, in order to argue from the inside[26]. This impressive work, which brings favorable arguments to the preservation of indigenous jurisdiction in disputes that threaten it, extracts and systematizes the accumulated experience in an array of judicial cases under the light of a thorough conceptual discussion, both in the fields of law and anthropology.

The author confirms that it is not the juridical minimum – a strategy chosen by the Colombian legal system to confront the dilemmas of juridical pluralism – that must orient the judgment of what in the West is perceived as a breach of the principle of the "superior interest of the child", established by the International Convention on the Rights of the Child. For the author, this principle "is an extension of the principles of the West and does not necessarily constitute an achievable ideal in all cultures and for all cases", because the "superior interest" refers to the child as an "individual subject of rights" and does not encompass the "constitutional recognition of the indigenous societies as collective subjects of rights". For this reason, the "generalized, non discerning and mandatory application of this principle, besides being unconstitutional, can be ethnocidal, as it eliminates cultural values that are indispensable to the biological and cultural life of a people"[27].

Thus we learn that each decision must comply with a "test of proportionality" and only "the ends admitted by the Constitution and recognized by the interpretation of the Constitutional Court as of a greater level could limit the fundamental right of the indigenous people" to being a people. In short: for the author, the rights of the child "do not prevail over the right of the indigenous people to be ethnically and culturally distinct"[28]. It follows that, in cases that entail a breach of the superior interest of the child, it is fundamental to consider and evaluate the rights that are placed in contradiction: the right to life of the individual subject and the right to life of the collective subject, as well as the right to life of the mother and the right to life of the newborn. Before these contradictory pairs, it will have to be decided which of the terms will be harmed, in favor of the greater right. If the mother cannot fulfil the responsibilities of protecting the new human life, as it happens in the medical field, priority must be given to the life of the mother instead of that of the baby, because other children also depend on her. In the same way, if the inclusion of a child in certain conditions puts at risk the survival of the community as such, it is the community that will have the priority, as

all of its members depend on its ability to continue existing. For Sánchez Botero, only the sociocultural context of each particular case allows this judgment to be made.

4. DECISIONS ABOUT THE STRUCTURE OF MY ARGUMENT.

Despite the fact that the reading of Sánchez Botero's work offered me certainties about the defensible nature of an extreme practice such as infanticide, always in regard to certain circumstances, it still did not solve the problem of how to argue about it before the legislators. In part because in Brazil there has not been yet an official debate about indigenous jurisdictions or autonomy that could orient my argumentation; in part because those to whom my arguments were addressed were not judges interested in solving cases of infraction of the interest of the child, but rather members of a House that found themselves on the brink of voting a general bill about the subject. Thus, I would have to take *sui generis* decisions that would allow me to deem convincing the central point of my lecture: that criminalizing indigenous infanticide, specifically, was in no way desirable to the Nation and its peoples.

Some data was necessary for the exposition, as well as finding a language that would make it efficacious: 1) the demographic growth of indigenous societies post-military dictatorship had been noticeable, and that proved the capacity of indigenous groups to care well for their children; 2) the State that attempted to frame indigenous societies in the law was itself, susceptible to framing and judgment[29]; 3) the penal efficiency and emphasis of the State on criminalization as form of control – resources to which the law appealed – had been questioned by respected specialists; 4) the law was not necessary because it legislated that which was already legislated; 5) by emphasizing the individual rights to life of the children, the law did not focus on considering the equally necessary respect and protection to the rights of the collective subjects – a result of many obligations contracted by Brazil in the field of Human Rights; 6) the National Congress had no legitimacy to vote a law of intervention in indigenous villages without the presence of representatives of the people affected by this deliberation – that was confirmed days later, on September 7, 2007, when Brazil became one of the signatories of the UN's Declaration of Rights of Indigenous Peoples[30]; 7) similar experiences showed that the pretension of legislating super-criminalizing infanticide and its witnesses, which is to say, the village and all of the people present in it, was dangerous, as the reaction, in a time beset by fundamentalist strategies, could be the transformation of this practice in an emblem of ethnic identity[31].

It was also fundamental to ponder carefully over what could be said about the role of the State, as well as to evaluate the options that could replace the examined law, since opposing its approval did not necessarily mean to approve the practice of infanticide – in respect to the complaint of the Yawanawa woman already mentioned. Despite the constant

demands of lands, health, education – among other things – by indigenous populations to the State, and considering the enormous unbalances brought by its disruptive, colonial action, it was not desirable the State to retire itself, leaving, for instance, internal powers inside the villages – in many cases inflated precisely by their role as mediators between villages and State institutions – to control the decisions about customs. On the contrary, the State would have to transform its role and focus on protecting and warranting internal deliberation in villages.

This was one among many tasks of retrieval that a reparatory State should ensure for indigenous people, within a pluralist national project. What would have to be restituted in this case, I concluded, was the capacity of each people to deliberate internally. *With the return of communal indigenous law and the institutional reformulation that this entails, naturally there would occur a retrieval of command over indigenous own history – because deliberation is nothing else than path, course, movement of transformation in time. With the devolution of history, the categories of "culture" (due to its inherent inertia) and "ethnic group" (that necessarily refers to cultural patrimony) would lose their centrality and give way to another discourse, whose subject would be the "people", as a collective subject of rights and collective author of a history – even though this may be narrated in the shape of a myth, that is nothing but a different style of decantation and condensation of the historical experience accumulated by a people.* I will show, next, the result of these considerations.

5. MY PRESENTATION IN THE HOUSE OF REPRESENTATIVES: "EVERY PEOPLE SHOULD WEAVE THE THREADS OF THEIR OWN HISTORY. IN DEFENSE OF A STATE THAT RESTORES AND GUARANTEES THE DELIBERATION IN ETHNIC FORUM (READ AT THE PUBLIC HEARING HELD ON SEPTEMBER 5, 2007 BY THE HUMAN RIGHTS COMMISSION OF THE HOUSE OF REPRESENTATIVES ON THE DRAFT LAW NO. 1057 (2007), PRESENTED BY REPRESENTATIVE HENRIQUE AFONSO, ON THE PRACTICE OF INFANTICIDE IN INDIGENOUS AREAS) [32].

Distinguished Representatives, ladies and gentlemen, advisers, and respected public:

The State scene and the Indian scene. From two scenes in visible contrast I begin this presentation. Two scenes compose a vignette of the nation where we live and reveal the State's role and meaning of the law. The first scene was selected from the newspaper I read every morning, *Correio Braziliense*, the leading journal of the Federal Capital, although it could have been found in the news in any other media, any day. This is the scene of the State, Public Health, Public Safety, protection and guarantees for life:

> *Brasília, Tuesday, August 28, 2007. Brazil Section:*
> *In five days, 11 infants dead in [the public maternity of] Sergipe.*

And today, as I wake up:

> *Brasilia, Wednesday, September 5, 2007. Holders and Cities Sections (referring to the cities surrounding the Federal District): Vera Lúcia dos Santos [...] had two sons murdered. Still mourning the death of Franklin, 17, when the younger, Wellington, 16, was executed with two shots on the neck [...] Nobody was arrested [...] According to a research from the Police Office, none of the 41 murders of adolescents aged 13 to 18 years, occurred this year, has been resolved yet.*

The second scene is the scene of the Indian, taken from a book that I strongly recommend: *The Massacre of the Innocents. The child without childhood in Brazil*. The organizer of this work, José de Souza Martins, summarizes in the following emotional words the first chapter of the volume, "The Indians Parkatejê 30 years later," by Iara Ferraz:

> *[...] it was the white society, in its cruel and voracious expansion, who led to the destruction and death of the Parkatejê Indians of southern Pará. Not only physically eliminated a large number of people, but also sowed within the tribe social disaggregation, demoralization, disease, hunger, and exploitation - terms of unconditional surrender of the Indian to the "civilized" society. The white society brought demographic imbalance to the tribe, compromising their bloodlines and social organization. The Parkatejê heroically surrendered, giving their orphaned children to the white people, so that they at least survive as foster children. Later, when the tribe was reorganized, it went in search of the scattered children, now adults, spread to distant regions, so that they could return to the tribe and share the Parkatejê people's saga. Even those who were not even aware of their indigenous origin, because the white people had denied them this information, were caught in the middle of a day in foster homes, by the visit of an old Indian chief announcing that he had come to pick them up and take them back to the village and to their people, who were waiting for them*[33].

Given the contrast of the scenes mentioned, confirmed by many others we know, I wonder and ask the audience: what State is this that now intends to legislate on how indigenous peoples should care for their children? What authority does this State have? What are its legitimacy and prerogatives? What credibility this State has to issue this new law that intends to criminalize peoples who where, here, weaving the threads of their history when they the greed and violence of Christians disrupted them and interrupted their path? In view of the evidence, which increases each day, of the absolute failure of the State in fulfilling its obligations and of its inability to perform what is nothing more than its own project as a Nation, I am forced to conclude that the only prerogative of this State is to be the custodian of the booty of conquest, the direct heir of the conqueror. We should, on the contrary, criminalize this same State that

intends to legislate today, and take it to court for the crimes of insolvency, default, omission and even homicide through the hands of many of its officers and agents vested with police power. When comparing the severity of its offenses, we have no choice but to acquit the people who are today criminalized here, and return the aim of Law toward the ones who try to blame them: an elite that each day demonstrates its inability to manage the Nation and sees dismantled in public its claim to moral superiority, the main instrument of all domination enterprises. The strength of that initial vignette speaks for itself. I could end here my presentation and it would already be convincing. However, much more needs to be said about the Bill whose discussion brings us here today. Starting with two clarifications that should be made before proceeding: the first one refers to what we are debating in this Hearing, as it should be clear that the discussion of the proposed law on infanticide in indigenous areas should not be focused on the individual right to life, which is already fully guaranteed by the Brazilian Constitution, the Penal Code and various Human Rights instruments ratified in Brazil. Instead of duplicating laws, already abundant, for the defense of individual lives, it would be more urgent to propose ways to enable the State to better protect and promote the continuity and vitality of the peoples that give so much wealth to the Nation in terms of diversified solutions for life. Children's lives depend on the welbeing of their societies!

The second clarification refers to the meaning of the expression "right to life". This expression can indicate two different types of right to life: the individual right to life, or the protection of the subject individual rights; and the right to life of the collective subjects, or the right to protection of life of peoples in their condition as a people. Precisely because the latter is much less developed in the Brazilian legal discourse and public policy, we should devote most of our efforts to reflect and figure out how to provide better legislative, legal and governmental protection to collective rights - the most vulnerable - such as promoting and strengthening collective and communitarian social fabric. I argue here that the priority is to save community where there still is community and to save a people where a people still persist. A fundamental right of every person is belonging to a people and to a community. The State needed to make this possible is not a predominantly punitive and interventionist State. It is a State able to return and restore the legal and material means, autonomy and guarantees of freedom within each community so that its members can deliberate about their own morality on a path of historical transformation, and build from within an idiosyncratic dialogue with the standards of Human Rights internationally established.

A critique of the punishing State. There are several authors, sociologists of violence and Law, jurists and political scientists who are concerned about the progressive intensification of the punishing aspect of the State, until the advent of an eminently criminalizing State, which concentrates its tasks and responsibilities on punitive efforts, relegating its other, higher priority obligations, to a second level. This law that we came here to discuss fits the profile, criticized and lamented, of a punitive State,

which restricts its activities to acts of force over and against those who should protect and promote. In his recent book *El Enemigo en el Derecho Penal*[34], the great Argentinean jurist Eugenio Raul Zaffaroni [...] examines the essence, the consequences and the sub-text [...] of the punishing State throughout history and especially in the contemporary context. What emerges is that, through criminal discourse, the idea of the enemy is designed – unfolding from the *hostile* category of Roman law. [...] (So) the criminal law profiles always inevitably [...] represent the figure of an alien who postulates, through the same maneuver, as the enemy.

In the case of the law that we debate today in this Public Hearing, the enemy of Criminal Law is each indigenous people, in the radicalism of their difference and in the right to build their own history, that is, the right to decide internally on the course of their tradition. This is clear, and would become evident for every inhabitant of Mars that, by a cosmic accident, landed here and read the text of the proposed law: it criminalizes the village and wants to punish the other for being the other. It cannot stand the idea of the existence of a community that chooses not to be a part of "us".

Therefore, this law is, first and foremost, anti-historical, since one of the central concerns of our time is to value and preserve difference and allow the reproduction of a plural world. This requires, unavoidably, the development of collective rights. Caring for such collective subjects' rights is also central because, despite the constant assaults suffered by communities in the course of these 500 years, these peoples not only survived by means of their own internal logic and strategies, but mainly because it is possible to imagine that they will surpass us in their future capacity to survive. Many of them refugees in places unreachable by what we pretentiously consider to be "Civilization", free from the greed to concentrate and accumulate, free from the heavy baggage that we carry, they will have, perhaps, an opportunity that we will not have, in a world that goes every day further in what many believe to be its final phase due to resource depletion.

The meaning of legislation. Julita Lemgruber, the prestigious Brazilian scholar on Public Safety and criminal efficacy, in her article "Truths and lies about the Criminal Justice System"[35], reveals the limited impact of Criminal Law not only among us, but also in the most scrutinized countries in the world. Using quantitative research on Public Safety in countries where monitoring is conducted regularly, the author warns that in England and Wales, in 1997, only 2.2% of the offenses had condemned those responsible, and in the United States, according to the 1994 survey, of all violent crimes committed - homicides, assaults, rapes, robberies, etc.., whose investigation, clarification and punishment seem more relevant - only 3.7% resulted in convictions. In light of these data, the author describes as a "First Lie" the assertion that the criminal justice system can be considered an effective inhibitor of crime. In Brazil, the reduced power of the law is even more extreme. In the state of Rio de Janeiro (as monitored by periodic surveys on violence) authors who conducted their research during the 90s as Ignacio Cano, Luiz Eduardo Soares and Alba Zaluar concluded, respectively, that

only 10%, 8% or 1% of all homicides reported to have reached some kind of conviction. In the words of Alba Zaluar: "In Rio de Janeiro only 8% of the investigations [...] are turned into processes and brought to trial. Of these, only 1% reach a verdict"[36]. These data lead us to wonder about the motivations that lawmakers could entertain when pushing for a law criminalizing indigenous peoples. Such punitive law, besides being contrary to ILO's 169 Agreement, fully in force in Brazil since 2002, hinders indian communities even further from restoring their own internal laws, ethnic rule and logics for the resolution of their conflicts and the promotion of internal deliberation... It should then be asked: if the law does not construct reality among us, how could it construct reality among other peoples who live in places hardly accessed by agents of the State? And if the law does not make it happen, then what would be the meaning of such insistence on passing this new bill by some lawmakers when, in fact, in addition to hinder a legitimated and legally validated right to difference, it enlarges, in redundant and unnecessary ways - because it enunciates rights already fully guaranteed in more than one article of the current legislation - the already too innocuous criminal law? Where does this legislative passion come from, this truly legislative fever that, once again, will only worsen the often criticized "legislative inflation"?

I can only find one answer to this question: what this proposed law actually does, and does it very efficiently, is to affirm, publicize, make patent before the nation, who are the ones who write the laws, which are the sectors within national society that have access to the offices in which this task is performed. In fact, we should not forget that the Law speaks, first, about the figure of their authors. It undoubtedly contains a signature. Whoever wants to write a law, wants to leave his/her signature on the nation's most eminent set of texts. But this is certainly not a valid, sufficient or fully acceptable motivation in the eyes of everyone. Especially because, in this Congress, there are no seats for Indians nor any other type of reserved places that can guarantee the participation in the making of the laws of the many peoples that compose the great Nation.

The future of the State. What then could be the work of the State, in order to overcome a scenario as disheartening as I have just presented? It should be a *State that returns and guarantees ethnic rule* and communitarian rights in general. With that, I mean that in view of the disorder that European and Christian metropolitan elites imposed to the continent during the process of conquest and colonization, disorder which was later aggravated and deepened by the administration of an Eurocentric national elite that inherited the control over the territories, today we have an opportunity. And that is the opportunity to allow those people who up until now have not had the chance, to restore their internal institutional order and resume the threading of their own history. Perhaps it is indeed possible to redo what was undone in terms of the cultural, legal, economic and environmental orders within a Nation now conceived as plural. If there is no perfect law, instead of insisting on an increasingly remote perfection of a deficient legal system, we can pave the way for other models. I refer here to the project of juridical pluralism.

It is not, as has been the understanding of lawyers and anthropologists to date, to oppose the relativism of cultures to the universalism of Human Rights or the universal validity of the constitution within the Nation. What the project of a pluralist state and the legal pluralism platform propose is to draw the idea of Nation as an alliance or coalition of peoples, allowing each of them to resolve their conflicts and develop their internal dissent in their own way. In every human village, however small, divergence is inevitable, and when it comes to the prescription of infanticide, dissent is often present. In face of this, the role of the State in the person of their agents will have to be available to oversee, mediate and intercede for the sole purpose of ensuring that the internal process of deliberation can take place freely without abuse by the most powerful within society. This is not a defense of the withdrawal of the State, because, as evidenced by the multiple demands for public policies placed by the very indigenous peoples since the Constitution of 1988, after the intense and pernicious disorder installed by ultramarine and later republican colonial interventions, the State can no simply withdraw itself. It must remain available to provide assurance and protection when its intervention is demanded by members of the communities, provided that such intervention occurs in dialogue between its agents and the representatives of the community in question. Its role, in this case, cannot be other than to promote and guarantee the dialogue between the powers of the village and its weakest members.

Caution in regard to legislative activity and commitment to ensure the freedom of the group to internally deliberate and self-regulate itself are particularly wise and sensible gestures in a multicultural globalized world like the one we have today, in which there is a very large risk of appropriation of elements of tradition to convert them into emblems of identity by groups who see in the political culture and fundamentalist strategy a way to defend their greed for power and influence within society. They are many the practices that, far from waning, when reppressed by modernizing and westernizing legislation, get reaffirmed as banners of identity against authority envisaged as culturally alien. By remembering this possibility, we are convinced that further discussion of this law is impractical and even dangerous for two reasons that we must consider. First, because it can generate forms of reaction that, on the basis of fundamentalist notions of identity and culture, might transform the practice of infanticide, now in progressive disuse with the improvement of living conditions of indigenous peoples after the end of Brazilian military dictatorship and with the hopes brought about by the 1988 Constitution, into an emblem of difference crystallized as an icon in ethnic heraldic. Second, because the sanction of this type of law demands its quite unattainable application, which inevitably relies on the intrusion and interference of State Security forces within villages, obstructing their autonomy and intimacy. This could lead to disastrous consequences, in view of police's lack of training to work across boundaries of difference and from a pluralistic perspective.

***People and history*: fundamental categories to transcend the binomial relativism/universalism**. The most appropriate and efficient way to think about the set of problems that arise here is not to enter the minefield of unsolvable dilemmas posed by the opposition relativism – universalism. When confronted with the principle of pluralism, the idea of culture as crystallized customs should be avoided and replaced by the idea of histories in plural – the multiple histories running through our nations. All people dwell in the flow of historical times, in dynamic interweaving with others. Every nation contains this very engine of history that is dissent within, so that costumes are changed in the course of constant internal deliberation, which is nothing else than the fluent and constant dialogue among its members. The problem of the peoples of our continent is not to preserve culture as heritage crystallized - after all, culture is nothing more than the result of the constant and unrelenting sedimentation of historical experience – but, on the contrary, desintrude – or resign intervention – in the threading of their history, which was intersected and sectioned by the outbreak of colonization by the agents of European metropolitan powers first and of eurocentric autochthonous eleites in control of national States later. It is not, as often believed, the repetition of a past what constitutes and validates the identity of a people, but their constant task of joint deliberation. In that sense, many a people have already deliberated and abandoned the practice of infanticide. This happened, for example, with the people Kaxuyana-Tyrio, as reported by Valeria Paye Pereira, who preceded me in this Hearing.The idea of history itself moves in precisely the opposite direction of what the law debated here intends to do. This law endorses a State that makes decisions about the direction of all the peoples that constitute the nation, and does so through punitive intervention. Quite on the contrary, it should stress the principle of respect for the agency and deliberative capacity of each collective subject preserving its right to keep its historical course free flowing and differential. Therefore, *the fact that societies transform themselves, abandoning customs and adopting and installing new ones is precisely an argument against the law, and not in its favor.* By saying that societies change at their own will as a result of internal dissent and in contact with the epochal discourses that circulate around and across them – precisely such as the international discourse of Human Rights – we are saying that the State is not the agency to prescribe and enforce, through threat and coercion, outcomes for the plot of all people's histories within the Nation. His only role is to protect the unique historical route of each people in its idiosyncratic and particular unfolding, ensuring that it can flow without authoritarian impositions neither from internal groups - *cacicatos* - empowered by their role as mediators with the State and the so called national society, nor from external constraints, as the one coming from this law. *The devolution of justice itself is nothing else than the return of history itself.*

From this anthropological and legal perspective that I propose, the State's role is therefore to restore to the peoples the material and legal means for them to recover their usurped ability to weave the threads of their own

history, and assure that the internal deliberation can occur in freedom, in accordance with legal guarantees of jurisdiction or ethnic forum. Accordingly, the kind of *garantism* invoked here refers to the legal commitment assumed by the national State to fulfill the demands of collective subjects and collaborate with the effort they invest in reproducing their existence. *The principle of protection of a history of their own is opposed to the relativist classic perspective, since this latter will never get to avoid referring indigenous internal law to a conception of culture as crystallized, a-historical and timeless. To affirm and oppose history instead of culture is the only efficient way to guarantee the progress of justice in the life of peoples through internal deliberation and the constant production and revision of their own logics and systems of legality. Such deliberation is no other thing than the engine of historical movement and transformation, in its own course and in constant dialogue with other peoples.*

6. SEVEN COROLLARIES

Seven corollaries follow from the argument presented here in support of the agenda of the Right to Difference and the values of pluralism against the limiting case that indigenous infanticide represents to Legal Pluralism:

1. It is more appropriate to the purposes of the defense of rights, to speak of "people" instead of "ethnic group", because people is a living collective and a dynamic subject, while ethnicity is a objectifying category, which serves the purposes of classification and anchors the group to a ethnicity based on a fixed cultural heritage.
2. *People* is the collective that is perceived plotting the web of a common history, coming from a shared past and going to a common future, including the drama of conflicts surmounted along the way. The loom warp of this tapestry collectivelly weaved is continuous, though it presents tears and ruptures in some of its threads; the design of its weaving reveals consensus and dissent among the people threading such fabric of history.
3. It is more appropriate to speak of "history" than of "culture, because, unfortunately and unavoidably, the idea of culture, due to the inherent inertia of its conception, often involves the removal of custom from historical flow - even well -intentioned actors condemn cultures to a museum-like existence. Culture is nothing else than the sediment left by the historical experiences of a collectivity, while myth and customs are the result of the condensation and symbolization of this historical process.
4. A good State should have a replacer/returner/restoring profile regarding justice, among other features to be reinstated.
5. To restore justice, that is to say, to restore internal law or ethnic rule is to promote the repairing of community tissue - the return of the territory is necessary but not sufficient for this purpose.
6. To restore inner rule also means giving back to the community the

reins of their history, since deliberation in inner ethnic jurisdiction of their own and the consequent unfolding of inner discourse inherent in the very practice of doing justice within the community constitute the engine pushing the historical path of a collective subject.

7. Yet, the State cannot withdraw suddenly and completely, due to the disorder installed in communities as a result of the long intervention of the white world over them. Its role, nevertheless, should be to ensure internal deliberation when hampered by established powers - *cacicatos* - within communities (usually men, elders and rich members, political leaders) whose power gets fed from outside the group, either as a reactive effect resulting from external interpellations or or due to alliances with segments of the national society (traders, agents of the State, politicians, farmers) that reinforce or even originate internal powers within communities.

>> ENDNOTES

[1] Segato, 2006: 228.

[2] "[...] a draft law dealing with the practice of infanticide in these communities is in discussion in the National Congress, and two hearings have already been held without the participation of indigenous women that are being criminalized. There is also a national campaign against infanticide and the Subcommission can take a position and demand participation in the hearings" (Ministry of Justice, FUNAI, 2007:35. My Translation).

[3] Segato, 2003: 31.

[4] Marés de Souza Filho, 1998.

[5] Carvalho Dantas, 1999.

[6] See <http://voiceforlife.glorifyjesus.com>.

[7] Platt, 1969.

[8] Segato, 2008.

[9] According to information sent by David Rodgers to the list <http://br.groups.yahoo.com/group/Nuti_Pronex>, this film can be downloaded through the page <http://www.hakani.org/en/premiere.asp> and the trailer is loaded in <http://br.youtube.com/watch?v=RbjRU6_ZjoU>.

[10] To read the bill, see the webpage <http://www.camara.gov.br/sileg/MostrarIntegra.asp?CodTeor=459157>.

[11] Wednesday, October 3rd, 2007 and Thursday, October 4th, 2007, <http://www.correioweb.com>.

[12] Davis, 2007: 1.

[13] McMullen, 2007: 4.

[14] See <www.voiceforlife.blogspot.com/>.

[15] Feitosa *et al*, 2006.

[16] Kroemer, 1994; Dal Poz, 2000.

[17] Feitosa *et al.*, 2006: 6; my translation.

[18] Feitosa *et al.*, 2006: 6.

[19] Feitosa *et al.*, 2006: 7. Dal Poz, 2000: 99.

[20] See, on the complexity of differences that surround infanticide practice and a critique of the very name "infanticide", Holanda, 2008.

[21] Segato, 2010.

[22] Viveiros de Castro, 1987.

[23] Agamben, 1998.

[24] Mendonça Rodrigues, 2008.

[25] Foucault, 2000, 2006 and 2007.

[26] Sánchez Botero, 2006.

[27] Sánchez Botero, 2006: 156.

[27]

[28] *Idem*: 170.

[29] Abdullahi Ahmed An-na'im, in his search for points of convergence between the Human Rights discourse and the Islamic perspective on rights, noted that, though cruel to the Western eyes, "Coranic law requires that the State fulfills its obligations of assuring social and economic justice and guarantees a decent life standard for all citizens before it applies punishments (to offenders). (1992:34. My translation).

[30] Two days after my presentation, exactly on September 7th of 2007, the adoption of the Declarations on the Human Rights of Indigenous Peoples by the General Assembly of the United Nations came to confirm this line of reasoning: "Article 18 – Indigenous peoples have the right to participate in the decisions of matters that could affect their rights, by means of

representatives elected by themselves in accordance to their own methods, as well as to maintain and develop their own institutions for the reaching of decisions".

[31] Segato, 2007.

[32] I appreciate the cooperation of Esther Sánchez Botero, Xavier Albó, Patrícia Rodrigues de Mendonça, Ernesto Ignacio de Carvalho, Saulo Ferreira Feitosa, Rosane Lacerda, Eli de Lima Passos, Leia BezerraWapichana, Suzy Evelyn de Souza e Silva, Marianna Hollanda and Danielli Jatobá.

[33] Martins, 1991: 10.

[34] Zaffaroni, 2006.

[35] Lemgruber, 2001.

[36] Cano, 2005; Soares, 1996; Zaluar, 2002.

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THE BEHEADING OF THE LEGISLATOR: THE EUROPEAN CRISIS – PARADOXES OF CONSTITUTIONALIZING DEMOCRATIC CAPITALISM

// A DECAPITAÇÃO DO LEGISLADOR: A CRISE EUROPEIA – PARADOXOS DA CONSTITUCIONALIZAÇÃO DO CAPITALISMO DEMOCRÁTICO

Hauke Brunkhorst

>> ABSTRACT // RESUMO

The European Union today finds itself in the midst of its greatest crisis. The crisis is due not only to one of the greatest breakdowns in the history of the global economy, but also to the fascinating internal evolution of the European constitution since its beginning, shortly after World War II. Parallel to the growth of constitutional law, latent legitimation problems began to arise and grow cumulatively. However, once the big global banks, corporations and hedge-funds began a concerted attack on the European periphery, the long lasting neoliberal turn from democratic capitalism to capitalist democracy has reached whole Europe, and the legitimation crisis becomes manifest. // Atualmente, a União Européia encontra-se no meio de sua maior crise. A crise se deve não somente a um dos maiores colapsos da história da economia global mas também à fascinante evolução interna da constituição européia, desde o seu início, logo após a Segunda Guerra Mundial. Paralelamente a expansão do direito constitucional, problemas latentes de legitimação começaram a surgir e crescer, cumulativamente. Todavia, uma vez que os grandes bancos globais, as corporações e os fundos de retorno absoluto iniciaram um ataque concertado na periferia da Europa, a perdurável virada neoliberal – de capitalismo democrático a democracia capitalista – alcançou toda a Europa e a crise de legitimação se tornou manifesta.

>> KEYWORDS // PALAVRAS-CHAVE

Kantian mindset; managerial mindset; constitutional evolution; normative constraints; existing concept; crisis; ordoliberalism. // mindset kantiano; mindset gerencialista; evolução constitucional; limitações normativas; conceito existente; crise; ordoliberalismo.

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1. INTRODUCTION

In the beginning was not the affirmation of *peace*, the protection of which now is the reason why the European Union got the Nobel Prize (although, at the same time, the Union or its Member States were at war in several parts of the world). In the beginning was not peace but the *negation of fascism*: that is the *emancipation* of Europe from the dictatorship of the Third Reich. In the beginning was not the *managerial mindset* of possessive individualism and "peaceful competitive struggle"[1]. In the beginning was political autonomy. In the beginning was not rational choice and strategic action enabled by *rule of law*, but the *emancipation from any law that was not the law to which we have given our agreement*[2].

Martti Koskenniemi calls the latter the *Kantian mindset* in contrast to the managerial mindset:[3] For Kant in his time the scandal of so called absolutism was not a lack of *Rechtsstaat* or rule of law. Kant had no doubt that the contemporary monarchy was a state of law. For Kant the scandal of that monarchy was its lack of political "autonomy" and "self-legislation", and the absence of "structures of political representation".[4] Historically the Kantian constitutional mindset is the mindset of the French Revolution as it once was expressed strikingly by the young Karl Marx in one short sentence: "*Die gesetzgebende Gewalt hat die Französische Revolution gemacht*" – *The legislative power has made the French Revolution*.[5]

2.

Today the memory that it was the same constituent legislative power of the peoples of Europe, that has made the European Union between Fall 1944 (that was the last year of World War II in Europe) and 1957, has been repressed and displaced by the managerial mindset that became hegemonic already during the 1950s. However, the European unification did not begin with the Treaties of Paris and Rome in 1951 and 1957, but with the *new constitutions* that all founding members (France, Belgium, Italy, Luxemburg, Netherlands, West-Germany) had given themselves between 1944 and 1948. Moreover, the foundation of the first Communities in 1951 and in 1957 was an effect of a *global revolutionary transformation of national and international law* that was as deep as that of the French Revolution.[6] All constitutions of the founding members were made by *new representatives* of the respective peoples.

1. All founding members had *changed their political leaders* and had *replaced great parts of the former ruling classes* with former resistance fighters or emigrants who had defected. They gained a power that did not exist before or during the time of the Nazi-occupation. Rebels, guerrillas and exiled politicians became heads and members of government. They risked their lives, not solely as patriots, but as democrats or socialists who had struggled for certain rights and universal constitutional principles.[7]

2. All constitutions of the founding members were *new* or in important aspects *revised* and *more democratic than ever before*. Only now did *all* of them stipulate *universal adult suffrage*.
3. All had *eliminated* the remains (or after 1918 newly invented structures) of *corporatist political representation* of society. For the first time the system of political democracy was completely autonomous and could *cover and control the whole society through parliamentary or popular legislation alone* (as it was the case with Kelsen's Austrian constitution of 1918 that then was a lone exception).[8] The German *Grundgesetz* even constituted a completely *new state*.[9]
4. All constitutions of the founding members expressed a strong emphasis on *human rights* and had *opened themselves* (more or less) *to international law*. The founding members of the European Communities designed their newly constituted states as *open states* – open to the incorporation of international law and international cooperation; an important example of this is, in the German Basic Law (*Grundgesetz*), the obligatory *Völkerrechtsfreundlichkeit* (*openness to international law*) established in Art. 24(1).[10]
5. Finally, and crucially for the foundation of Europe: the new constitutions declared the *strong commitment of their respective peoples to the project of European unification*, which was to be realized in the near future (for example: Preamble in combination with Art 24(1) of Basic Law). All founding members of the European Communities bound themselves *by the constituent power of the people* to the project of European Unification, which then, from 1951 onwards, became constitutive for all European constitutional (or quasi-constitutional) treaties.[11] The only instance of a constitution of a founding member that made no declaration about Europe, the Constitution of Luxemburg, is in itself a revealing case. In 1952 in Luxemburg its *Conseil d'État* decided that the Constitution implicitly committed the representatives of the people to join the *European Coal and Steel Community*, and to strive for further European unification.[12]

In all, the Founding Treaties of Paris and Rome were directly legitimated by the *constituent power of the peoples*.[13] Consequently, it can be concluded that, from the outset, the European Union was not founded as an international association of states. On the contrary, it was founded as a *community of peoples* who legitimated the project of European unification *directly* and *democratically* through their combined, but still national, constitutional powers (represented later in the *Council of the European Union* and the *European Council*). At the same time and with the same founding act, these peoples, acting plurally, constituted a single *European citizenship*, embodying *new rights for the European citizen*, which were different from the rights of the citizens of the respective member states (represented later by the *European Parliament*). These remained implicit for the first decades, but the European Court of Justice (ECJ) made them explicit in *van Gend en Loos* and *Costa* in 1963 and 1964. The community of European citizens as a whole thus now constitutes a second and independent 'subject of legitimization'.[14] From the beginning, the Treaties

were not just intergovernmental, but *legal documents with a constitutional quality*.

3.

However, as one can also observe in other cases of national or transnational constitutionalisation, the constitutional moment was followed by an unspectacular evolutionary incrementalism and a silent but gradual and steady process of ever denser integration. The *managerial mindset* took over soon after the first big changes. However, it has not only *replaced and repressed* the *Kantian mindset* of revolutionary foundation but – in a paradoxical move – also *stabilized* and *realized it step by step legally*.[15] In European law today the Kantian mindset is expressed in the reference of the preambles of the European Treaties to 'solidarity', 'democracy', 'social progress' 'human rights' and 'rule of law'. Solidarity is mentioned again and again, however, the Treaty also states that solidarity should be for free (as in David Cameron's first sentence when the crisis erupted: "No money for the Greeks!"). Nevertheless, the Kantian mindset is implemented in many single articles and legal norms of primary and secondary European law, such as the famous Art. 6 of the Treaty of Maastricht, or the Articles 9-12 of the Lisbon Treaty. Moreover, the Kantian mindset also underlies legal precedents such as the famous cases Costa and van Gent en Loos from the early 1960s which refer to the subjective rights that we have *as* European citizens ('direct effect' plus 'European law supremacy'). Finally, the Kantian mindset found its way into numerous juristic commentaries and treatises: that is the emergence of a European *Rechtsdogmatik* (legal doctrine)[16], and became part of the European common law.[17]

At the end of the day, and after the symbolic re-establishment of state-sovereignty through the constitutional court of the European hegemon in Karlsruhe – the counter-hegemonic Czech constitutional court in its judgment on the Lisbon-Treaty stated that the *European Union today forms a complete and gapless system of democratic legitimization*, and rightly so.[18] Legally Europe no longer has a crucial democratic deficit. It is already a fully fledged democracy on both levels: the national *and* the transnational. The problem is that nobody knows it.

The problem is not just the managerial mindset but the *hegemony of the managerial mindset*, and the *reduction* of politics to technocracy that today allows the political and economic elites to bypass and manipulate public opinion and democratically legitimated public law *on both levels*: the European *as well as* the respective national level. At the same time as it is growing legally, the public power of the people and its representative organs is more and more deprived of real power and replaced by grey networks of *informal government*[19] – called 'good governance'[20] instead of democratic government, called 'administrative accountability'[21] instead of parliamentary responsibility, called 'deliberative democracy' instead of egalitarian decision making.[22] In a world where good governance

has replaced democratic government, where administrative accountability has replaced parliamentary responsibility, where deliberative democracy of educated middle-classes has replaced egalitarian procedures of decision making, in a world where the semantic of pluralized civil societies has replaced the unity of capitalist society, where competition has replaced cooperation, where the managerial mindset of individual empowerment has replaced the Kantian mindset of emancipation – public contestation over real issues, public debate and public struggle over substantial alternatives are just "not helpful" (*nicht hilfreich*), to say it in the matchless managerial language of Angela Merkel. In Angela Merkel's world deliberative democracy begins when the doors are closed.

Hence, and this is my *overarching thesis*, the Kantian mindset of revolutionary foundation has been concretized and stabilized throughout the gradual evolutionary process of constitutionalization. This evolutionary process developed under the lead of the managerial mindset of Europe's political elites and professional experts. However, the hegemony of the managerial mindset had the paradoxical result that the Kantian mindset at the same time was *preserved and repressed* (or displaced), *constitutionalized and de-constitutionalized* – again and again at every stage of the twisted paths of European constitutionalization.[23]

To demonstrate that, I will combine throughout the following chapters (4-7) Koskenniemi's Kantian inspired distinction between the two constitutional mindsets with Karlo Tuori's more managerial reconstruction of the constitutionalization of Europe as an incremental evolutionary process of stages of structural coupling of law with other social systems. Through this combination, Koskenniemi's more voluntaristic distinction is transformed into a set of "existing concepts" (Hegel) that are internal to the social evolution.[24]

4. STAGE I: ECONOMIC CONSTITUTION

As Tuori has shown, Europe now has not only many national (and subnational) constitutions but also many transnational constitutions that evolved gradually and in stages. The first evolutionary step was taken in 1957 with the establishment of a functional *economic constitution* that consisted in the *structural coupling* of the *legal* and the *economic system*. The establishment of the economic constitution was due to German Ordoliberalism. The Ordoliberals were a German-Austrian group of economists and jurists at the end of the Weimar Republic who all were more or less far right wing neo-conservatives but with few exceptions anti-Nazis. The centre of the school was the University of Freiburg in south-western Germany. Members of the School were Franz Böhm, Walter Eucken, Alexander Rüstow, Wilhelm Röpke, Alfred Müller-Armack and Friedrich August von Hayek.[25]

Originally the idea of an economic constitution was the invention of the German socialist left at the end of World War I, in particular Hugo Sinzheimer and his student Franz Neumann. Sinzheimer and

Neumann strictly followed the Kantian presupposition that the political constitution and the parliamentary legislator should keep the absolute supremacy over the economic constitution. The economic constitution should have a mere service function: It should improve the possibilities of the democratic legislator, to place the markets, and in particular the private sphere of domination within the capitalist firm, under democratic control.[26]

At the end of the Weimar Republic *Ordoliberals* "rather hi-jacked" the idea of an economic constitution from Sinzheimer and Neumann, watered it down and reversed it severely.[27] During the 1950s they turned the idea upside down, trans-nationalized the economic constitution, decoupled it from the national political constitution and subsumed the latter to the former. Now the whole society should be "subsumed" under the "principle of market-compliance", as the (at that time pious) former Nazi Alfred Müller-Armack wrote[28] in 1960.[29] In 1957 treaty negotiations the German Ordoliberals under the lead of Müller-Armack, and strongly supported by the American government, finally won the battle against the recalcitrant French government that, at the time, defended a constitutional project that was much closer to the original ideas of Sinzheimer and Neumann.[30]

With the establishment of the economic constitution in 1957 a Schmittian constitutional *Grundentscheidung* (basic decision) was made. It consisted in the radical "negation of a political constitution of Europe".[31] Instead of subsuming the economic under the political constitution, the political constitution was subsumed under the economic constitution, and therefore *Wettbewerbsrecht*, competition law became the "axis of the economic order".[32] In case of doubt the 'concrete order' of *law and economics* trumps the formal constitution of *law and democracy*.[33] Whereas formal constitutional law still adhered to the Kantian priority of democratic legislation, the concrete order of *law and economics* became Europe's informal prerogative constitution – Europe's "hidden curriculum".[34] The legal link between visible constitutional law and the invisible prerogative constitution was Art. 2 TEEC (Treaty establishing the European Economic Community).[35] One of the most crucial effects was that the negation of any transnationalization of the political constitution. The hegemony of the hidden curriculum stimulated and reinforced the Europeanization of big enterprises and employers' federations, but at the same time strictly limited unions activities and employee organizations to the sphere of the national state.[36]

Ordoliberals today are proud of the fine differences that distinguish them from Neoliberals. But it was indeed Ordoliberalism that disclosed the historical path to the latest great transformation of globalization that has lasted since the 1980s. If we resume the three basic ideas of Ordoliberalism, it becomes evident, that only one idea is different. Therefore, the relation of Ordo- and Neoliberalism resembles more a cooperative historical division of business than a fierce opposition:

- The *first* basic idea of Ordoliberalism is to *get markets rid of state-control*. The spectre of 'socialism' and 'communism' must be banned

as long as it is haunting Europe under the mask of macroeconomic state interventionism. Here Ordo- and Neoliberalism meet from the beginning. Today's representatives of the power elite, such as the President of the German *Bundesbank*, Jens Weidmann, or the former judge of the *Verfassungsgericht*, Udo Di Fabio are accusing even the President of the ECB (European Central Bank), Mario Dragi of creeping socialization (*schleichende Sozialisierung*) and planned central states economy (*planwirtschaftliche Zentralität*) – Dragi, the creeping socialist who learned his job at the communist cadre training centre Goldman & Sachs.[37]

- However, Ordoliberalism not only distrusts the (bureaucratic) state but also big size (that is bureaucratic) capitalism and its tendency to concentration and centralization of capital that has led to monopoly capitalism since the beginning of the 20th century.[38] Therefore the *second* basic idea of Ordoliberalism is to *get rid of monopoly capitalism*. Competition law shall keep the economic chances of *all* market participants equal *any time*. This idea is called market justice, but it is a very poor idea of justice.[39] From the beginning it was mere ideology. In fact (as Kelsen has demonstrated in his scathing criticism of Hayek already in 1955) it worked in favour of the haves who disposed over the means of production, and at best regulated *their* competition.[40] However, in this respect Ordoliberalism is clearly different from Neoliberalism. Neoliberalism bluntly has abolished competition law and reduced so called market justice to shareholder value that then has been identified with the common good by Milton Friedman and others.[41] That's why we can no longer side step the bright lights of the latest stock market news everywhere we go.
- The *third* (and in terms of constitutional law most crucial) basic idea of Ordoliberalism is *to get rid of democratic legislative control*. Here again Ordo- and Neoliberals meet in applying the categorical imperatives: Give the judges what you have taken from the democratic legislator and the parliamentary controlled government! Promote the Judges to the guardians of functional *Ordnungsrecht* (regulatory law)! In the words of Ernst Joachim Mestmäcker: "*Die wichtigsten Aufgaben obliegen nicht der Legislative oder der Regierung, sondern der Rechtsprechung*." ('The most important decisions have to be taken not by the legislator or the government but by the judges').[42] The beheading of the legislator is the true end of the French Revolution and the Kantian political era.[43] If it really comes true, it will be the final triumph of the counter-revolution that in this case is the counter-revolution against 1789: Never again shall a legislator be able to effect a revolution. That was Margaret Thatcher's actual message. In 2000 Alec Stone-Sweet could only state that in "today's multi-tiered European polity, the sovereignty of the legislator, and the primacy of national executives, are dead. In concert or in rivalry, European legislators govern with judges."[44] One has to add that in combining transnational and national constitutional jurisdiction have reinforced one another, and in a way the European *Verfassungsgerichtsverbund*

> (Udo Di Fabio) has reserved for itself the most basic functions of all three classical state-powers – at least in normal times of incremental and managerial evolutionary constitutionalization.[45]

For these reasons, the implementation of the Euro without political government was not just a mistake, or the worst possible compromise – that it was, at least from the perspective of the negotiating parties[46] – but actually nothing else than, as Wolfgang Streeck says, the "frivolous experiment" to realize a "market economy emancipated" from all political bonds and to establish "a political economy without parliament and government".[47] The implementation of the Euro finalized the prerogative constitution and perfected the hidden curriculum of European governmentality by "immunizing the markets against democratic corrections"[48] [49]. This immediately resulted in an increase of the social differences between the rich North and the poor South. When finally the crisis came, European *Ordnungsrecht* derogated national as well as transnational *constitutional law*.[50] As a result, the social gap that separates the North from the South grew dramatically in favour of the northern hegemon: that is Germany.[51]

Hence, by beheading the legislator Ordoliberalism opened the evolutionary path for the neoliberal globalization of capital beyond state-control. Intentionally or not doesn't matter. Ordoliberalism had done its job, Ordoliberalism could go. Once Neoliberalism was over, the *great transformation* of the last thirty years could begin: the transformation *of state-embedded and state-controlled markets* into *market-embedded and market-controlled states*.[52] The new world order of market-embedded states makes it extremely hard for any political actor to get rid of the pressure to market compliance, to gain independence from the whims of a highly sensitive class of investors, and to return to macroeconomic steering, be it national or transnational.

5. STAGE II: JURIDICAL CONSTITUTION

For all that, economic constitutionalization is not the only evolutionary formation of European constitutional law, and even if it remains the hegemonic constitution to date, it was and is not the last stage of Europe's constitutional evolution. The latter is, as we have seen, conducted by the managerial mindset of *law and economics*. However, once the Kantian mindset has been constitutionalized and integrated into the public authority of European law, it counteracts the managerial mindset of blind evolutionary adaption *as* a *normative constraint*. However weak it may be, it operates no longer as a Kantian (allegedly) *empty ought* but as a Hegelian *existing concept* (as a moment of objective spirit).[53]

In the European constitutional history, the Kantian mindset of autonomy came back already in the early 1960s, together with the rapidly increasing volume of European regulations. It came back in the reduced and, for professional lawyers, manageable form of individual lawsuits over issues of *private autonomy*. In two landmark decisions of the

European Court from 1963 (*van Gent&Loos*) and 1964 (*Costa*) the *emancipatory* side of the legal form flared up. As public authority with binding legal force the Kantian mindset remained, it is true, *privatized*. However, to establish only private autonomy, the judges (in a bold teleological interpretation of the Treaties) had to create an autonomous European *citizenship* and European *citizens' rights* as rights of an autonomous legal community.[54] The two decisions from 1963 and 1964 therefore emphatically were described (by European law jurists) as "the declaration of independence of Community law".[55]

However, the Kantian moment of the two landmark decisions would have disappeared immediately from the trajectory of constitutional evolution, if the two decisions had not been followed by thousands of cases appealing to European Law in national courts of all member states (and the backing of the national courts by the ECJ submission procedure under Art. 267 TFEU).[56] In this case the old evolutionary insight became true that not the elites but the *masses* make the evolution, and here I mean the masses of negative legal communications that filled the variety pool of the legal evolution, and finally engendered a new constitutional formation: the European *Rechtsstaatsverfassung*, the juridical constitution of Europe. The European *Rechtsstaatsverfassung* consists in the (reflexive) *structural coupling of law and law* – or may be better: the structural coupling of *law and subjective rights*.[57] The European *Rechtsstaat* finally has transformed Europe into *one single*, internally differentiated legal order, negatively described as fragmented, positively as pluralized[58] – and it is an order that is not toothless, as just recently Hungary came to experience.[59]

However, all these legal advances remained limited to legal experts and individual plaintiffs. On the rule-of-law-stage-II of the constitutional evolution of Europe the Kantian mindset was *constitutionalized under private law* (in a kind of Teubnerian *Zivilverfassung*[60]). However, at the same time it was repressed and displaced again[61] in public.[62] On the second stage of constitutional evolution we can get aware of a paradox: *Constitutionalization at once advances and is de-constitutionalized by its own advances*.

This paradoxical structure is due to the emergence and continuation of *formal constitutional law* together with its opposite: that is *informal prerogative law*. Both constitutional formations constitute a European *double-state*.[63] Whereas, for example, the Kantian mindset of the formal constitution is reflected by the court's interpretation the basic freedoms of EU-Law as *anti-discrimination norms* that are constraining the *basic freedoms* through the *basic rights* of *all* European citizens – the managerial mindset of the informal constitution is reflected by the court's interpretation of the *basic freedoms* (in particular of big money and big capital) *as constraints of basic rights* (*Walrave*, *Bosman*, *Viking* and *Laval*).[64] It is this contradiction between the formal and the informal constitution of Europe that causes a latent *crisis of legitimization*. The contradiction between the two constitutional mindsets is productive as long as it becomes a driving force of further constitutionalization.

6. STAGE III:POLITICAL CONSTITUTION.

Since the middle of the 1970s the long latent conflict between the ever closer united executive powers of Europe and the parliamentary legislative bodies became more and more manifest. At the same time the European Court of Human Rights turned into an active court. Now backed by the ECJ's doctrines of *European law supremacy* and *uniform application*, it radicalized its human rights jurisdiction.[65] This was important for the process of democratization because – different from civil and economic law – human rights have an internal relation to democracy and cannot be dissociated from public autonomy and public self-determination.[66] The pressure to reduce the growing democratic deficit of Europe finally compelled the political and professional power elites to take in account the Kantian mindset's commitment to public autonomy. Again it became evident that the *Kantian mindset* of emancipation can be repressed, "can be halted or inhibited, but it cannot be eliminated" once it is constitutionalized.[67]

Since the first direct elections of the European Parliament in 1979 the power of the Parliament increased consistently. The managerial mindset and stubborn incrementalism of every-day parliamentary work for over a quarter-century, made the weak and restricted European Parliament a *controlling and law-shaping parliament* that now is one of the strongest institutions of the EU.[68] The final step to the *parliamentary legislative procedure*, taken in the Treaty of Lisbon, largely completed the political constitution of Europe.[69] The third stage of structural coupling of law and politics was achieved.

However, even this time the managerial mindset prevailed again. The polling stations and the market places remained empty. To the same extent as the shaping power of the parliament increased its public legitimacy decreased dramatically from election to election.[70] The most crucial act of the Kantian mindset, the political implementation of representative government based on fierce public debate ("*Freiheit der Feder*"), had the paradoxical effect of generating *democratic public legislation without democratic public life*. The increase of *constitutionalization of public legislation* again came at the price of a *de-constitutionalization of public discourse*.

Here again we encounter the managerial mindset: the *bloc* of ever closer united executive bodies in concert with the politico-economic power elites, supported by the omnipresent chief-economists of the big banks , by the willing legal and political experts, and by co-opted journalists (who are much better paid than ever before and trained in the same economic vocabulary, at the expense of freelance journalists who are much worse paid than ever before) – seems to prevail over the Kantian 'power of the people'.[71] Public debate is not suppressed or limited but – more effectively – bypassed by political and economic power as "not helpful". Again *Ordnungsrecht* derogates constitutional law and stabilizes the new collective Bonapartism of Europe.[72]

7.

However, these days, we witness the return of the repressed. The *economic* crisis, and in particular the *banking* crisis can no longer be displaced by the *budget* crisis. As a consequence, the long latent *crisis of political legitimization* suddenly becomes manifest. The Kantian mindset re-emerges in the streets, in Athens, in Madrid and elsewhere.

It appears that the structural coupling of law with the systems of social welfare and security can no longer be performed silently behind closed doors and at low costs. The crisis makes it evident: that there is *no modern mass-democracy* without the *rough equality of stakeholders*, at the very least.[73]

The national state looked like the big winner after the outbreak of the global economic crisis in fall 2008 (and many political theorists and analysts proclaimed, such as once Erich Honecker, the last prime minister of the GDR: *Totgesagte leben länger* – "The condemned live longer"). But in fact the state was already weak, and therefore became one of the greatest losers of the crisis. Wolfgang Streeck rightly headed an essay two years later with: *Noch so ein Sieg und wir sind verloren* ("Another victory like that and we are lost"). The great crisis of 2008 has proven that the national state already was deprived of its most basic alternatives in economic and social politics.[74]

The national state's capacity to act and shape the future always relied on the existence of *two major instruments* to get modern capitalism under control, and to enforce the legislative will of democratic majorities: either the stick of the law, or the carrot of money.[75]

However, it seems that from the beginning of the present crisis, the national states were no longer able to perform *macroeconomic steering* through an effective mix of stick and carrot, of legislation and investment. The political actors had already lost most of the legislative power that is needed to regulate and control capitalist economies. They have not regained it at the global level. On the contrary, during the last 30 years of neoliberal global hegemony, the fragile balance of power between democracy and capitalism has shifted dramatically in favour of capitalism.

As long as a modern, functionally differentiated economy (with capitalist markets) is embedded in democratically controlled state-power, the parties of the have-nots, either the exploited social classes, or the nations who are the losers of the global economic competition between states and regions, have two means to enforce *rough compensatory justice*.[76] They can perform macroeconomic steering in times of crisis: (a) *nationally* by legal regulation and investment, in particular increasing taxes for high incomes and assets, and/ or (b) *internationally* by means of devaluation of their national currency.[77] In Europe today they have lost both.

Globalization (a') has transformed tax-collecting states into debt-depending states, hence reversed the direction of control between states and capital. The *taxing state* that is in control of capitalism has become a *borrowing state* that is controlled by capitalism.[78] The implementation of

the Euro (b') has taken away all means of resistance poor countries have in their unequal competition with rich countries.

Franklin D. Roosevelt's New Deal administration in the 1930th, supported and pushed by a fighting working class with young and strong Unions that had nothing to loose, finally regulated and controlled Wall-Street, increased taxes for the rich, cut back banks and industrial corporations, created jobs administratively, printed money. In this way those politicians and other social democrats and socialists in advanced societies were able to square the circle: that is to *socialize the means of production within the capitalist mode of production*.

However, this seems no longer possible. After 2008 nowhere were taxes increased in measure comparable to the US and other western countries in the 1950s and 1960s. Not one of the banks deemed 'too big to fail' was nationalized or divided. Except for Lehmann all were bailed out again and again. Moreover, in Europe the common currency excluded all possibilities of currency devaluation. Deprived of its legislative power to regulate the economy, the state no longer had an alternative, except spending the rest of its money.[79]

Therefore the state has become susceptible to blackmail, and Margaret Thatcher's lie, that there is no alternative, became true as a self-fulfilling prophecy.[80] Former democratic governments are now in the hands of bankers and their staff of technocrats – directly or indirectly. In states where the bankers have not yet taken the lead, their advice resembles the advice of the old Roman Senate, the *senatus consultum*. That was an advice without any legally binding force: soft law. But whoever did not follow it, was already a dead man, even if he left the room alive. Therefore the national state must execute the neoliberal programme with micro-economic means and "devalue labor and the public sector", "put pressure on wages, pensions, labor market regulations, public services"[81] – and then sell the whole think as 'reform', 'modernization', 'new public management' and 'individual empowerment', best served by Third Way labour parties, reformed social democrats and red-green coalitions.[82]

Unfortunately neither Keynesians nor Marxists have ever tried to develop transnational continental and global alternatives to national state power. They have socialized the means of production not only within the capitalist mode of production but also within one country. They never even envisaged a plan to establish a transnational *political power* that could measure up to global big money and the unleashed forces of the world market that are at once productive and destructive. The Ordo- and Neoliberals (and that is the historical truth of Neoliberalism) had such a plan, as we have seen, and it worked, with catastrophic results. Only that explains the strange non-death of Neoliberalism – after a crisis that (if we follow the prognosis of the Chicago doctrine of neoliberal economy) should happen only all 50.000 years.

Now national state power is over, at least as the power of the so called sovereign state. To take up a metaphor of Eyal Benvenisti (an Israelian international lawyer): in the process of globalization the state politically, legally, economically and culturally has been transplanted completely

from a detached villa into a condo in the middle of a house of 200 condos with many different and overlapping forms of real estate ownership.[83] However, the network of transnational public law and politics, and the already emerging formation of transnational statehood[84] is far too weak to get the global markets under control again. The coordinated state powers together with international organizations at best can *make* the global market (negative integration) but nowhere are capable to *constrain* it *normatively* that is in the general interest of all of us (positive integration).[85] In thirty years of globalization the most powerful (for good *and* for bad) states of history – Western democracies – have been turned, in the words of Streeck, "into debt-collecting agencies on behalf of a global oligarchy of investors, compared to which C. Wright Mills's "power elite" appears a shining example of liberal pluralism"[86]

The only way out seems to be the *reinvention of democratic class struggle* on the transnational level. The chances are very small but must not be overseen. Unions of southern Europe for the first time in history are beginning acting and striking transnational and beyond borders. Together with a European Parliament that now becomes publicly visible for the first time, they finally could trigger a new democratic class struggle for profane aims: a European unemployment assurance to solve the biggest social problem of Europe today that consists in the highest unemployment rate of the young people of the south ever since the great depression of the late 1920th and 30th.[87] The next step then could be a massive change against the deadly ailment of neoliberalism that is called austerity. There is a simple and effective alternative to cutting expenditures, and that is raising taxes.[88] The chances seem small but without renewed democratic class struggle that is transnational, there is no way out of crisis, and now towards a political union of Europe that is worth of the name democracy.

>> ENDNOTES

[1] Marx, 1852:98.

[2] Somek, 2013.

[3] Koskenniemi, 2006:9-36.

[4] *Ibid*, p. 26.

[5] Marx, 1972: 203-333. Because of the indeterminacy of law-application also the application and concretization of legal norms is not simply a politically neutralized business of managerial experts but, as Kelsen, Merkel and Heller rightly have argued already in the 1920th, that any "determining the content of the legal norm [is] a political question" (Koskenniemi, 2006:29).

[6] See Brunkhorst, 2012.

[7] Osterhammel/Petersson, 2007:85; Hobsbawm,1994:185-187. This does not mean that there did not remain strong continuities in all countries, in particular in Germany the Nazi-continuities of the elites still were strong but silenced and displaced, strikingly described by Hermann Lübbe as "kommunikatives Beschweigen brauner Biographieanteile"), see Lübbe, 1983.

[8] See already: Jesch, 1961.

[9] See Kelsen, 1945:518-526.

[10] See Rainer, 2003; Di Fabio, 1998.

[11] Fossum/Menéndez/Augustín José, 2011:175.

[12] It is argued that, even if the constitution of Luxemburg did not contain anything vaguely resembling a proto-European clause, the *Conseil d'État* constructed its fundamental law along very similar lines. When reviewing the constitutionality of the Treaty establishing the Coal and Steel Community, the Conseil affirmed that Luxembourg, not only could, but should, renounce certain sovereign powers if the public good so required. See the Report on the 1952 judgment of the Conseil d'Êtat and Fossum/Menéndez, 2011.

[13] *Ibid*, 2011.

[14] On the double legitimization of the EU by the community of peoples of the member states and the people of the European Union see Habermas, 2011. For a striking comparison with the development of the United States founded by a similar kind of 'double sovereignty' (which still is a technical term of constitutional law in the US), see Schönberger, 2005. Augustine Menendez has made an important contribution to that thesis, comparing in a case study the implementation of federal taxes in the US and the EU, demonstrating the striking parallels: Menéndez, 2004.

[15] An illuminating case study is: Madsen, 2012:43-60. On the general need of the 'Kantian' mindset of normative social integration for systemic and 'managerial' stabilization see: Habermas, 1981:228; see: Nassehi, 2006:126-127.

[16] A good explication of the Kantian democratic and even cosmopolitan mindset of the Lisbon Treaty is: Von Bogdandy, 2012: 315-334; see already (with respect of the Maastricht-Amsterdam Treaty and in particular the Constitutional Treaty that failed in 2005 but to a large extend is identical with the Lisbon Treaty): Callies, 2005:339-421.

[17] What German lawyers observe as the emergence of an *autonomous legal doctrine* is reflected by a Scottish observer as the emergence of *European common law* that transcends the *pacta sunt servanda* validity of international law. European "institutions and organs", Neil MacCormick argues, "have had a continuous existence over several decades and through many changes of personnel. They have become central institutional facts in the thinking of Europeans. Citizens and officials throughout Europe have interpreted the norms of and under the treaties as having direct effect on private persons and corporations as well as on states. Over more than four decades this has proceeded with impressive continuity" (MacCormick, 1999:139).

[18] Cf. Ley, 2010:170.

[19] Möllers, 2005: 351-389; Möllers, 2003. On the accumulation of fexible and decentred power see Hardt/Negri, 2002; Prien, 2010; Fischer-Lescano/Teubner, 2006; on white, grey and black networks see: Matiaske, 2012.

[20] See Zürn, 2004.

[21] See Grant/Keohane, 2005:29-43.

[22] For a sound criticism of these tendencies see Rieckmann, 2010:120-139.

[23] On the stages see Tuori, 2010:3-30.

[24] I have tried to explain that further in: Brunkhorst, 2013 (forthcoming). On the "existing concept" see Hegel, 1969:481. On the (very one-sided) critique of the empty, or as Hegel says: "abstract" ought see Hegel, 1971: 369-372. Kant is not that far away from modern historical and evolutionary thinking as his critics since Hegel regularly assume, see already Vorländer, 1921: 100. Such a concept then can work in both directions dialectically: as a mechanism of stabilizing the so called Sittlichkeit (ethical life) of the social systems of bourgeois society, capitalist or bureaucratic class-rule and authoritarian economic government, or – in dialectical retaliation – "can strike back" (Müller, 1997:56). It can strike back because law, and in particular constitutional law can be used by the have-nots, by peripheral states and lower classes as a legal principle, a legal claim, or even as a legal remedy to contradict its own interpretation and implementation that is in the service of the respective ruling classes.

[25] Most of the school were conservative opponents to Nazi-fascism. Böhm was a declared anti-Nazi, especially an early defender of the Jews, and a member of the resistance with close relations to Bonhoefer and Gördeler. Eucken was a conservative Anti-Nazi who strongly opposed Heidegger as the first Nazi-Rektor of the University of Freiburg (over whose main entrance even in 2011 the 1936 dedication is still clearly visible. He was loosely associated with the conservative resistance. Rüstow was a member of the far-right shadow cabinet led by General Kurt von Schleicher. He engaged in a half-hearted attempt at an anti-Hitler coup d'état, and he had to emigrate in 1933. Röpke was attached to the conservative 'revolution' (Tat-Kreis) from the early 1920s. However, he strongly opposed German fascism as early as the late 1920s, and he emigrated (as did Eucken) to Turkey in 1933. Alfred Müller-Armack was a Nazi of the first hour. Hayek took a chair at the London School of Economics (LSE) and he left the continent by 1931. He was the most radical liberal opponent of Keynes, who already had at that time a chair at the LSE. Still the best criticism of Hayek is Kelsen, 1954:170-210. As a legal theorist Hayek was very close to Carl Schmitt. This point is made in Scheuerman, 2004:172-188; see Vatter, 2010:199-216.

[26] Cf. Neumann, 1978:70-74, 79-99.

[27] See Tuori, 1933:16. The hi-jeking was organized by: Böhm,1933.

[28] For a brief and powerful criticism of the imperial tendencies of ordo-liberalism see Teubner, 2012:30-34.

[29] Cf. Müller –Armack, 1960:11-12, 15.

[30] Cf. Wegmann, 2010: 91-107, at 93.

[31] Cf. Tuori/Sankari, 2010: 15.

[32] *Ibidem*, 2010, pp. 91-107, at 93.

[33] "Diese Asymmetrie ist bereits in den Gründungsverträgen angelegt, was sich daran zeigt, dass im Gegensatz zu den meisten Rechtsordnungen der Mitgliedstaaten die Wettbewerbspolitik der Union verfassungsrechtlich abgesichert ist, während die Bewältigung der sozialen Folgen den Mitgliedstaaten überlassen bleibt. Auf diese Weise fallen Deregulierung und Regulierung institutionell auseinander. Legitimationstheoretisch lässt sich das nicht begründen. Die Aufspaltung in eine bloß formelle Legitimation des gemeinsamen Marktes und

eine materielle, über die Mitgliedstaaten vermittelte Legitimation der Marktkorrektur macht angesichts der vielfältigen wechselseitigen Abhängigkeiten heute keinen rechten Sinn mehr. Will man Freiheiten über Grenzen hinweg ausdehnen, müssen auf Ebene der Union politisch hinreichend verantwortete Kompetenzen für eine Umverteilung geschaffen werden." (Franzius/Preuß, 2011:70).

[34] On the "hidden curriculum" see Offe, 2003:437-469, at 463. On the distinction between the two constitutional orders see Fraenkel, 1999:33-266 (published 1974, originally finished 1938); see Joerges, 2012:357-386, at 360-361, 366-367, 377-381.

[35] Wegmann, 2010:94. Art. 2 ECC: "It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States." Today it is replaced by Art. 2 EC: "The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States". On the term "invisible constitution" but with a bit different meaning see: Antje, 2008.

[36] See Sonja, 2012:20.

[37] See Weidmann, 2012b:33; Weidmann, 2012a:28 (quoting already the following article of Di Fabio); Di Fabio, 2012:9.

[38] See already Marx, 650-657.

[39] See Friedman, 1982:15-26, especially at 20-21.

[40] See Kelsen, 1967:170-210; Tugendhat, 1992:352-370; Streeck, 2012a.

[41] See Crouch, 2011.

[42] Mestmäcker, 2012:5-14, at 9; the same argument seems to fit the present crisis, see Mestmäcker, 2012:12. In the same way Milton Friedman and the Chicago School argues that the main threat to political and economic freedom "arises out of democratic politics" and must be "defeated by political action" (Amond, 1991:467-474, at 231).

[43] For the thesis that transnational law already has realized a mutation to a law that is no longer related to the legislative power see: Amstutz/Karavas, 2006: 14-30, at 20; sceptical: Ladeur, 2012:220-254; Albert/ Stichweh, 2007.

[44] Stone-Sweet, 2000:193.

[45] See Voßkuhle, 2010:175-198.

[46] See Enderlein, 2011.

[47] Cf. Streeck, 2012a:8.

[48] Streeck, 2012a:6. On the unity of ordo- and neoliberalism see also: Scharpf, 2011.

[49] *Ibidem*, 2012, p.8.

[50] See Rödl, 2012: 5-8; Joerges,; Böckenförde, 2011: 299-303; Grözinger, 2012. Grözinger calls "financial markets" strikingly "a second constituency".

[51] Paul Krugman rightly states: "Fifteen years ago Greece was no paradise, but it wasn't in crisis either. Unemployment was high but not catastrophic, and the nation more or less paid its way on world markets, earning enough from exports, tourism, shipping and other sources to more

or less pay for its imports." (Krugman, 2012).

[52] Cf. Streeck, 2005.

[53] On the "existing concept" see Hegel, 1969: 481. On the (very one-sided) critique of the empty, or as Hegel says: "abstract" ought see Hegel, 1971:369-372. Kant is not that far away from modern historical and evolutionary thinking as his critics since Hegel regularly assume, see already Vorländer/ Leben, 1921:100. Such a concept then can work in both directions dialectically: as a mechanism of stabilizing the so called Sittlichkeit (ethical life) of the social systems of bourgeois society, capitalist or bureaucratic class-rule and authoritarian economic government, or – in dialectical retaliation – "can strike back" (Müller, 1997:56). It can strike back because law, and in particular constitutional law can be used by the have-nots, by peripheral states and lower classes as a legal principle, a legal claim, or even as a legal remedy to contradict its own interpretation and implementation that is in the service of the respective ruling classes.

[54] See Chalmers/Damian/Hadjiemmanuil/Christos/Monti/Giorgio/Tomkins, 2006; Craig/De Búrca, 2007.

[55] Cf. Tuori; Sankari, 2010:17.

[56] See Alter, 1996:458-487; Alter, 1998:121-147; Hitzel-Cassagnes, 2012 (TFEU is the Lisbon Treaty on the Functioning of the European Union).

[57] *Ibidem*, 2010.

[58] On the ambivalence of the fragmentation diagnosis (that is true also for all larger national states) see Möllers, 2010: 150-170.

[59] ECJ Nov. 6, 2012, EU-Commission vs. Hungeria, quoted from: <http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30db11f305cc49ce45dbba9d83a1834337eb.e34KaxiLc3qMb40Rch0SaxuKbNbo?text=&docid=129324&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1&cid=9743> Acess in: 7. 11. 2012.

[60] Cf. Teubner, 2003:1-28.

[61] In cases such as Walrave, Bosman, Viking and Laval the European Court the basic freedoms prevail over basic rights. In an antidemocratic way basic rights are now constrained by the four basic freedoms, and in particular by the freedoms of big money, capital etc., and not – as it should be at least in an egalitarian democratic society – the other way round, see Buckel and Oberndorfer, 2009:277-296, at 285.

[62] Weiler writes: "[Y]ou could create rights and afford judicial remedies to slaves. The ability to go to court to enjoy a right bestowed on you by the pleasure of others does not emancipate you, does not make you a citizen. Long before women and Jews were made citizens they enjoyed direct effect." (Weiler, 1997:495-519).

[63] Cf. Fraenkel, 1974.

[64] Cf. Buckel/Oberndorfer, 2009:285.

[65] Cf. Madsen, 2012:55.

[66] See Maus, 1992; for the present legal-philosophical discussion see Besson, 2011:103-122, at 73-77.

[67] With reference to the historical concept of emancipation see Somek, 2013:8.

[68] See Dann, 2002; Fossum/Menéndez, 2011: 123.

[69] Cf. Bast, 2010:173-180.

[70] See "An ever-deeper democratic deficit", in: The Economist, quoted from: http://www.economist.com/node/21555927 Acess in: 18.11.2012.

[71] On the strangely sustainable triumph of ordo- and neoliberal economy in global media see Streeck, 2012b; Schulmeister, 2012:1, 12-13, at 12.

[72] Cf. Brunkhorst, 2007:1-6.

[73] Crouch, 2004; see also the quintessence of the last books of the economists Paul Krugman and Joseph Stiglitz: Hacker/ Pierson, 2012: 55-58; with instructive statistics and observations: Judt,

2010. On rough equality of stakeholders see Christiano, 2010:119-137, at 130-132; on "rough equality" as a necessary condition of modern mass-democracy see Crouch, 2004, Chapter 1.

[74] Cf. Streeck, 2010:159-173; Cf. Streeck, 2011.

[75] See Mayntz, 2010:175-187.

[76] On states as global economic actors see Brink, 2008.

[77] Offe, 2012:3; Streeck, 2012a.

[78] Offe, 2012:6. On the genealogy see Streeck, 2011. What is crucial for the neoliberal triumph and sharply recognized by Reagan and Thatcher and their economic advisers: that the Unions first are losing their formerly strong political influence, and then their organizational power, either by direct oppression such as in the UK, the US and in the low intense democracies of the formerly so called Third World, or by internal reform that makes them sometimes a powerful, quasi council-democratic participant in globally operating industrial enterprises such as Volkswagen, but at the price of the general interest of the working class. On the latter see the case study: Herrigel, 2008:111-133.

[79] See Mayntz, 2010; Streeck, 2010; see also the long time case study Streeck/Mertens, 2012.

[80] See Beckert/Wolfgang 2012:7-17.

[81] Cf. Offe, 2012:3. Scharpf, 2012.

[82] See Somek, 2013. See Brunkhorst, 1999: 28; Brunkhorst, 1999:54; Brunkhorst, 2007:22-25.

[83] Quoted from Bogdandy, 2012.

[84] See Albert/Stichweh, 2007.

[85] See Offe, 2003:457; on the concept of solidarity as the general or universal interest of all of us, see Brunkhorst, 2005; on normative constraints see Brunkhorst, 2013; on the distinction between 'positive' and 'negative integration' see Scharpf, 1999.

[86] Streeck, 2011. As a consequence popular sovereignty has been fragmented and marginalized, beyond and within the national state, see Prien, 2010.

[87] This goes back to a suggestion of Claus Offe after a highly pessemistic lecture of Wolfgang Streek on a conference at the New School for Social Research and the Deutsche Forschungsgemeinschaft on "Social Research in a Transforming World: Transatlantic Conversations", Feb. 28, 2013.

[88] Offe concludes: "(The) rich countries of Europe dictating the poorer ones the austerity cure in order for them to regain the trust of the financial industries. They do so in spite of all the evidence that austerity is a highly poisonous medicine, an overdose of which will kill the patient (rather than stimulate growth and expand the tax base), in which case the weakest Euro zone members (and eventually all of them) become ever more dependent on lenders and allow them to charge ever higher and ever more unsustainable rates. It becomes ever more difficult to envisage the bootstrapping act by which European political elites might escape from this vicious circle." (Offe, 2013:13-15)

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THE RACIAL BOUNDARIES OF GENOCIDE

// AS FRONTEIRAS RACIAIS DO GENOCÍDIO

Ana Luiza Pinheiro Flauzina

>> ABSTRACT // RESUMO

This article discusses the Eurocentric features of international criminal justice in the characterization of genocide and consequent denial of the genocidal victimization of black communities in the Diaspora. This dynamic is largely sustained by the symbolic overlap of genocide as a general category and more specifically as it was exacted the Holocaust, which positions the violation of European bodies as a unique expression of terror and dismiss the expressions of black suffering from the protections of international justice. // Este artigo discute as características eurocêntricas da justiça penal internacional na caracterização do genocídio e na consequente negação da vitimização genocida das comunidades negras na Diáspora. Esta dinâmica é amplamente sustentada pela sobreposição simbólica entre o genocídio como uma categoria geral e o Holocausto, sinalizando padrões históricos que situam a violação de corpos europeus como uma expressão única de terror e desconsideram as expressões do sofrimento negro nos preceitos da justiça internacional.

KEYWORDS // PALAVRAS-CHAVE

>> Genocide; Racism; Black Diaspora; International Criminal Justice; Holocaust. // Genocídio; racismo; Diáspora negra; justiça penal internacional; Holocausto.

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1. INTRODUCTION

The United Nations adopted the Convention on the Prevention and Punishment of the Crime of Genocide on December 9, 1948, as a direct response to the Nazi policies responsible for the extermination of more than six million Jews during World War II[1]. Genocide is defined in article II of the Convention, which reads:

> *In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*
> *Killing members of the group;*
> *Causing serious bodily or mental harm to members of the group;*
> *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
> *Imposing measures intended to prevent births within the group;*
> *Forcibly transferring children of the group to another group*[2].

The formulation of an international instrument that could prevent and punish the practice, which Winston Churchill called a "crime without a name," was guided by the necessity to affirm the right of a human group to exist, thus confronting the social and physical destruction of the Holocaust. This perspective was officially declared in United Nations Resolution 96 (I) that was adopted on December 11, 1946. Resolution 96 (I) asserted that:

> *Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United nations. Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part. The punishment of the crime of genocide is a matter of international concern.*
> *The General Assembly, therefore, Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices — whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds — are punishable*[3].

The criminalization of genocide was inspired by the primordial notion that human groups should be physically and culturally preserved. Despite its humanitarian purpose, the Convention was conceived during a long series of debates expressing the strategic political interests of the nations involved[4]. After its adoption, the importance of this legal instrument to the international human rights field was not sufficient to absolve it from criticism, particularly with regard to its objective capacity to prevent and punish genocide.

After more than sixty years of scrutiny by the international legal and social communities, the definition of genocide remains the same as it was articulated in 1948 Convention and has been incorporated verbatim into the statutes of the *ad hoc* criminal tribunals and the International Criminal Court (ICC).

The current discussions on the limits of the Genocide Convention stem from a history of controversy about the meaning of genocide that has existed since its conceptualization. The implicit dialogue that accompanied the more exposed debates - such as the characterization of *mens rea*, the categories of groups to be protected, the doubts about cultural genocide, and the dilemma of enforcement, among others - is one about the social and political groups that could be potentially affected. In short, the question of the definition of genocide was, and still is, connected to the concern of whether individuals - as a symbolic representation of their nations and social groups - will be held responsible for the crime.

To adequately explore this issue, one must first recognize that genocide is a category that does not belong exclusively to the self-centered circles of law. In reality, the apparent solid ground established by the Genocide Convention is a sensitive terrain of political disputes where the very notion of genocide and the correlated issues raised by the criminalization of the practice are in contention. This history of controversy can be traced back to the very process of conceptualizing genocide and the subsequent drafting of the Genocide Convention.

2. CONCEPTUALIZING GENOCIDE: BETWEEN POLITICAL WILLS AND LEGAL LIMITATIONS

Raphael Lemkin, a lawyer of Jewish descent, born in Imperial Russia known today as Belarus, was the first author to develop a concept of genocide. In his 1944 publication, *Axis Rule in Occupied Europe*, Lemkin analyzed the legal framework of the Nazi occupation in Europe and coined the term genocide to represent that scenario of violence[5]. From an intellectual standpoint, Lemkin was part of the long philosophical tradition that held the question of the morality of European colonization as one of its main concerns since the invasion and domination of the Americas in the sixteenth century[6]. Developing his research within this framework, Lemkin devised a concept of genocide that was intrinsically associated with colonialism[7]. As he states in *Axis Rule in Occupied Europe*:

> *Genocide has two phases: one, destruction of the national pattern of the oppressed group: the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population which is allowed to remain, or upon the territory alone, after removal of the population and the colonization of the area by the oppressor's own nationals.*[8]

Following this line of reasoning, Lemkin's notion of genocide is the result of a reflection on German colonialist and imperialist impulses that

were historically experienced in several different contexts. As Andrew Fitzmaurce explains, Lemkin "was trying to read the colonial past from the perspective of European present"[9]. For him, the method applied by the conquerors to subjugate the locals and transplant populations during the colonization process in the Americas was guided by the same principles that oriented the execution of modern forms of genocide like the Holocaust[10].

Lemkin's central concern regarding the violent actions he described as genocidal was "their threat to existence of a collectivity and thus to 'the social order' itself"[11]. This original idea of genocide was associated with the perception of broad social destruction, which had as important elements direct killings and cultural, economic, and political assaults on the target groups[12]. As Lemkin points out:

> *Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all the members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of cultural, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is direct against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.*[13]

Considering the multiple dimensions of assaults that together constitute genocide in Lemkin's original formulation, it appears that this definition conceals an essence that is not fully captured by the Genocide Convention's traditional analysis[14]. For him, the content to be protected by this new international legal instrument was the social, economic, cultural, and political destruction of the collectivity[15].

Instead, the broad idea of genocide developed by Lemkin had to be adjusted to penetrate the legal domain. The first draft of the Genocide Convention, initially authored by Lemkin, was rejected by the General Assembly in 1947[16]. The draft's language expressed genocide as connected to the direct killing of and the systematic assault on the general structures of the target group's social life[17]. The definition of genocide in the terms proposed by Lemkin was considered too wide and a potential source of harm to sovereignty[18].

In the following year, the General Assembly designated an *ad hoc* committee to prepare a new draft of the Genocide Convention[19]. The delegates struggled to develop a document that could incorporate the fundamental principles of the alleged "right of a human group to exist as a group", considering the political tension among the countries. The United States and the Soviet Union were especially diligent in ensuring that their practices would not be identified as genocide[20].

Among the most debated issues were the inclusion of political groups in the list of groups protected by the Convention and the matter of cultural genocide[21]. With respect to the inclusion of political groups, the Sixth Committee decided that political and social groups should not be included as subject to protection because belonging to such a group, in opposition to a race, religion, ethnicity, or nationality, was a matter of individual choice[22].

In contemporary debates, while some authors consider the formal inclusion of these groups in the Genocide Convention unnecessary because they are protected by other human rights and humanitarian laws, many consider that "the failure to protect political and social groups constitutes the 'Genocide Convention's blind spot"[23].

Regarding the issue of cultural genocide, the initial understanding of the Sixth Committee was that the Convention should protect physical and cultural genocide because both represent a threat to the existence of a group[24]. However, some countries, such as the United States, were uncomfortable with the proposed language that included cultural genocide[25]. Lemkin, who was present during the debates, insisted on the necessity of this important feature of the crime in the document[26].

After defending the idea in two drafts, Lemkin finally gave up on its explicit insertion in the Convention due to the apparent lack of support[27]. In the final draft, the argument that cultural genocide should be considered in a supplemental convention prevailed under the proposition that the 1948 Genocide Convention addressed only the most "serious" forms of genocide[28].

For some, the exclusion of cultural genocide from the legal definition has compromised the very understanding of what genocide is and has allowed the perpetration of uncensored genocidal practices[29]. Analyzing the specific role of the United States, Ward Churchill affirmed that:

> *For starters, the American initiative in excluding the entire criteria of cultural genocide from the 1948 legal definition has so confused the matter that both academic and popular understandings of the crime itself- never especially well developed or well rooted – have degenerated to the point of synonymy with mass murder. This has facilitated the continuation – indeed, intensification – of discriminatory policies against America's "domestic minorities" throughout the 1970s and `80s, and on into the `90s. It has also masked the fact that much of what the United States has passed off as "developmental" policy in the Third World, entailing as it does the deliberated underdevelopment of the entire region and emulsification of its "backward social sectors", is not only neocolonial in its effects but patently genocidal (in Raphael Lemkin's sense of the term).*[30]

In reality, the decision to exclude these important aspects of genocide from the final document was primarily based on the political concerns of states over the possibility that the Genocide Convention could target their actions[31].

The Soviet Union considered the issues of political groups and socio-economic exploitation to be sensitive matters[32]. The United States viewed

the issue of cultural genocide as associated with the continuous assaults on Native Americans with great suspicion[33].

What is clear in view of the controversy is that the delegates were framing genocide to limit the original fundaments of the protection to the structural lives of the target groups proposed by Lemkin[34]. There was a noticeable effort to restrict the definition of genocide to the most explicit element of the crime — mass murder with an express intent[35].

If the rhetoric to justify the restraint of the capitulation of the crime was based on claims of legal appropriation, then the narrowing genocide definition in the Convention reflected multiple concerns over the extension of its applicability.

Yet not defined in its original version, the final document approved by the General Assembly in 1948 maintained the essential meaning of the protection of the right of a group to exist as such as proposed by Lemkin[36]. Interestingly, although reducing the scope of recognition for genocide and allegedly reformulating what was considered broad to a more precise definition, the Convention is often characterized as an instrument with "ambiguous and frequently misunderstood provisions"[37] and receives considerable criticism in the legal sphere. Moreover, the challenges posed by the concrete prevention and punishment of genocide under the terms established by the Convention have also been a recurrent source of debate.

Even after the establishment of key international tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which are generally considered to be important advances in the confrontation of the crime, criticism is still constantly adressed at the Convention itself and the overall response to genocide.

Considering this panorama, it is apparent that the absence of legal consensus over the scope of genocide and the situations that should be evaluated within its framework along with the lack of political volition by states to comply with their legal and moral obligations to prevent and punish the crime have become central issues.

This delicate balance between strict legal demands and political concerns has set the tone for discussions over the features of the crime from the broad intellectual approaches of genocide field studies to the "technical rulings" in international tribunals. If the controversies over the plain text of the law receive a considerable amount of intellectual and juridical analysis, proving the complexity of the theme, the claims of social groups throughout the world wanting access to the Genocide Convention as an effective legal instrument to address their specific issues adds yet another piece to this already challenging puzzle.

3. THE DISPUTES ABOUT GENOCIDE

The delicate equations in international criminal law gain complexity in the worldwide phenomenon of the use of genocide as a slogan to

denounce violence. Some argue that activists' claims that consider issues like drug distribution, manufacturing nuclear weapons, birth control and abortion policies to be forms of genocide are often more debated than the "real" genocidal atrocities[38]. Helen Fein calls attention to the fact that in the 1960's and 1970's several genocide cases did not have an impact on the international community:

> *Between 1960 and 1979 there were probably at least a dozen genocides and genocidal massacres- cases include the Kurds in Iraq, southerners in the Sudan, Tutsi in Rwanda, Hutus in Burundi, Chinese and "communists" (...) in Indonesia, Hindus and other Bengalis in East Pakistan, the Aché in Paraguay, many peoples in Uganda, the people of East Timor after the Indonesian invasion in 1975, many peoples in Kampuchea. In a few cases, these events stirred public opinion and led to great campaigns in the West (as did allegations of genocide during the Nigerian civil war) but in most cases, these acts were virtually unnoted in the Western press and not remarked upon in world forums.*[39]

There are important questions that must be posed to understand this, at the very least, contradictory scenario. First, what is the reason of emphasis on genocide? Why is this specific crime used by activists worldwide to describe violent social contexts and practices? Second, if one takes into consideration the episodes seriously considered as genocide by experts, why are so few accepted as such from the legal perspective? And third, on what basis does international criminal law deal with the recognition of genocide?

3.1. GENOCIDE CLAIMS AND THE HOLOCAUST STANDARD

The fact that social activists and scholars use genocide to define violent and discriminatory practices, from sterilization to imprisonment, from torture to a lack of health care, is often subject to criticisms that consider this a political misuse of the term[40]. These claims tend to be interpreted as passionate and irrational attempts to call the attention of the international community to relevant human rights violations that are far from rising to the level of genocide.

Rather than supporting the commonplace use of genocide as a political term to denounce social violations as a negative process, it may be important to perceive this phenomenon as an informative one. After all, what does it say about genocide? What are these claims telling us about this crime, both materially and symbolically? What are people aiming to conquer when they establish the comparison of a social context of violence with genocide?

To answer these questions, one must understand what the recognition of genocide afforded social groups that had their tragedies acknowledged as such. With respect to the political disparities in the international context regarding the degree of censorship yielded to the different scenarios of genocide, the Holocaust remains the most paradigmatic case to be analyzed.

In fact, the Holocaust has become the standard as it is the most well known and politically recognized instance of genocide, and the one with which others are compared to discern the minimum political requirements for a genocide claim. Yet it is the occurrence with which no other human tragedy can compare given its alleged unique status.

The question of why genocide is such a recurrent term employed to describe human rights violations is connected to the political response to the Holocaust in terms of punishment and reparation policies. What intellectuals and activists aim to achieve with the characterization of certain forms of social and institutional violence as genocide is the moral and legal degree of censorship that was accorded to the Holocaust.

Here, it is important to consider that, in terms of the more immediate consequences, the legal recognition of the Holocaust was able to stop violations against the targeted minorities and punish the perpetrators of the crime, albeit in a distorted and symbolic way.

In a broader sense, the international moral acknowledgement of the Nazi extermination practices guaranteed the implementation of reparation policies, such as the preservation of the memory of the tragedy and pecuniary restitution to the victims. From this perspective, genocide as a political category is disputed as a symbolic instrument able to produce material responses in a world order where the indifference to human tragedies is the great obstacle to be overcome.

Even though the Nuremberg Charter did not have the United Nations (UN) Genocide Convention as a formal resource to charge the individuals responsible for the Jewish extermination policies, it was in the indictment of October 8, 1945, against prominent Nazi criminals that the term genocide debuted in an international document[41].

If the approval of such paradigmatic Convention was the first of several international political responses to the Holocaust, no one can deny the irony that the charges of genocide are not legally attached to the Nazi extermination activities.

Yet, even though other cases of genocide were recognized, the Holocaust remains the universal paradigm, from the ostensible media productions on the topic to the current discussions on intent in the *ad hoc* tribunals and the International Criminal Court.

The fact that genocide and the Holocaust have no legal boundaries in terms of the formal application of penalties does not interfere with the symbolic capital that enabled the effective political response to the crime, creating space for reparation policies that go far beyond the limited sphere of international criminal law.

After all, the Holocaust is the event that made the U.N. Convention politically viable and has since become the one that most effectively extracted practical consequences from the international legal instrument.

The punishment of the perpetrators of the Holocaust and the subsequent reparation policies are considered remarkable accomplishments with respect to both moral and legal human rights consciousness after World War II. Among the most well known reparations is the economic restitution to the victims derived from class action suits in the U.S.

In the mid-1990's, several private civil law suits were filed in U.S. courts on behalf of Nazi victims against businesses and the Swiss, German, French, and Austrian governments[42]. Thus far, the suits have resulted in more than $8 billion to be shared by the Holocaust victims. The case involving the Swiss banks in 1998 was settled for $1.25 billion[43]. The procedures for the trial and the effective payment of the victims were indisputably challenging, resulting in an important corpus of jurisprudence that Morris Ratner and Caryn Becker best describe:

> *The Swiss bank case is the only major Holocaust case that was fully resolved through a private class action and not through an international agreement. Chief Judge Edward R. Korman of the Eastern District of New York, the presiding federal judge, extended the American court's jurisdiction over a worldwide class of victims and targets of Nazi persecution for the purpose of resolving all claims against Swiss banks and other Swiss entities in one proceeding. Judge Kroman oversaw an incredibly detailed and extensive worldwide notice plan (including a multi-million-dollar publication program, direct mail to survivor lists and support groups, and grass-roots community outreach) and appointed a Special Master to develop a plan for allocating the settlement funds among the many different types of class members. After holding hearings in both New York and Israel, he issued an order approving, first, the settlement and then, later, the Plan of Allocation. The Second Circuit upheld both orders. The lesson from these cases in the U.S. courts can effectively provide forum for resolving these kinds of extraordinary historical wrongs.*[44]

To achieve this outcome, the political articulation of social organizations and institutional forces was crucial. The media, the executive and legislative branches, and several grassroots organizations provided the indispensable environment, based on the moral legacy of the Holocaust, to pressure the Swiss banks to settle after a great deal of resistance.[45]

A good example of this dynamic was the so-called "rolling sanctions" that were specifically designed to pressure the Swiss banks into agreeing to the terms proposed by the Holocaust victims' lawyers. The sanctions stated that:

> *(1) if a settlement was not reached by September 1998 the New York State and city comptrollers would stop depositing their short-term investments with the Swiss banks and would bar Swiss banks and investment firms from selling state and city debt;*
> *(2) if a settlement still was not reached by November 1,1998, private investment managers investing for the state and city would be instructed to cease trading through Swiss firms; and*
> *(3) finally, other unspecified sanctions would follow if the matter was still pending.*[46]

In August 1998, a month after the sanctions were publicized, the Swiss banks capitulated[47]. In 2001, several cases against German corporations, insurance companies, and banks were dismissed as the result of the

establishment of the German foundation "Remembrance, Responsibility and the Future" that holds $5 billion for the compensation of Holocaust victims[48]. Also in 2001, a billion dollar Austrian foundation responsible for providing restitution to Holocaust victims was established in response to the pressure generated by the litigation in the U.S against Austrian banks that resulted in a $40 million settlement in 1999[49].

All these cases demonstrate the incredible mobilization power of the Holocaust as a genocide incident with great international recognition. The status of Holocaust victims allowed the unprecedented success of restitution litigation targeting the profits of banks, corporations, and insurance companies that were generated by slavery and forced labor, among other wrongs, such as the retention of Holocaust victims' money by the banks after the end of the war.

Aside from the condemnation of the extermination practices executed by the Nazis in the criminal sphere, there is also the perception that the exploitation of human beings as slaves is immoral, illegal, and should be compensated. This is an impressive exception in modern history that has otherwise used extermination and labor exploitation as essential tools to enrich and impoverish countries and peoples without moral or legal censorship[50].

It is also worth noting that in the interface of symbolic and material grounds, the criminalization of the denial of the Holocaust in some countries is a very important feature of the response to the Holocaust. The criminalization of Holocaust denial is one important aspect of the political responses to the Jewish genocide. It is important to remember that in the years following the end of World War II, a process of disqualification of the Holocaust was promoted by important public figures[51].

The assault on the memory of the Holocaust would begin on European soil with publications such as *Le Passage de la Ligne* by Paul Rassinier and *Nuremberg ou la terre promise* by Maurice Bardeche in 1948 and would be rapidly replicated by preeminent anti-Semitist intellectuals, especially in the United States[52].

Beginning in the 1950's, scholars such as Austin J. App, David Leslie Hoggan, Arthur Butz, Richard Verrall, David Irving and many others disseminated works that questioned the existence of the Nazi policies and, most importantly, the massive extermination of Jews during World War II[53].

Among the most aggressive attempts to discredit the Holocaust is *Did Six Million Really Die?*, written by Richard Verrall. In his book, Verrall claims that the predominant narratives of the Holocaust are "atrocity propaganda"[54] and add to "a growing mythology of the concentration camps and especially to the story that no less than Six Million Jews were exterminated in them"[55].

Moreover, Verrall argues that the exaggerated portrayal of the tragedies of the Holocaust serve as blackmail in favor of the Jewish community which "emerged from the Second World War as nothing less than a triumphant minority."[56]

This perspective, disseminated by key anti-Semite individuals and right-wing organizations primarily in the 1970's, would become the

theoretical foundation for the establishment of one of the most important organizations focused on the denial of the Holocaust in the United States—the Institute for Historical Review (IHR), founded by Willis Carto and William McCalden in 1978[57]. The IHR became an international reference for Holocaust deniers and created a platform through the *Journal of Historical Review* that aimed to build academic credibility for denial literature.[58]. Furthermore, it sponsored international conferences and used the media to foment distorted perceptions of the Holocaust to the general public.

Naturally, the systematic discrediting of and assault on the memory of this tragedy caused outrage within the Jewish community and the general public. From an intellectual standpoint, several authors, including Deborah Lipstadt, Gill Seidel, and Kenneth Sterns, are recognized in the genocide field for their groundbreaking contributions challenging the Holocaust denial framework[59]. From a legal perspective, Holocaust denial has promoted direct responses vis-à-vis the recognition of the suffering of the victims and the violation of the tragedy's memory.

The decades of 1970, 1980, and 1990 were marked by trials in several countries, including Canada, the U.S, Germany and France against individuals who were considered Holocaust's deniers. In his book *Holocaust Denial and the Law*[60], Robert Kahn explores the legal and political aspects of the prosecutions, considering the differences between the civil and common law jurisdictions.

Regardless of the differences in legal systems, what is important to retain from the debate on the criminalization of Holocaust denial is the degree of protection that this historic event has achieved. Denying or trivializing the Holocaust is not just an immoral practice, it is illegal in many countries.

The law is there to support historic versions of the past and ensure that the collective memory of a social group is not violated[61]. It is the ultimate recognition that the right of a group to exist is comprised of the right of a group to have a past—a historic narrative that supports collective identity based on cultural patterns, epic episodes, and myths and also by the tragedies shared by the members of a community.

The degree of censorship associated with the denial of the Holocaust indicates an understanding that if the response to genocide in the short term is connected to the criminalization of the perpetrators and the most immediate reparations for the victims, then the long term dispute is about the integrity of the episode, the necessity to remember lives that were lost, and the responsibility that should arise from the extermination practices. History, though, is the great piece in dispute and the Holocaust has been the modern episode able to set the tone of the narratives allowed to circulate in the public sphere.

Considering the symbolic dimensions inscribed in the criminalization of Holocaust denial, one can understand some of the elementary roots of the dispute about genocide as a category claimed by activists and scholars worldwide. In a world where violent episodes motivated by racism constantly take place, the great challenge is to become visible

and to make the local suffering matter. This is exactly what was achieved with the great political recognition of the Holocaust.

Fundamentally, the Holocaust is not just a Jewish problem contextualized in the limits of a European conflict—it is perceived as a human tragedy. It is an episode built on the notion that the violation of social groups cannot be dismissed in the justifications of historic contexts, but must be recognized as harm to humans in general. In a period defined by the extermination of so many people, the extermination of Jews is a harm shared by all.

This is the essential and most important meaning the Holocaust gave to genocide: proving the power of the tragedy in social imagination.

The fact that this historic episode was able to generate so many tangible political responses is the subject of different analyses by scholars of genocide. At the heart of the matter is the debate about the singularity of the Holocaust.

3.2 THE UNIQUENESS DEBATE IN PERSPECTIVE

The controversy over the oneness of the Holocaust began simultaneously with sociological and anthropological interests in genocide. The scientific investigations of genocide, which still are largely produced by scholars with an educational background in the United States, Canada, and Israel, began in the 1970's and grew considerably in the 1980's when inquiries about the Holocaust's uniqueness heated up[62]. The uniqueness debate has since become a central topic in the academic agenda of the genocide studies field.

In the social science fields—philosophy, sociology, anthropology, theology, among others—authors[63] that believe in the uniqueness perspective defend the general idea that the Holocaust has a singular nature that distinguishes it from other cases of genocide[64]. Some common arguments point to the number of victims, the methods and efficiency of execution, and the intent element of the Holocaust as evidence of its unmatched status in the violent context of modernity[65].

Gavriel Rosenfeld, a defender of the Holocaust's uniqueness, explains that this paradigm began as an intellectual tendency that took place during the 1970's and 1980's to confront a scholarly inclination to historicize and politicize the Holocaust. From his perspective, this was a "defensive response to the perceived attempts by others to diminish the event for apologetic or revisionist purposes."[66]

Among the most popular pro-uniqueness arguments are those formulated by Yehuda Bauer and Steven Katz in the 1980's and 1990's, respectively. For Bauer, the Holocaust was an event that deserves a separate designation from genocide given its extreme nature and is therefore "qualitatively different from other cases of genocide."[67]

Katz's harshly criticized approach to the uniqueness argument considers the Holocaust as the only true case of genocide. In his extensive work, *The Holocaust in Historical Context*, first published in 1994, the author aimed to demonstrate how the "holocaust is phenomenologically

unique"[68]. To prove the singularity of the Holocaust, Katz narrows the concept of genocide:

> *For myself, I shall use the following rigorous definition: the concept of genocide applies only when there is an actualized intent, however successfully carried out, to physically destroy an entire group (as such a group is defined by perpetrators). [...] The intention to physically eradicate only a part of a group – in contradistinction to the UN Convention and most alternative definitions proposed by others- I shall not call genocide. [...] Any form of mass murder that does not conform to the definition provided here, though not necessarily less immoral or less evil, will not be identified herein as an occasion of genocide.*[69]

Although both authors have clarified their positions over the years, explicitly acknowledging the suffering of other human groups and even applying different categories to define the Holocaust, such as Bauer's use of *unprecedented* instead of *unique*, it is clear that their understanding of the Holocaust as a special tragedy still remains at the core of their analysis[70].

Attempts to perpetuate the memory of the Holocaust as exceptional are not restricted to the close circles of academic debate. The idiosyncratic nature of the Holocaust is vehemently defended by prominent names in the Jewish community, especially in the United States. They not only consider the Nazi extermination of Jews as unique, but also view any intellectual comparison of the Holocaust to other human tragedies as an expression of anti-Semitism.

According to rabbi Irving Greenberg, the founder of the Holocaust Resource Center and the first director of the U.S. Holocaust Memorial Commission, comparing other genocides to the Holocaust is considered "blasphemous"[71]. Elie Wiesel, holocaust survivor and 1986 Nobel Peace Prize recipient, considered such a comparison a "total betrayal of Jewish history"[72]. In *Denying the Holocaust*, Debora Lipstadt, professor of modern Jewish and Holocaust studies at Emory University, called equating the Holocaust with other historical events an "immoral equivalenc[y]"[73] .

This irreconcilable depiction of the Holocaust as a distinguished tragedy has been widely criticized[74]. A general counter-argument maintains that there are no historical grounds to sustain this assertion[75]. Native American scholars in the United States have developed a consistent corpus of scholarship addressing this issue. Historian David E. Stannard was one of the first intellectuals to challenge the uniqueness concept by taking into consideration Native American genocide during the colonization process. The publication of his book *American Holocaust* in 1992, in which he describes this reality of extermination, began to popularize the expression and naturally ignited the debate about uniqueness[76].

In another important piece published in 2001, *Uniqueness as Denial: the Politics of Genocide Scholarship*[77], Stannard considers the main arguments developed by those who defend the uniqueness of the Holocaust and defies them based on historical and political grounds. Among other

issues, the author analyzes the inconsistencies in the uniqueness argument taking into consideration matters such as the percentage of the population affected by the extermination process[78], the path of the genocidal campaign[79], the means of destruction used by the perpetrators[80], and the question of intent.

Other approaches that criticize the uniqueness perspective highlight the use of uniqueness rhetoric as a political tool serving as a moral justification to dismiss genocide claims. From this standpoint, the uniqueness paradigm poses obstacles to the recognition and confrontation of other genocides. More explicitly, it helps to silence the past exterminations responsible for the very foundation of modern states. In a more discrete and yet effective way, it is used as a symbolic and political shield so that the current genocidal practices can be minimized or neglected. As Lilian Friedberg points out:

> *It is not a matter of oral bookkeeping or of winners and losers in the battle of the most martyred minority. It is not a matter of comparative victimology, but one of collective survival. The insistence on incomparability and "uniqueness" of the Nazi Holocaust is precisely what prohibits our collective comprehension of genocide as a phenomenon of Western "civilization", not as a reiterative series of historical events, each in its own way "unique." It is what inhibits our ability to name causes, anticipate outcomes, and, above all to engage in preemptive political and intellectual action in the face of contemporary experiences.*[81]

In this constellation of political nuances, the insistence on the uniqueness paradigm has as particular consequences the reinforcement of the Eurocentric features of international criminal law and the symbolic overlap of genocide and the Holocaust.

3.3. NEGLECTING BLACK SUFFERING: THE SYMBOLIC IMPACT OF CRIMINALIZATION

To capture the limits imposed on the recognition of genocide given the legislative restrictions and hegemonic jurisprudential reasoning, one should consider the symbolic dimension of the prosecution of the crime. The intrinsic ambiguities of international criminal law—still considered a "very *rudimentary* branch of law"[82]—with respect to the general lack of clarification of crimes, the limitations regarding the determination of a scale of penalties, and the inconsistencies concerning procedural matters have produced systematic challenges to its legitimacy[83].

If the discussion on prevention and retribution is a challenging one, if the sacrifice of criminal law standards affects the legitimacy of the discipline, then the symbolic value of international criminal law seems to be an indisputable basis for justifying the system. This is especially true when one observes the conservative patterns of prosecution and the judicial determinations of the scope of genocide, which aim to represent an incontestable declaration of the "international community's"

repulse to what is considered the most hideous crime on the scale of mass atrocities.

In this dynamic, the intimate relation between racism and genocide has made the discussion about the symbolic reproduction of the former in the very judicial recognition of the crime a challenging one. Actually, the absence of a deeper analysis of the impact of racism in legal decisions is hardly exclusive to the discussion of genocide, configuring a broader pattern of silence in the domains of international legal theory[84]. As Ruth Gordon points out, "traditional international discourse is framed in terms of formal equality, and race appears to be an almost non-existent factor. International legal theory rarely mentions race, much less employs it as a basis of analysis."[85]

The absence of a more articulated legal scholarship addressing the issue promotes a silence that, as Edson Cardoso points out, is "full of meanings"[86]. At the center of the crossroads is the very denial of the "institutionalized power of white supremacy"[87] as one of the most preeminent forces guiding both the perpetration of mass atrocities and the acquiescence of international institutions with the scenarios of violence[88].

It is important to clarify here that the violent expedients of white supremacy are not primarily associated with specific historical contexts, but to projects of longer, perpetual durations such as: "relations of fatal and immanently fatal dominance; inscriptions of 'the human' and its historical subjectivity; distensions of genocide as both a militarized technology for extermination and a structuring logic of social formation (encompassing and exceeding the social forms of slavery, colonialism, and frontier conquest); and so forth."[89]

This international legal horizon that formally proscribed the manifestation of racism, while paradoxically still very much informed by the dehumanizing standards of white supremacy, is responsible for a distorted administration of genocide [90].

Noticeably, both the perpetration of the crime and the passivity of the international criminal justice system in response to the horrors of genocide have a special impact on black communities worldwide in light of the peculiar historic representations that cast this social group as the antonym of humanity[91].

In this process, the high degree of vulnerability around black life is cultivated by acts of uncontested state-sponsored and state-sanctioned violence meant to control what are perceived as "untamable bodies".

Here, one should realize that the exercise of extreme forms of assault on black life in an international context that embraces the rhetoric of egalitarianism and multiculturalism could not be achieved except through investment in the symbolic dehumanization of black subjects[92]. Considering this assertion, what is argued is that, aside from the more evident process of direct claims over black inhumanity, this investment is also made in an indirect fashion by the recuperation of the notion of white humanity and its juxtaposition with the notion of humanity itself[93].

Indeed, the equating of humanity with white humanity does not bring any kind of novelty *per se* in the way white supremacy operates.

This operation can be traced to the primary waging of European colonization in the 15th century and more explicitly to the expansion of the European colonial empire in the 18th and 19th centuries, having the notion of the "white man's burden" as its more accurate image.

The superiority of whiteness forged in the formulations of the Enlightenment and the subsequent openly racist theories of the 19th century insisted on the distinctive predicaments "intellectually, aesthetically and physically"[94] of white people, carefully observing the prescriptions of patriarchy[95]. The emphasis was on the positive aspects of whiteness that would bring about the "development" and "progress" of the world's civilization, justifying the pervasive colonial and imperialist European impulses[96].

The patriarchal white supremacist construction of a sense of humanity connected to the positive features of whiteness would be wounded by the tragic events of World War II. The horrific terror materialized in gas chambers and concentration camps, meaningless extermination, and gratuitous infliction of pain inside the European perimeter added other dimensions to the meaning of humanity. Coming to terms with the Holocaust and its "speechless horror"[97] demanded a rationalization in which humanity would also be defined by its vulnerability.

Therefore, although the potential for rationality would still constitute a frame for white superiority, victimization—best symbolized by the systematic violation of the "quintquessential human being" namely the heterosexual white male—was also incorporated as a crucial distinctive mark of humanity.

If humanity, given its superior physical and intellectual attributes, was mainly characterized by the ability to govern and explore before World War II, then after it the possibility of being a victim would also constitute an important aspect of the human condition. It is in the fundamental quest to defend against harm to humans, now also identified as those who are submitted to relations of terror, that a series of international legislations such as the Universal Declaration of Human Rights[98] and the Convention on the Prevention and Punishment of the Crime of Genocide[99] were adopted.

The incorporation of white bodies into the categories of victimization had a definitive impact on the structure of international criminal justice and particularly on the judicial administration of genocide. Focusing exclusively on the symbolic dimensions of such criminalization attached to the representation of blackness, there is a clear pattern deriving from both the judicial recognition and the denial of the occurrence of the crime.

Here, there is a visible tension around the possible racial combinations of the status of victim *versus* perpetrator as genocide is addressed to reinforce the usual stereotypes, especially among those considered as racial equals.

In this peculiar symbolic scenario, the recognition of a "white tragedy"[100] like the Holocaust is made with an emphasis on the victim's role. The narratives of condemnation are to a great extent either connected

to the individual demonization of the most preeminent perpetrators or serve to emphasize that genocidal practices are a unique and inapprehensible expression of evil[101]. Even if the role of bystanders in the perpetration of the crime is also accentuated in the Holocaust literature[102], and the several restitutions provided to Holocaust victims as a result of civil-law suits[103] indicate the turn to a broader conception of perpetration and responsibility, the fact remains that censorship is still intrinsically connected to the practices of extermination.

Indeed, among the arguments that sustained the very preference of judicial trials of the Nazi leadership over the initial proposed solution of summary execution for the most preeminent perpetrators, sustained by Britain and the Soviet Union, was the need to preserve the German population from an overall depreciative depiction[104]. As Michael Scharf notes, "legal proceedings would individualize guilt by identifying specific perpetrators instead of leaving Germany with a sense of collective guilt. Finally, such a trial would permit the Allied powers, and the world, to exact a penalty from the Nazi leadership rather than from Germany's civilian population."[105]

Following this original animus, the condemnation of the horrific genocidal practices during the Holocaust did not collapse into a symbolic demonization of the white social groups in Germany and elsewhere.

With the signs inverted, it is also possible to recognize the tragedies among Africans, such as in Rwanda. In this case, the rhetoric is connected to the image of primitivism and savagery[106].

Here, the narratives portray victims and perpetrators as a kind of "lost mass of human beings" fighting irrational wars[107]. As Bhakti Shringarpure commented, "the specificities of these wars are downplayed and it is often cast as a 'contest between brutes' or an explosion of ancient 'tribal' rivalries without any connections drawn to the experience and history of European colonialism and its resounding and long-last effects."[108]

From this standpoint, genocide becomes an intrinsic creation of the "uncivilized world" in which perpetrators and victims are both liable for their irredeemable violent nature.

The least recognized cases of genocide in the political, and therefore juridical, arena are those in which the crime is perpetrated by whites and the victims are non-whites. Since the adoption of the Genocide Convention there has been a visible tendency to block access to the symbolic and material consequences of the recognition of genocide when the crime is committed as a result of white supremacist demands for the victimization of blacks.

In these cases, the historical complaints of victims stressing the existence of genocidal arrangements promoted by states that are predominantly controlled by white elites and "society-sanctioned genocidal practices"[109] have been systematically rejected. As such, the labeling of genocide to characterize these various scenarios of violence became a rhetorical and legal heresy.

This obstruction to the characterization of genocide has particularly impacted the recognition of the crime assaulting blacks in the Diaspora.

The scholarship on genocide against blacks in the Diaspora is, as João Vargas points out, "disappointing"[110]. Both in the genocide studies field or the legal sphere, the claims of genocide that have the lowest degree of visibility are those connected to this social group.

In short, all the noise created around this issue becomes almost a complete silence when genocide is approached in the historical and current social experience of blacks in the region.

Here one can visualize the restrictions of the international legal framework on the recognition of black suffering. This pattern is reproduced both in the overall exclusion of blacks from the effective set of protections and guarantees of the human rights legal paradigm and in the refusal of international criminal justice to recognize the systematic assaults on black communities as genocide.

This process of denial has been sustained essentially by the imposition of a legal armor around genocide that indicates the impossibility of recognizing the crime. There is a specific administration of genocide that aims to frame political resistance to recognizing the crime as a technical legal matter. Here, one refuses to recognize the historical indifference of the legal system to black suffering and the consolidation of the mandates of white supremacy as a key basis for the exclusion genocide as a viable category in the Diaspora.

Therefore, if the apparent barriers to the recognition of genocide are connected to normative rhetorical issues, such as the discussion of intent, in practice they lie on the fact that the convictions have indisputably represented a symbolic condemnation of the systems of extermination.

Following this line of reasoning, it is easy to conclude that the representatives of white elites in the Diaspora do not fit the perpetrator standards in the destruction of black communities because the systems of white supremacy are not supposed to be challenged.

Ultimately, what one observes is the overall detachment of international legal provisions from black suffering. There is a clear naturalization of State terror targeting black bodies despite the celebration of the imperative value of international human rights law, which has the proscription of genocide as one of its most celebrated bastions.

>> ENDNOTES

[1] United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

[2] G.A. Res. 96(I), U.N. Doc. A/RES/96(I) (Dec. 11, 1946).

[3] *Id.*

[4] Churchill, 2001:363-98.

[5] See Lemkin, 2005.

[6] Fitzmaurice, 2008:55-56.

[7] One of the most complete studies developed by Lemkin regarding the application of the notion of genocide in the colonial world was an analysis of what he described as "Spanish colonial genocide". His descriptions of genocide in the colonial arena were profoundly influenced by Bartolomé Las Casas, who recognized the existence of rights for indigenous populations based on principles of natural law. Some points of Lemkin's analysis in the Spanish colonial context are worth noting. Considering the physical aspect of genocide, Lemkin referred to three sorts: massacres to conquer territory, massacres to put down rebellions, and gratuitous exhibitions of violence. One important observation is that Lemkin considered slavery as part of the physical element of genocide. He viewed the "deprivation of livelihood" as "genocidal slavery". With respect to the attribution of responsibility for the crime, Lemkin accentuated the role of the colonists in the process. He considered the military officers as "the enforcers of genocide" and also blamed the indigenous collaborators of the Spanish for the extermination. For him, the Court in Madrid also shared responsibility because "they had the power and duty to interfere on the basis of royal orders". Lemkin also considered the cultural assault on indigenous populations an essentially genocidal one. His drafts highlighted the fact that the conquerors developed strategies to destroy the indigenous culture and replace it with their own. This is the same argument he used to justify the existence of genocide in Europe with the German occupation. This framework enabled Lemkin to theorize about the Holocaust and the Spanish colonial experience using genocide as a main category, confirming that Lemkin's formulation was developed to qualify a vast range of historical episodes marked by generalized social destruction. See McDonnel, Moses, 2005:501, 503-14; Moses, 2008:3, 9.

[8] Lemkin, *supra* note 5, at 79.

[9] Fitzmaurice, *supra* note 6, at 75.

[10] Moses, *supra* note 7, at 8-10.

[11] Shaw, 2007.

[12] *Id.* at 19.

[13] Lemkin, *supra* note 5, at 79.

[14] Moses, *supra* note 7, at 13, 37.

[15] Lemkin, *supra* note 5, at 79.

[16] Churchill, *supra* note 4, at 363-64.

[17] *Id.* at 365.

[18] *Id.*

[19] *Id.* at 364.

[20] *Id.* at 365.

[21] *Id.*

[22] Lippman, 2001: 467-75.

[23] Verdirame, 2000:578-81.

[24] Churchill, *supra* note 4, 367.

[25]

[26] *Id.* at 365.
[27] Docker, *supra* note 6, at 81, 82.
[28] *Id.*
[29] Lippman, *supra* note 22, at 477-78.
[30] Churchill, *supra* note 4, at 388.
[31] *Id.*
[32] *See id.* at 365.
[33] *See id.*
[34] *See id.*
[35] *See id.* at 368.
[36] *See id.*
[37] Costa Vargas, 2008.
[38] Lippman, 1994.
[39] Fein, 2006.
[40] *Id.* at 75.
[41] Vargas, *supra* note 36, at 6.
[42] Van Schaack/Slye, 2007.
[43] Ratner/Becker, 2006:345.
[44] Bazyler, 2003.
[45] Ratner & Becker, *supra* note 42, at 346-47.
[46] *Id.* at 348.
[47] Bazyler, *supra* note 43, at 23
[48] *Id.*
[49] Newborne, 2003:615-616.
[50] *Id.* at 617.
The exceptional character of the reparations litigation for Holocaust victims in the U.S. gains special relevance when one considers the failure of the reparations litigation for slavery. The legal parameters that dismiss the reparatory claims for the enslavement of Africans and their descendents rest on two fundamental pillars. The first refers to temporal limits imposed on the recognition of the rights. In this case, the official argument inverts the reasoning of responsibility and asserts that compensation cannot be granted because there was delay or negligence by African Americans in addressing the issue. Best/Hartman, 2005:8. This position disregards the historical efforts of African Americans to make the state accountable for the brutalities and the illegal labor exploitation that took place during slavery. Indeed, litigation seeking monetary compensation for the unjust enrichment of the American state for the exploitation of slave labor in the country dates to the 1800s. This narrow understanding also contradicts the reasoning of the plaintiffs who see the passage of time and the lack of any recognition of or reparations for the wrongs committed as an intensification of the original violation, rather than the evasion of the right to sue the state. One should also take into consideration conflicting perspectives on the "time of slavery." Here, the strict legal parameters are challenged by a notion that advocates slavery as a continuous violation, a "death sentence reenacted and transmitted across generations." *Id.* at 4. In this context, the right to pursue reparations cannot be dismissed because the time of slavery is the present with the vivid agonies that are reproduced by the institutional omission to address the past and the engagement in new forms of violence targeting this social group. The second legal argument refers to the judicial models of redress that respond to individual rights. This understanding determines that the claims of redress must be able to identify "victims and perpetrators, unambiguous causation, limited and certain damage, and the acceptance that the

agreed remuneration shall be final." *Id.* at 8. From a legal standpoint, this liberal individualistic approach is considered to be the main obstacle to the effective grant of reparations to African Americans. As Stephen Best and Saidiya Hartman explain: "First, this paradigm's standard of accountability renders all claims for black reparations null and void, as the victims and perpetrators of slavery have been long dead. Second, the focus on the individual in liberal legal formulas for remedy makes difficult an account of the group oppression and structural inequalities. Third, and finally, the focus on identifiable victims and perpetrators foregrounds the law's indifference to tangled and complicated webs of causation". *Id.* Therefore, the very structure of the legal action is grounded in biases that proscribe African Americans for the articulation of their reparatory claims. Here, one can observe the erasure of the victims' collective voice and the denial of the engagement of multiple actors, including the state, in the brutalities of the slavery enterprise. In the end, this arrangement serves as a confirmation that the real grief of slavery, sacrificed in the limited conceptions of law and property, did not
[51] penetrate the legal domain. *Id.* at 9.
[52] Churchill, *supra* note 4, at 19-20.
[53] *Id.* at 20.
[54] *Id.* at 19-21.
Harwood, 2005.Availabe in: http://www.vho.org/aaargh/fran/livres5/harwoodeng.pdf. Access
[55] on: April 2011.
[56] *Id.*
[57] *Id.*
[58] Churchill, *supra* note 4, at 21.
[59] *Id.*
See Lipstadt, 1994; Seidel, 1986, Saul Stern, 1993. It is important to highlight that although the works of these intellectuals constitute an important response to the Holocaust denial claims, they also engage with a perspective that celebrates the uniqueness of the Holocaust. In this line of reasoning, censorship is not directed solely at the arguments that try to discredit the Holocaust, but to any comparative perspective that is established between the Holocaust and
[60] other cases of genocide. *See* Churchill, *supra* note 4, at 25-36.
[61] *See* generally Kahn, 2004.
[62] Lawrence Douglas, 1995:367-73.
[63] Fein, *supra* note 38, at 75.
Some of the important authors in this debate who subscribe the uniqueness of the Holo-
caust are: Steven Katz, Yehuda Bauer, Lucy Dawidowicz, Leni Yahil, Michael Marrus, Deborah
[64] Lipstadt, and Martin Gilbert.
[65] *See* Katz, 1992; Dawidowicz, 1997; Bauer, 2002.
[66] Katz, *supra* note 64, at 162-92.
[67] *Id.* at 30.
[68] *Id.* at 35.
[69] Katz, 1994.
[70] *Id.* at 128-33.
[71] Dirk Moses, 1999:7-15.
[72] Friedber, 2000:353-54.
[73] Finkelstein, 2000.
[74] Lipstadt, *supra* note 59, at 212.
Some of the authors that challenged the concept of Holocaust uniqueness are: Hannah Arendt, Irving Louis Horowitz, Israel Charny, Helen Fein, Simon Wiesenthal, Peter Novik, Ward Churchill, David E. Stannard, Lilian Friedberg, Boas Evron, Arnold Jacob Wolf, Jacob

[75] Neusner, João Vargas, Joy James among others. *See* Friedberg, *supra* note 71, at 357.

Dan Stone argues that the uniqueness hypothesis relies on Jewish identity politics and not historical evidence because the uniqueness argument tends to change in response to every posed challenge. In his words: The fact that the uniqueness hypothesis has less to do with historical explanation than with identity politics is clear when one traces the changing criteria that have been offered in its defense. Every time the hypothesis is challenged, the criteria are changed. Whether it is numbers, the role of technology, the role of the state, or the inten-
[76] tion of the perpetrators, all can be and have been questioned by valid comparisons.

[77] *See* generally Stannard, 1993.

[78] *See* generally Stannard, 2001.

Stannard points out that the usual argument that considers the Holocaust as a unique event from a quantitative perspective—that is, the unprecedented process of extermination of human beings—cannot resist a serious historical analysis. The death rates of the Gypsies during the Holocaust and the Armenian population in the Turkish campaign from 1915 to 1917, for example, have similar numbers regarding human loss. In general terms, Stannard remarks that the genocide of native peoples in the pre-twentieth century was visibly more aggressive in terms of both proportionate losses and the gross number of people exterminated than the Jewish genocide during the Holocaust. According to Stannard, just in the Americas, a total of fifty to 100 million people collapsed as a result of European colonization, resulting in
[79] the annihilation of 90-95% of the hemisphere's indigenous population. *Id.* at 251, 263.

According to Stannard, in other genocidal campaigns, such as in Cambodia and Rwanda, the destruction of human lives was made in a superior path than during the Holocaust. The main question for Stannard is whether the duration of the genocidal practices and the correlated effectiveness of the exterminatory practices should even be considered as relevant criteria when comparing the different cases in terms of gravity. After all, however short or long the process, the results are the same—the final destruction of human lives. According to him, this leaves no moral ground, aside from Eurocentric hierarchization purposes, for this kind of
[80] distinction to be made. *Id.* at 254.

Stannard also argues against the differentiation of the Holocaust from other tragedies, especially the genocide of Native American peoples, using the means of destruction as a criterion. According to the Stannard, the common allegation that the native societies were largely decimated by the introduction of diseases in the colonization process, which is perceived by some as an "unintended tragedy," does not reflect the reality of the time. The extermination of indigenous peoples in the Americas followed a pattern that combined a series of lethal agents that included direct killing, disease, starvation, exposure, and exhaustion, among others. Moreover, if some historical investigations indicate that "deaths from disease may exceed those deriving from any other single cause," *id.* at 255, in the case of Native American genocide, so do the ones that consider the deaths among Jews in the Holocaust. Therefore, the greater cause of death during the Holocaust can also be "attributed to the same so-called natu-
[81] ral phenomena." *Id.* at 254-60.

[82] Friedberg, *supra* note 71, at 368-69.

[83] Cassese, 2008.

[84] *Id.*

[85] Gordon, 2000.

[86] *Id.*

[87] Lopes Cardoso, 2010.

[88] James, 1996.

[89] *Id.* at 45-46.

[90] Rodriguez, 2011.
[91] *See id.* at 49.
[92] Woods, 2009:31, 35-363.
[93] Carneiro, 2005:125-36.
[94] *Id.* at 125-36.
[95] Carrington, 2010.
[96] *Id.* at 67-68.
[97] *Id.* at 70.
[98] Arendt, 2003.
[99] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).
[100] Genocide Convention, *supra* note 1.
[101] The representation of the Holocaust as a "white tragedy" aims to accentuate the ultimate violation of European bodies in the context of World War II. However, this appreciation does not endorse the much-criticized depiction of the Jewish community as a monolithic one. Indeed, the overwhelming focus on the Holocaust and European anti-Semitism in the affirmation of contemporary Jewish identity has been viewed by many as a powerful ideological instrument that silenced the non-European and non-white Jewish histories. This arrangement reflects the high degree of racism experienced by non-white Jews within the Jewish community worldwide. Peto, 2010.
It is also important to stress that from the standpoint of identity politics, the Holocaust is considered a decisive historic event in a process that would result in the whitening of European and European-descendent Jews. The assimilation of Jews into the category of whites has as its ultimate consequence the engagement of the privileges of whiteness and the concomitant appeal to a past victimization imposed on their non-white ancestors. This powerful duality helps to explain the solidification of depictions of the Holocaust as a unique event and the impressive reparation policies conceded to Jewish communities. For a more detailed discussion on this particular issue, *see generally* Goldstein, 2006; Brodkin, 1998.
[102] For an analysis that highlights the idiosyncratic nature of the Holocaust as a unique expression of evil *see generally* Katz, *supra* note 68; Lipstadt, *supra* note 59.
[103] For an introduction to the role of bystanders in the Holocaust *see generally* Hilberg, 1992.
[104] *See* Ratner & Becker, *supra* note 42, at 345.
[105] Scharf, 2010.
[106] *Id.*
[107] Shringarpure, 2009.
[108] *Id.*
[109] *Id.*
[110] Vargas, *supra* note 36, at xxvi.
Id. at 5.

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CRIMINAL COMPLIANCE, CONTROL AND ACTUARIAL LOGIC: THE RELATIVIZATION OF THE *NEMO TENETUR SE DETEGERE*

// *CRIMINAL COMPLIANCE*, CONTROLE E LÓGICA ATUARIAL: A RELATIVIZAÇÃO DO *NEMO TENETUR SE DETEGERE*

Ricardo Jacobsen Gloeckner e David Leal da Silva

>> ABSTRACT // RESUMO

The present article will seek to investigate the phenomena actually known as criminal compliance that, especially with the Law 9.613/1998, brings to the Brazilian criminal law scenario deeply and important modifications. We believe that the implementation of the so called compliance duties, especially with the advent of the new anti-money laundering law (Statute 12.683/2012), is responsible for the deterioration of the fundamental principle of *nemo tenetur se detegere*, characterized by the statal limitation in achieving evidences against the will of the suspect or the indicted. This new facet of penal intervention that mitigates and weakens constitutional rights of the jurisdictionalized integrates a larger context, that a long a time ago David Garland called as culture of control. The institutional modifications brought by the new law, inside this criminological vision may be better understood through the demonstration that the Brazilian State, as it happens in United States and some European countries, adopt an actuarial criminal politics, responsible, mostly, by the risk management and by the apparatus of governmentality dissemination, what, according to Foucault, will give rise to an actuation focused on prevention, precisely with the aim to gain security. // O presente artigo procurará investigar o fenômeno atualmente conhecido como *criminal compliance*, que especialmente com a Lei 9.613/1998, trouxe para o cenário do direito penal brasileiro importantes e profundas alterações. Acredita-se que a implementação dos denominados deveres de *compliance* seja responsável, especialmente com o advento da nova lei de lavagem de dinheiro (Lei 12.683/2012), pelo enfraquecimento do princípio fundamental do *nemo tenetur se detegere*, caracterizado pela limitação do Estado na obtenção de provas contra a vontade do suspeito ou acusado. Essa nova faceta da intervenção penal, que mitiga e enfraquece direitos constitucionais dos jurisdicionalizados, integra um contexto mais amplo, e que há bom tempo David Garland denominava como cultura do controle. As modificações institucionais trazidas pela nova lei, dentro dessa visão criminológica, podem ser mais bem compreendidas através da demonstração de que o Estado brasileiro, na esteira do que ocorreu nos Estados Unidos e em alguns países europeus, passa a adotar uma política criminal atuarial, responsável, sobretudo, pela gestão de riscos e pela disseminação de dispositivos de governamentalidade, que segundo Foucault, ensejarão uma atuação voltada para a prevenção, justamente com o fito de se obter segurança.

>> KEYWORDS // PALAVRAS-CHAVE

Criminal Compliance; *nemo tenetur se detegere*; culture of control; actuarial logic; economic reason. // *Criminal Compliance*; *nemo tenetur se detegere*; cultura do controle; lógica atuarial; razão econômica.

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1. WHAT IS CRIMINAL COMPLIANCE? BRIEF CONCEPTUAL EXCURSUS

Compliance comes from the verb *to comply*, which can be presented as "acting in accordance with a rule, an instruction or request of someone". Naturally the *compliance* function assumes a strategic position in neoliberalism, because it is intrinsically linked to good business practice, i.e. integrates what might be called business ethics[1].

The *compliance* is also associated with what might be called *corporate governance*, which can be comprehended as a guidance system of business organization[2]. Corporate governance involves regulatory mechanisms of market as well as the relationship between the direction of the company, shareholders and *stakeholders*[3] regarding the core activity for which the company was created. The *compliance* is thus an essential element of business practices, as a kind of ethical commandment, becoming the theme set by economic law.

It can be affirmed, along with Silverman, the context in which *compliance* is inserted is relatively new. The development of legal and regulatory *compliance* as a growing force in organizational life results from a clump of several spheres: legal, legislative, economic, social and technological[4].

The *compliance* should not be confused with the implementation and efficiency. Unlike these two elements, the *compliance* do not cares about authoritarian regulatory in directives of public policies and policy changes offered over a period of management (implementation), neither consists in effectiveness of certain regulation to solve a political problem for which it was instituted[5]. The research on *compliance* is primarily concerned with the degree of adherence of the addressees of the standard processes of operation and analysis of obedience obout legal parameters established by it[6]. The *compliance* with a high degree of commitment is a necessary condition for effective governance[7].

The opposite of *compliance* becomes the *non-compliance*, which may result from the anti-facticity[8] legal command, as well as *non-compliance* can be effectively a process itself [9]. In the first case it will be possible to verify the *non-compliance* by the finding that the recipients of the standards do not act according to the normative commandments. This is the regulatory standards of behavior that agents are not guided by legal commands. There is obviously a great difficulty for the law sociology in assessing the difference between the behaviors adopted by the parties as conduits of diverse normative prescriptions. Issues such as breach the duty to conduct and its extension (mild, medium or severe violations), the very terminology employed by the normative (the interpretation as a condition for the emergence of the rule itself - difference between text and standard - as suggested hermeneutics) are some examples that attest to the complexity of this task bow between behaviors normatively guided and those empirically verified. The second form of *non-compliance* can result as a kind of procedure. In order to evaluate the procedure as *non-compliance*, it must register both situations. There was a *non-compliance* when the initial practiced conduit which lies outside the regulation scope is identified

immediately. This way, such identification allows the supervisory agency control (*compliance officer*), the judicial or investigative authority (criminal police or prosecutors). The second form would be a "procedure crisis in *compliance*", much more serious than the first[10]. The crisis in procedure *compliance* result of a systematic disregard of the legal standards which guide that action, even after the onset of a controlling agent[11].

Regarding to criminal law, social relations and processes globalization in its complexity have allowed the emergence of transnational criminal practices. This new scenario on which it began to demand the economic criminal law a new guise of their categories as objective type, intent, causality, tender people, etc., also demanded that were object of study certain duties of information and acting on some agents, when it comes to market relations and practices of economic transaction.

May speak therefore in *compliance criminal* when you are facing the possibility of illicit activities covered up or directly related to the economic and financial practices of certain agent. Hence the prosecution of economic institutions and entrepreneurs are immediately connected with the *criminal compliance*[12]. Can estimate that *criminal compliance* has claim to guarantee that illicit activity that aims to tackle will be eradicated even before their practice[13]. In other words, the *criminal compliance* deals with the issue of crime prevention, an *ex ante* perspective[14]. Basically, the *criminal compliance* seeks to avoid agent or company accountability, that operates with the financial markets, determining procedures for that with its fulfillment, is a practice avoided of criminal offense. What is with this strategy promotes corporate governance is the risks management of criminal prosecution through standardized procedures and, therefore, can be controlled by an inspector agency (*compliance officer*) who must necessarily be created by the economic and financial institutions of traded (in the case of Resolution 2554/1998 National Monetary Council). Its importance is directly linked to the use, sometimes legal, sometimes illegal, activities and services available to the society for the conduct of economic transactions, and in most of them, not the regulation of investment activities, purchase and sale, offset assets, may be confused with illegal practices. Within a criminological perspective, sometimes it is hard to distinguish the lawful from those illegal practices[15], constituting the company in a central *management* of *compliance* risks. In short, the establishment of standardized and sectored activities allows control within the company, the practices in accordance with the procedures manual[16], allowing, in turn, the verification of a protocol or another practice that exception, by monitoring that practice and theory, allowing an analysis of *non-compliance* early and avoid trying to make it endemic or criticism. As noted by the *Advisory Group on the Federal Sentencing Guidelines for Organizations*, "organizations must periodically prioritize their *compliance* and ethics resources to target those potential criminal activities that pose the greatest threat in light of the risks identified"[17]. These priority activities are: a) the distinction between major and minor risks, b) assessment of each risk and its importance to the objectives and purposes of the institution; c) assess the level of internal

controls and test its frequency d) determine the resources required to manage risk[18].

The *compliance* risk is nothing more than the possibility in application of legal or regulatory sanctions, financial loss, or credibility of the financial agency market due to non-fulfilment laws, regulations, codes of conduct or best practices in a particular sector[19]. Certainly, also, one of the *compliance* function is the identification and prevention of money laundering conduct, which is at the origin of the specific regulations of *criminal compliance* in Brazil.

In Brazil, the *criminal compliance* arises only with the advent of Law 9613/1998 - Money Laundering Act - now altered in the resolution 2.554/1998, of National Monetary Council. In both regulatory instruments establishes a policy to risks control derived from financial and economic activities, including the creation of responsibilities of the board from such institutions. In the United States, for examplethe the creation of *compliance* duties has the systematic attempt to processing avoidance[20] through *wilful blindness doctrine*[21].

The following will analyze the changes introduced in the scenario of money laundering, with the enactment of Law 12683/2012.

2. THE NEW *CRIMINAL COMPLIANCE* MONEY LAUNDERING LAW: REACH OF THE LAW 12683/2012

As previously mentioned, the *criminal compliance* aims to prevent economic and financial crimes at an early stage of criminal prosecution. In addition, the foundation of *criminal compliance* lies in the avoidance of any legal action, criminal sanctions, investigative character or even a judicial nature. The first legal documents that take care of this matter are deposited in Resolution 2.554, from 1998 National Monetary Council and the Law of Money Laundering (Law 9613/1998), now modified by Law 12683/2012. It must be emphasized that on September 1st, 2012 came into effect Resolution 20 of Coaf (Financial Activities Council), a body created to combat money laundering crime and asset recovery.

Anyway, will be necessary, first, briefly review what is understood by money laundering, since in a second moment, determine which innovations were derived with the Law 12683/2012, especially in what regard, the denominated, *compliance* duties. Finally, on this same topic will examine the expansion of duties alluded to then, further, to analyze such modifications in the light of criminal procedure and criminological digressions needed for the good availability to unfold the Brazilian politica criminall horizon.

First, it must be highlighted that the *compliance* duties arise in conjunction with the Money Laundering Act. And this is not a episodic or accidental relationship. Because it is the money laundering crime of an offense which falls within the practice of favoring many other crimes, ie washing corresponds to the transformation of illegal practice origin of certain goods or assets in other, apparently legitimatethe, attempt to

preventing criminal offense of this type would require an act of State that allowed detection of their practice at a prior moment to the masking the origin illicit of those goods or values. The difficulty to prove[22] the crime of money laundering and to recover, therefore, of the assets has an enormous scale[23]. Many problems could be leveraged here. Mentioning only a few in the scope of the thematic context: a) as a general rule, these are offenses that cover up other criminal practices. The fragmentation of proof is pretty much given in trivial crimes of money laundering, making it difficult "puzzle" to mount by authorities; b) the money laundering offense also occurs with the utilization of financial markets through "cascade" operations, ie, by a chain of transactions apparently legal that often unfolds by several countries (stratification - layering). Therefore, legal international cooperation ends up being necessary, with all sorts of obstacles to celerity and effectiveness of their own evidence found; c) not infrequently money laundering is practiced with the companies help whose lawful activities and also with mixture of values also from licit nature, making it difficult to demonstrate the values introduction derived from criminal activity within these strings on financial operations. There are of course difficulties regarding the separation of originating amounts from illegal operations of those who have a lawfully thirst; d) because it is a crime that admits only the willful figure, subjective proof of element type, not to admit any interpretation that mitigates legality principle (presumptions, evidentiary burden inversions, admission similar to the eventual intention figures as *reckleness*[24] from the United States) also makes a clear demonstration of the offense tempestuous; e) the use of *offshore* companies for illegal practice and the inadequacy of means placed at the international law service in adoption of facilitating policies to bank records access and business transactions in some countries must also be enrolled as a factor that makes difficult to procecute this crime[25].

As can be seen, the admission of certain duties to be supported by the companies agents in the financial market and economy is intimately linked to the prevent efforts of money laundering crime. The adoption of the *compliance* duties by own Money Laundering Act specifies this idea passing to the State act directly on suspicious transactions or even about that transactions category that commonly serve to practice this offense. In other words, the State to prevent the commission of the offense in question ultimately determines that certain people or companies assume determined burden of practice activities (bear the risk of fulfilling duties established by good business practices) and also achieve with *ex ante* prevention of money laundering crime, the assets or securities resulting from an criminal offense before practice are more easily retrieved and proof to be easier, since no matter the process introduced by the camouflage money laundering. In short, it seems easily verifiable the close relationship among the state and international efforts towards combating the crime of money laundering and the establishment of *criminal compliance*. Currently, *compliance* duties are based on occupational *standards* developed by organs such as the *U.K Financial Services Skills Council* (FSSC)[26] in association with the *International Compliance*

Association (ICA) and are used to ensure the smooth functioning of financial markets and avoid the utilization of this market for the practice of money laundering activities[27].

With the enactment of brasilian Law 9613/1998, regulated for the first time in the legal-criminal set the money laundering crime. It is, as portion spots of doctrine, a law called the second generation. That by the fact that the money laundering crime requires prior commission of an offense, previously enrolled in a series of primary crimes. Therefore, if the first legislations to combat money laundering antecedent crime maintained the linked trafficking in narcotic substance and third-generation laws did not require the closed list, allowing the washing to fall on any criminal behavior (laws of third generation) the Law 9613/1998 allowed certain category of offenses authorizing the practice of washing. Therefore, a second generation law. In the original wording of Law 9613/1998, for existing offense of money laundering was necessary that the antecedent crime, whose product it would hide or transform the nature it were practice was founded: a) illicit trafficking in narcotic substances or similar drugs; b) terrorismo; c) the terrorism financing; d) the smuggling or weapons trafficking, munitions or materials used for their production; e) of extortion through kidnapping; f) crimes against public administration; g) of crimes against the national financial system. These antecedents crimes are subject to lead to commission of money laundering offense. With the enactment of Law 12683/2012, there was suppression from the predicate offenses list in the legislation (Law of third generation), assuming the content of Art. 1st of the said rules, the money laundering offense is derived from assets, rights or values derived from the practice of any criminal offense. Thus then, including the practice of a misdemeanor becomes susceptible of supporting the washing practice.

Secondly, with regard to the duties of *compliance* established by Law 9613 of 1998, it should be emphasized that the mentioned legal provision contemplated as being subject to control activities and, cumulatively, had the obligation to notify some suspect financial activity practice those entities that develop certain activities legally consigned.

The Law 12683/2012 expanded and modified persons with *compliance* duties. Thus, first of all the biggest change introduced by the novel legislation concerns the extent of coverage, no longer confined to the rule that only legal entities were inserted in this context, with only a few exceptions that admit natural persons as the receivers of mentioned duties. As a general rule, Art. 9th of Law 9613/1998, with the changes introduced by Law 12.683/98 establishes that *compliance* will extend the duties, indistinctly, to individuals beyond the legal entities. What are the duties which *compliance* must be subordinate those recipients? The Art. 10 of Law 9613/1998, with the wording of Law 12683/2012 asserts that the individuals and companies object of Art. 9th should: a) identify their clients and maintain data in up to date terms instructions issued by the competent authorities; b) keep records of all transactions, national or foreign currency, marketable securities, bonds, metals, or any asset that can be converted into cash that exceed limits set by the competent authority and

in accordance with instructions issued by this; c) duty to adopt policies, procedures and internal controls, consistent with its size and volume of transactions, enabling them to meet the provisions of Art. 11th, in a disciplined manner by the competent bodies; d) duty to register and keep their registration current in the regulator or supervisory, in the absence by this, the Council for Financial Activities Control (Coaf) in the manner and conditions set by them; e) duty to suit requests made by Coaf in frequency, form and conditions established by it, and shall preserve, under the law, the information provided under confidentiality.

Still, according to art. 11th of Law 9613/1998, now with the modifications introduced by Law 12683/2012, individuals and legal entities referred in art. 9th : a) pay special attention to transactions which, in terms of instructions issued by the competent authorities, may constitute serious indications of crimes defined in this Law or they relate; b) shall inform the Coaf, abstaining to give knowledge of such action to anyone, even to that of which the information relates, within 24 (twenty four) hours, a proposal or accomplishment: 1) all transactions mentioned in item II of Art. 10th, accompanied by referred identification in item I of the aforementioned article; 2) the referred operations in item I; c) must notify the regulatory or supervisory agency of their activities or, failing that, to Coaf in frequency, form and conditions set by them, the non-occurrence of proposed transactions or operations that can be communicated in accordance with item II; d) the competent authorities, in the instructions referred to in item I of this article, draw the operations relation that, by its characteristics, in respect to the parties involved, values, embodiment, instruments used, or the lack of economic or legal base, can configure the hypothesis stated therein; e) communications in good faith, made in the manner prescribed in this article, shall not generate civil or administrative liability. All these *compliance* duties are still regulated by Resolution nº 20 of Coaf, which is on effectiveness since september of 2012 and will further broaden the range of obligations that individuals and companies described in Art. 9th of Law 9613/98 will be subject to.

Finally, there is the analysis of the legal consequences from failure of so-called *compliance* duties. According to art. 12 of Law 9613/1998, with the modifications introduced by Law 12683/2012, the persons referred to in art. 9th, as well as managers of legal entities that fail to comply with the obligations foreseen in the Arts. 10th and 11th will be applied together or separately, by the competent authorities, the following sanctions: I - warning; variable monetary penalty not exceeding: a) twice the amount of transaction; b) twice the actual profit achieved or that would presumably be obtained from the transaction; or c) the amount of R$ 20,000,000.00 (twenty million reais); III - temporary disability for a period of ten years, to exercise the director office of legal persons referred to in Art. 9th IV - terminate or suspend the activity authorization, operation or functioning. § 1st The warning penalty is applied by an irregularity in the instructions fulfillment referred to in sections I and II of art. 10th. § 2nd. The fine will be applied whenever persons referred in art. 9th with malice or negligence: I - no longer remedy the object deficiencies warning within

the period marked by the competent authority; II - do not fulfill provisions of sections I to IV of art. 10th; III - fail to respond within the specified period, a request made in accordance with section V of article. 10th ; IV - disobey the seal or fail to make the communication referred to in art. 11th.

Presented the configuration of compliance duties and institutions subject to control by the Coaf, remains therefore a critical analysis of such institutes, which will be held on topic.

3. THE *NEMO TENETUR SE DETEGERE* PRINCIPLE DETERIORATION PROCESS: THE USE OF SANCTIONING CRIMINAL LAW AS A MEANS OF WEAKEN THE RIGHT TO SILENCE

As glimpsed, an extensive list of individuals and *companies* remains covered by Law 9613/1998, and must perform a number of *compliance* duties. However, this series of obligations - especially those relating to the information provision - must be vented under the aegis of principles relating criminal procedure and its constitutional instrumentality.

It is not difficult to think of an hypothesis in which, for example, a financial institution, subjected to the rules of Art. 9th of Law 9613/1998, may be involved in a crime of money laundering. Starting with this assumption, so how could conciliate *compliance* obligations, their administrative sanctions and the right not to provide evidence against himself? In other words, the possible consequences that come from breach of the *compliance* duties possess legal liability when the institution itself is suspected of practice of capital laundering methods listed in article 1st of Law 9613/1998?

Even before proceeding with the analysis about the hypothetical response to the case, it has been a duty weave brief comments about the so-called "right not to produce evidence against himself," which results from a contemporary conception of the maxim *nemo tenetur se detegere*. Preliminarily, from the starting point that, the Constitution, with the paradigmatic rupture to the totalitarian model carved in the Criminal Procedure Code of 1941, provides comprehensive filtering required for some Constitutional devices. By accusatory system, defending here, the system that centralizes production and evidentiary initiative in the hands of the parties (device principle) was not observed any kind of instructive *ex officio* power in the hands of the judicial authority.

As a corollary of an accusatory system, as a general rule, the principle device that determines the rules of evidence comes associated with many others procedural safeguards of Constitutional ranking. Like clear example mentions the right not to produce evidence against himself. It is a principle constitutive of contemporary criminal procedure, which erects a barrier against coercive methods to force the accused to cooperate with the prosecution. In the words of Bacigalupo, the State is the suspect guarantee of not incriminate himself against their will, because the current Right imposed on criminal prosecution authorities the duty to instruct anyone who is interrogated[28].

The right to non-self-incrimination is correlative to the right to ample defense, which may be expanded in self-defense and defense technique[29]. Self-defense concerns the possibility to be informed of the charge that weighs against you as well as opt for refute it personally or even refuse to provide any kind of information. In this latter sense you can affirm the existence of a negative personal self-defense. In the same direction can be sought in the words of Pisapia, for whom there is a necessary overlap between the defense right and the interrogation act of the accused or indicted[30].

In the inquisitorial system, in which the accused is a mere investigation object there is a true exploration of defendant for psychic probes, being found and adjusted the axiom *reus tenebatur se detegere*[31], not admitting the use of silence. In order to break the defendant silence, the torture was a strategy used by the inquisitorial evidence system. The *nemo tenetur* principle, therefore appears linked to a matrix that starts from renegation to the dogma of real truth as the purpose of criminal proceedings. Moreover, as Schmidt asserts, limiting the means to access the truth is an important tool to control the legality of the acts committed by its agents, consisting undeniable achievement of the Democratic Rule of Law[32].

However, further exploration of this principle in the universe, is necessarily refer to the treatment accorded by this warranty, called adversarial system[33], which has a intense connection with the concept of accusatory system advocated here[34]. Several conclusions can be pointed on the applicability of this principle in of *common law* regime: a) the prohibition of self-incrimination principle does not know the existence in England during the birth of modernity; b) its functionality is bound to the procedure reconfiguration implemented by the emergence of the adversarial system and the defense attorney participation; c) there is a significant change in the course of time with regard to ensuring the self-incrimination prohibition, which passes from the right not to deliver a complaint against itself to the right not to testify, including in this core, the right to be free from corporal interventions designed to extract evidence from the defendant body the; d) there is no sense at all in getting a deeply cut in the right to not autoincrimination from the right to a technical defense, since he only has sense when you admit that someone can speak on defendant behalf[35]. In the U.S. system this fundamental right gains strength through the *Miranda vs. Arizona* case, deriving then so-called *Miranda warnings*, ie, the necessary warning that suspect or accused is not obliged to cooperate with the State investigation.

As previously mentioned, there is a gradual transformation of *nemo tenetur se detegere* principle which encompassed in the beginning only right to not answer, and that goes later to cover other probationary forms as the body intervention itself and the right not to serve as a witness when such a position can somehow compromise the exercising the right to silence. However, this same organic change of principle has led some situations to be left outside the scope of warranty protection. In the United States, the paradigmatic case *Schmerber v California*, in which he was collected accused's blood without the consent while he was in

unconsciousness state. Despite remains shrouded by Fifth Amendment in the U.S. Constitution, the Supreme Court denied any kind of violation of the the right to non-self-incrimination principle.

This tendency can recently be found in Brazil, where the enactment of Law 12.654/12 introduced what can be termed "genetic investigation", substantially altering the Law 12.037/09, which deals with criminal identification. Upon judicial authorization, even without suspect consentment, the police can collect, by painless method, when essential for police investigations, the suspect's DNA in order to confront the genetic material found on the crime scene. The major problem brought by this legislation - alongside his immovable unconstitutionality - is the possible ripple effect that could fall on other species of evidence, especially those whose investigated body or accused may establish a probationary causal link between action and outcome. Certainly the redimensioning on warranty clause against self-incrimination may carry interpretations to conclude for mandatory submission to the breathalyzer test, among many other inadequacies that can be built from precedent normative.

Once crossed the theoretical analysis point of the *nemo tenetur se detegere* principle, fulfills return to the original point topic. The determination of sanctions provided in art. 12th of Law 9613/1998, may be applied to suspect of some form of money laundering practice? Preliminarily, it must be emphasized that German Constitutional Court itself recognized existence of a obligation to ensure the *compliance officer's* employee (responsible agency for supervision over the financial institution activities) on the grounds of crime prevention, having assumed the responsibility for result avoidance, having duties of care, surveillance and protection[36]. As emphasize by Badaró and Bottini[37], there is a increasingly tendency towards the resource utilization to the improper omissive crimes, as a means to criminalize certain conduct supported by law of money laundering. Naturally, individuals and legal entities described in art. 9th of Law 9613/1998 could collaborate, intentionally, for the offense commission, according to proponents of the thesis proponentes, the applicability of improper omission offense the in question. The central nerve of the matter lies in the circumstance that the *compliance* duties would be true result avoidance standards, so now, not existing as only "programmatic" rules for the financial institution or the individual activities management and control, to be executable. On the contrary, the procedures creation and the administrative rules observance located in Law 9613/1998 and especially in Resolution nº 20th of Coaf, would indicate that is being described to a true duty of result avoidance attributed to such persons (legal and natural). Therefore, from this point of view, the improper omission punishment that would be appropriate for such situations, may therefore, arise conflicting with the incidence of *compliance* duties.

In being admitted the hypothesis that the persons addressed the *compliance* duties may suffer administrative sanctions for the regulatory guidelines breach when suspected or accused of money laundering offense, there would be inevitably, a serious *nemo tenetur se detegere* infringement of principle.

The fines introduced by Law 12683/2012 in Law 9613/1998 are of such amount that it becomes possible the affirmation that they constitute a real administrative nature sanction. Although unannounced as such, the eminently expropriation nature reach values (up to R$ 20,000,000.00) does not allow other conclusion. If indeed it comes to administrative penalties that try to coerce or force the compliance duties recipients to fulfill the inspection agentes role, what is doing is an indirect coercion that such duties be fulfilled, by appeal to some kind administrative penalty so severe that it would also be incompatible with the very nature of administration ground that you want to assign. In addition, it is argued here that such penalties and activities termination, for example, differ in no way from those of criminal conviction, such as fine and activities prohibition (see that in the environmental crimes even with regard to corporation conviction would configure main penalties). These features of severe sanctions, without, however, resorting to criminalization are themselves called the administrative law sanctioning. In a few words, the Law 9613/1998 establishes a administrative law true sanctioning to favor the fulfillment of *compliance* duties in Brazilian standards stipulated. However, in many European countries that adopt administrative law sanctioning, is found a renunciation of criminal law use. Or guardianship certain circumstances by the administrative law use by sanctioning or criminal law. Everything depends on the offensiveness of the conduct.

The situation remains aggravated when considering the double, criminal and administrative sanctions, acceptance will have the following consequences for the same fact: a) heavy administrative fine falls on the *compliance* duty recipient's may cause the information be provided, even it implies a " responsibility assumption" before the criminal sphere. Given that the money laundering penalty - which ranges from 3 to 10 years – could authorize, in the absent of increased and aggravating causes to estimate that imprisonment sentence be less than four years prison, allowing thereby the application of art. 44 of Criminal Code and the liberty restricting penalty substitution for two rights restricting penalties; b) not providing information may, admitted the concourse standards possibility of *compliance* duties addressees heavy fine, which may be even most severe than criminal; c) provision of information to achieve success in the money laundering appointment, with substantial recovering in part of the assets could even depending on how it proceeds, bring the reduced penalty cause, called plea bargaining, the content of § 5 art. 1 of Law 9613/1998.

What can be glimpse, before this scenario, is the relativization progress of *nemo tenetur se detegere* from what could be denominated as a legal standards juxtaposition imposed on the same consignee, starting from the different perspectives that each law field is able to offer. This phenomenon is responsible for the increased uncertainty in state response. And more than that, the administrative sector, more and more threatens herding tasks previously linked to strict jurisdictionality view. So, there is a growing criminal law administrativisation by recourse "to layers of legal norms formation", focusing each according

to its rationality. The bifurcation point, and (perverse) continence will occur when these norms authorize, necessarily, a waiver of rights (in this case even unavailable), in favor of a penalty release which may, case by case, configure equal intensity penalty, "administrative penalty" masked.

We must remember here this procedure is not new in Brazil. Somehow the *nemo tenetur se detegere* principle had been relativized when the enactment of Law 8.137/90 and the wording of art. 1st of this Law. The situation becomes aggravated when the Law 12.654/12 arises, which regulates genetic identification. Therefore, carved by Law 12.683/98 was solely broaden the scope of *compliance* duties and increase the "encouragement" dose to accomplishment of these duties. The result is a legal-criminal-administrative normative elaborate in a superposed layers, so the same situation of two distinct branches of legal system is expected from the perspective, encouraging, so to speak, the fundamental rights waiver by threat with parallel-punitive control devices. The numerous standards determination that act on the same fact makes sense facing a perverse logic of efficiency and the primacy of public over private. A simple analysis of new money laundering regulations establishes a very worrying situation: either the recipient of *compliance* duty relies on the constitutional right not to produce evidence against himself, and may suffer with it, one great magnitude administrative sanction, either as well waives the right to that and disclaims suffer the administrative penalty, naturally assuming one of a criminal nature. Here's a good example how the economic instrumental rationality colonizes law (criminal) and the constitutional rights pass through a stage of exceptionality.

It seems that with this overlapping legal rules phenomenon that protect the same factual circumstances it was already possible explain this new control form over fundamental rights. In short, one can say that will fall administrative criminal law sanctioning for those who do not waive their constitutional right not to provide evidence against himself. Penalizes with this, regular exercise of a right. Behold offense to Democratic State by diffuse and ramified safety devices mechanisms that consolidate contemporary governmentality. This is the final assay task.

4. THE ACTUARIAL CRIMINAL POLICY AND CONTROL CULTURE IN BRAZIL: GOVERNMENTALITY DEVICES, RISK MANAGEMENT AND SECURITY POSTULATE

David Garland, in an important trilogy, culminating in the book *culture of control* tried to examine a radical change wrought in the North American punitive system, with the so-called abandonment of previdenciary criminal[38]. The central aspect of this work is to highlight the culture of control emergence, captained by criminology of the Other. This new criminology deviates from the XX century 60s and 70s discussion itself, dedicated on the responsibility concept. The theoretical basis modification of this new criminology rests on criminal risk management aspects, especially with causation and prevention "scientific" theories[39].

There is a criminological rationality transformation itself, operating discussions on economic thinking applied. In the words of Garland, there is a new way of operation of criminal justice: costs of crime are now routinely calculated, as are the costs of prevention, policing, prosecution and punishment; numbers produced help guide policy choices and operational priorities[40].

This economic approach, management or actuarial of crime appeals directly to economic rationality. The so-called economic analysis of crime - whose developments are due to Becker[41] – allows the punitive modeling construction and the system according to instrumental rationality maximization. Perhaps the high point of actuarial criminology structuring is leaning on the statistics and calculus management use as capable elements of changing the punitive system very self-definition. There are herecurrently, in British and American criminological literature, a profusion of texts ranging from explanatory formulas of the crime to hypothetical victimization limits demonstration of particular crime practice. And that correspond to Jock Young as a loss of "criminological imagination"[42]. It is a new sort of criminological positivism that uses the economicist orthodoxy. There are undeniably a numbers fetish concerning the precision illusion they are charged[43], allegedly under the pallium of eradicating the ontological insecurity.

No wonder that in parallel to criminal law administrativization will compete also criminology administrativization. Something Zaffaroni baptizes the end of history criminology[44]. This administrative criminology corresponds, what grants a rather troubled relation, on that governmental aspect that hosts the nominated actuarial criminal policy. Here follows the Dieter Maurício analysis, in a deep and accurate pioneering study on the topic, when examining the actuarial criminal policy. The actuarial logic: refers to actuarial calculation systematic adoption as *rationality* criteria of an action, such as defining itself *mathematical weighting* of data - typically inferred from samples - to determine probability of future concrete facts[45]. It can be, as a consequence, set the actuarial criminal policy as reproduction of economic instrumental rationality with the use of this arsenal combined epistemic procedures of secondary criminalization[46].

One can not fail to observe that we are faced with the true instrumentalized knowledge domain by neoliberal and market interests (*business principles*). To this economic form of rationality Garland has claimed to be derived from private sector practices[47]. This approach logically, has quickly reached the criminal field conferring a radical economic disposition[48]. This is the arithmetic control under a gaze whose hostility nothing stays out. This way of interest managing meets the economic globalization logic itself, increasingly colonizing more and more territories[49]. In the society of control, moreover, regulations models developed from the organizational economy logic will become increasingly influent[50]. These mechanisms consecrate themselves as master criteria on articulation of prevention and control criminality strategies. It is a rationality that no longer eludes the crime eradication, knowing, in contrast, there is some everyday criminal offenses regularity[51].

Around the actuarial logic centers the concept of *risk*, which previously was co-opted by criminal law discourse. However, managerialism and the fetish caused by the numbers dominance - something undoubtedly presented by actuarial logic - demonstrates to satiety there is a collective imagination, alongside the contemporary ontological insecurity context, highlighted by Giddens[52], there was a possibility to recover security. It is, as if the actuarial logic represent one (subject supposed to) know now able to ensure that it is in fact (!), before the truth in order to minimize contemporary life risks and uncertainties and to ensure our decisions correctness[53].

This actuarial criminal policy can be better understood through an examination that relates to *governmentability*[54]. The latest Foucault seminars in *Collège de France* was directed in order to examining conditions, structures, associations and small diagrams of power headed by devices called governance. The governance strategies, especially by studies that looked regarding the inexorable link between criminality and governmentality - as nicely demonstrated by Simon[55] – passes directly by devices production. The devices according to Agamben are like network species, allowing connectivity between several elements. And still, has a strategic role in the governmentality study[56].

Foucault's thesis is that the disciplinary society - especially those outlined in *Vigiar e Punir* – already can not account for the whole phenomenon of governmentality. Evident that in a post-disciplinary society, discipline will not simply be replaced by another element. There will be a juxtaposition of both naturally. It happens that the unsuccessful lessons in disciplinary logic undeniably well absorbed without, however, his manifest ideals - at least by the well intentioned - to be consummated. Thus, within the governmentality genealogy, it can be said that unfolds by legality way(which acts through a permitted and forbidden binary code), discipline (through surveillance and correction mechanisms) and finally, security. In respect to this new technology of power, reactions facing criminality, for example, will operate through the cost estimate[57]. The legality system is that referring the Middle Ages, the second, the disciplinary system is that of modernity, while the third - the security - is the contemporary, which is organized around the cost estimate and corresponding the american and european forms of criminality treatment.

Foucault sets out essential differences between discipline and safety devices. The discipline is essentially centripetal, by isolating space and acts in a segmental manner, isolating the phenomenon. The security mechanisms, however, are designed to centrifugal expand. Producing, through the imbrications whenever new elements. Foucault sustain many other differences that arise between disciplinary system and safety devices. Yet, for this essay task, this unevenness between the disciplinary and security system is vital to understand the conclusions raised here[58].

In this direction, a new form of crime management develops from responsibility transfer strategy[59], according to which delegates to groups and individuals control responsibility, so the State, in some sectors, no longer acts against crime directly (with: police, courts, prisons, etc..), but

indirectly, with support agencies and non-governmental organizations preventively. It is as well a new ethics or ethical commandment[60] that spreads according to governance regime whose strategic interest is none other than to form a culture *compliance* and, consequently, increase the economic control. It is precisely what this is about, will say that some authors: The culture is the most effective conduct guidance and control of individuals and organizations[61]. Then, with that delineates an forced attempt to establish a delusional administration culture of social life in our context, such as a master significant[62] establishing by force and violence a new order. And nevertheless the very judicial system takes on more regulatory function, as predicted Foucault[63].

With the *managerialism* spread, makes possible even the existence of a double regular codes that permeates this field from the imperative populist tendencies nature and international criminalization commandments supported by constant paranoid threats visions. Ends up thereby functionalizing criminal law with the symbolic criminalization second market interest and hypertrophy the unsustainable suspicion that everyone is guilty (it can not be reach another conclusion on the exacerbated prevention of new Money Laundering Law). The atuarialism comes to be, in our case, the reason hyperbole that ferments figures and intends to subject everything from world to numerical view, which corresponds to a refined calculator paranoia to employ an expression of Sloterdijk[64]. In terms of subjective structure, it is about somewhat similar to Freud's crystal metaphor in which, by breaking the crystal is not broken at random, but only along the cleavage lines, fragments of which are predetermined[65]. Seems to be experienced the same consequence in the society of control: there is a way to organize the individuals experience in which all behavior is previously included in risk and control analysis as omnipresent and annihilating, as a absolute father figure who does not allow failure in let te *moi* be constituted.

The present thesis shows that so-called *compliance* duties are nothing more than capillary structures control, addressing the intersection between administrative and legal. Through acting on reality, there is kind of adjustment of its features and elements. The very prevention function usually attributed to these duties makes clear it is a strategic regulator. Through these state control devices goes the enlargement of the, in large part with the same core of risk category fetish. So much so that the *compliance* duties are justified by the use of risk *compliance* decreased factor. Between *compliance*, *compliance* risk, administrative and criminal sanctions, there will be a reality background that enshrines and perpetuates the relationship between these categories, allowing these elements dispersal for all areas of sociality. The analysis carried out by Silva-Sánchez[66] which became known worldwide could be explained with much more depth and property by safety devices lenses, designed to expand.

Because these devices will exercise obviously latent and undeclared functions, even not possible to summarized in a few previously attributable purposes. Besides the relativization of *nemo tenetur se detegere* principle, would be possible to associate the so-called *compliance* duties

to forcible attempt, with the use of administrative sanctioning law as a veiled form to obtain on the plane of preliminary investigation, one *total enforcement*. Brazil, fleeing the other countries adopted example[67], does not make the notice-crime in order to initiate the preliminary investigation. It is noted here the introduced exception by Law 3.688/41, in its art. 66, I and II (failure to communicate public criminal action crime when, by virtue of his functions, the public official took note of his practice; failure to communicate crime; failure to communicate public criminal action crime by medical professional). In the remaining cases, the notice crime is optional. Failure to comply the *compliance* duties established, as mentioned several times, the omitting agent will be subjected to administrative penalties of high magnitude. As we can see, behind the regulatory changes there is a great elements network capable of allowing governmentality maximization, that is, subject to the subordination of statistical control purely (remembering that statistic is nothing more than a mechanism of the *state reason*). It is clear, yet again, the correct analysis of Foucault about the expand tendency of safety devices. An analysis as basted allows immediate diagnose, two direct affectations of criminal procedure system: next to preliminary investigation and self-incrimination prohibition principle. Certainly further analysis might raise many other mutations series in the criminal justice functioning brought by the *compliance* duties.

On completion rate, seems easily understandable the broadening and deepening of administrative and punitive control over certain economic practices. As also occur numerous devices that operate in other venues. The punitive system functioning, through the use of standards juxtaposition, strategically arranged to relativize constitutional guarantees incidence appears to be an important tool of contemporary governmentality. The insertion of safety devices reveals a tendency to blurring the codes legality themselves of criminal justice.

It was verified by the prohibition of self-incrimination fundamental principle analysis, that the *compliance* duties are presented as devices which make legal logic to an actuarial logic. The driving idea of prevention and risk management, embedded in the administrative criminology discourse, is precisely the *leitmotiv* of these *compliance* duties. The salacious logic of constitutional guarantees is supported by neutral institutes without pretense to maximize state control apparently. It must be exercise due care to be wary of this duties expansion and even opening to economic and managerial rationality that threat to govern the juridical issues. These profound changes in the punitive system functionality begin to be noticeable, at least to a certain contemporary criminology sector.

The big debate to be waged will reside in the battle against these guarantees gradual removal, alerting the fact that the punitive system has been gradually colonized by economic rationality. The *compliance* duties are just another safety device immersed in the vast network of post-disciplinary governmentality. Therefore, it is necessary investigate in which extent they are compatible with the Constitution and what the limits to be imposed.

>> ENDNOTES

[1] Cf Weber, 2001.

[2] Aglietta/Rebérioux, 2005.

[3] Stakeholder was first employed by Robert Edward Freeman to designate essential participants of a negotiating strategic planning.

[4] Silverman, 2008: 05.

[5] Neyer/Wolf, 2005: 41-42.

[6] Neyer/Wolf, 2005: 42.

[7] Cf Deacon, 2007.

[8] For Luhmann "behavior expectations norms are stabilized in terms factual expectation. His unconditionality sense implies its validity insofar as the term is experienced, and therefore also institutionalized, regardless of factua satisfaction or not of the norm. The symbol 'should be' mainly expressed in the effective expectation against factual, without putting in discussion this actual quality - there are, heare, the meaning and function of 'must be'". Luhmann, 1983: 57.

[9] Neyer/Wolf, 2005: 42.

[10] Neyer/Wolf, 2005: 46.

[11] Neyer/Wolf, 2005: 46.

[12] Saavedra, 2011: 11.

[13] Blount, 2002.

[14] Saavedra, 2011: 12.

[15] Cf Ruggiero, 2008.

[16] Yeung, 2004.

[17] Organizations should prioritize their ethical resources periodically and compliance to achieve those potential criminal activities that place the greatest threat in the identified risks light. Free translation.

[18] Silverman, 2008: 231.

[19] The Compliance Funtion in Banks. Bank for International Settlements. Available in: <http://www.bis.org/publ/bcbs103.htm.>.

[20] Stessens, 2003: 178.

[21] The United States in regard of the Control Act Money Laundering (Money Laundering Control Act of 1986) use, the courts have, however, flexibilized the requirement of illicit practice common awareness needed in order to exercise greater pressure on business person. With this, employed an alternative institute, the "willful blindness". The willful blindness theory basically deals with situations where the agent intentionally sought ways to make impossible to create awareness of specific illicit activity or the particular fact existence. Would be concrete situations with high probability resulting in a criminal activity that the defendant chose to ignore, or knew be existing. Nothing becomes willful blindness, inasmuch as recognized hermeneutic institute easy handling by indeterminacy reason applicative (which therefore gives enormous power to the courts), rather than a mental substitute prosecution that satisfies the consciousness criteria essential to the criminal practice configuration. A typical example of willful blindness would be the traveler who accepts shipping a package to a stranger under payment of some value to do it. The traveler may bring a reasonable suspicion if it is contraband. But without investigation, it would not be possible to ascertain whether or not the traveler knew of the illicit package content. However, the willful blindness theory allows this inference. If the traveler claim ignorance, the theory encompasses the subjective actual knowledge requirement imputed. Of course in terms of due process, it can

bring some problems. By adopting such intentionality method, clearly expanded, one ends up weakening and reduce the prosecutor body of proof burden as there is no way to create direct evidence, the burden shifts to the defendant probativeness, strengthening an undesirable – *juris tantum* - assumption of guilt and knowledge imputed. In short, the willful blindness theory comes precisely to break with a traditional knowledge standard, expanding it and equalizing culpability either for knowledge or for the deliberate ignorance. Cf, Kaenel, 1993: 1189-1216.

[22] Cf Demetis, 2010.

[23] Pieth/Aiolfi, 2004.

[24] It is a figure linked to the "mental state" of a criminal conduct agent, constituting *mens rea* (guilty mind). The reckleness figure means that the agent that did not wanted the result but, foreseeing the outcome, acted in such a way to expose anyone to risk. It is a very similar figure to the *dolus eventualis* in Brazilian law.

[25] Bernasconi, 2005: 247-256.

[26] These *standards* can be found at: <www.fssc.org.uk.>.

[27] Howarth, 2007: 17-20.

[28] "el Estado es garante de que el sospechoso no se incrimine contra su voluntad, pues el Derecho vigente impone a las autoridades de persecución del delito el deber de instruir a cualquier persona que es interrogada" Bacigalupo, 2005: 69.

[29] Armenta Deu, 2004: 54.

[30] Pisapia, 1975: 31.

[31] Cordero, 2000: 94.

[32] Schmidt, 2006: 67.

[33] Langbein, 1997: 82.

[34] Damaska emphasizes: "by adversary I mean a system of adjudication in which procedural action is controlled by the parties and the adjudicator remains essencially passive." Damaska, 1997: 74.

[35] Langbein, 1997: 108.

[36] Saavedra, 2011: 12.

[37] Cf Badaró/Bottini, 2012.

[38] Garland, 2008: 50.

[39] Garland, 2008: 390.

[40] Garland, 2008: 396.

[41] Becker, 1990: 39-85.

[42] Young, 2011: viii.

[43] Young, 2011: 44.

[44] Zaffaroni, 2011: 305.

[45] Dieter, 2012: 05.

[46] In a similar vein see: Dieter, 2012: 06.

[47] Garland, 1999: 65.

[48] O'Malley, 2009: 12.

[49] This does not mean, frize up, the State to weakens. Ferguson/Gupta, 2005: 123.

[50] Braithwaite, 2003: 10, 20-3.

[51] Sets up a real Penology transformation under three main dimensions: (1) discursive change with the a new numerical language implementation of probabilities and risk analysis, (2) new imposition objectives guided by the control efficiency primacy, not more intending eliminate crime, but run it through a systematic coordination, crime management process (a fair acceptable amount of crime in any society), and (3) a new verification techniques application

of risk profiles for the increase prevention purpose of health hazards,selective incapacitation promoting of high risk offenders, with a promise to reduce the crime effects on society. Feeley/Simon, 1992.

[52] See Giddens, 2003.

[53] Zizek, 2008: 79.

[54] By this word, 'governmentality', understand the structure composed of the institutions, procedures, analyzes and reflections, calculations and tactics that authorizes the exercise of this very specific ways, although complex, power that is the population as primary target for main way of knowing the political economy and essential technical instrument, the safety devices. Foucault, 2008: 143.

[55] See Simon, 2007.

[56] Agamben, 2009.

[57] Foucault, 2006: 20-21.

[58] The other elaborated distinctions by Foucault would be that: a) while the disciplinary system has a tendency to all regulate, safety devices would act on permittivity in the "let to do"; b) discipline would distribute things according to the allowed/prohibited code. There is a constant codification tendency of permitted and prohibited by disciplinary mechanism. The security device does not fully adopts the point of view of the allowed or forbidden. The security device acts directly on reality, nullifying it. Foucault, 2006: 66-67.

[59] Garland, 1999: 67.

[60] Saavedra, 2011: 11-12.

[61] The culture is the most effective guidance and control of the individuals and organizations conduct. Coimbra/Manzi, 2010: 87

[62] Zizek, 2008: 57.

[63] Foucault, 1998: 157.

[64] Sloterdijk, 2012: 500.

[65] Safatle, 2011.

[66] Silva-Sánchez, 1999.

[67] For example, in Spain, the crime notice is mandatory, and subject the agent who omits to penalties of art. 450 of the Organic Law 10/1995.

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HUMAN DIGNITY, SOCIAL SECURITY AND MINIMUM LIVING WAGE: THE DECISION OF THE BUNDESVERFASSUNGSGERICHT THAT DECLARED THE UNCONSTITUTIONALITY OF THE BENEFIT AMOUNT PAID TO ASYLUM SEEKERS

// DIGNIDADE HUMANA, ASSISTÊNCIA SOCIAL E MÍNIMO EXISTENCIAL: A DECISÃO DO BUNDESVERFASSUNGSGERICHT QUE DECLAROU A INCONSTITUCIONALIDADE DO VALOR DO BENEFÍCIO PAGO AOS ESTRANGEIROS ASPIRANTES A ASILO

João Costa Neto

>> ABSTRACT // RESUMO

This text analyses the recent decision of the Federal Constitutional Court of Germany that declared the unconstitutionality of the amount paid to asylum seekers (*Asylbewerber*). The decision reaffirmed and consolidated some views of the Court on the living wage (*Existenzminimum*). Furthermore, instead of simply declaring the unconstitutional act void, the Court established a transition rule (*Übergangsregelung*), which involved assigning prospective and retroactive effects to the ruling. // O presente texto analisa a recente decisão do Tribunal Constitucional Federal alemão que declarou a inconstitucionalidade do valor do benefício pago aos aspirantes a asilo (*Asylbewerber*). A decisão reafirmou e consolidou algumas das posições da Corte sobre o mínimo existencial ou mínimo de existência (*Existenzminimum*). Ademais, em vez de simplesmente declarar a nulidade da lei inconstitucional, a Corte estabeleceu um regramento de transição (*Übergangsregelung*), que envolveu conceder, simultaneamente, efeitos prospectivos e retroativos ao julgado.

>> KEYWORDS // PALAVRAS-CHAVE

human dignity (*menschenwürde*); social security; living wage (*existenzminimum*); federal constitutional court of germany (*bundesverfassungsgericht*) // **dignidade humana (*menschenwürde*); seguridade social; mínimo existencial ou mínimo de existência (*existenzminimum*); tribunal constitucional federal alemão (*bundesverfassungsgericht*)**

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>> ACKNOWLEDGEMENTS // AGRADECIMENTOS

I would like to thank the anonymous peer reviewers for their insightful comments and criticisms. I also thank Carolina Barreto Lemos and Carina Rodrigues de Araújo Calabria for their help during the editing process of this paper. Finally, I am profoundly indebted to Professor Marcelo Neves and Justice Gilmar Ferreira Mendes for their invaluable academic support. // Eu gostaria de agradecer aos revisores anônimos da revista, pelas suas percucientes críticas. Sou também devedor de Carolina Barreto Lemos e de Carina Rodrigues de Araújo Calábria, pelo auxílio durante o processo de edição deste artigo. Por fim, registre-se minha gratidão ao Professor Marcelo Neves e ao Ministro Gilmar Ferreira Mendes, por todo o inestimável apoio acadêmico.

1. INTRODUCTION

On July 18th 2012, the First Chamber (*erster Senat*) of the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) went public with one of the most important decisions of 2012. The controversy was submitted to the Higher Social Court of North Rhine-Westphalia, Germany (*Landessozialgericht Nordrhein-Westfalen*)[1], in a concrete review of statutes (*konkretes Normenkontrollverfahren*).[2]

The issue arose from two lawsuits which were ruled together: the first was taken to Court by an Iraqi citizen of Kurdish descent, born in 1977, who travelled to Germany in 2003 and applied for political asylum, which was denied. On humanitarian grounds, his residence in that country has been tolerated (*geduldet*) since then[3]; the second was made by a child, represented by his mother, who fled Liberia for Germany. Since 2010, the child, born in 2002, has been granted German citizenship. Before that, the mother filed a suit, in order to question the value of the benefit paid to them during a few months of 2007.[4]

In both cases, the Courts that first examined the controversies understood that the claims should be rejected in light of the sub-constitutional or ordinary law. From the constitutional point of view, it was for the *Bundesverfassungsgericht* to determine the final solution.

The decision proves to be relevant in at least two perspectives. On one side, it consolidates and confirms some of the *Bundesverfassungsgericht*'s decisions in regard to human dignity and minimum living wage (*Existenzminimum*). On the other side, the Court used a type of prospective overruling to postpone the consequences of the declaration of unconstitutionality, in order to give the legislator time to adjust the sub-constitutional or ordinary legislation to the Basic Law. This also meant assigning both prospective and retrospective effects to the decision, through the creation of a transition rule (*Übergangsregelung*) that enforces another legal Act by analogy. We sought to elucidate this point in part six (6) of this text.

The trial was the subject of extensive publicity in the press; articles have been published regarding this matter across several media vehicles in Germany, including websites of *Stern* magazine, *Süddeutsche Zeitung* and *Frankfurter Allgemeine Zeitung* newspaper.

The purpose of this article is to explain the relevant points of the decision and clarify some of the legal theories which underlie it. The text was written to be read in its entirety. However, if the reader wants to take cognizance only of the main aspects of the recent decision, without distressing about other issues, though relevant for a more insightful understanding of the topic, it is suggested reading only the parts 3 and 6 of this article.

2. BRIEF OVERVIEW

Before we analyze the decision itself, it is important to make a slight digression in order to understand the *Bundesverfassungsgericht*'s position regarding the minimum living wage.

The State respects human dignity through abstention. In this dimension, dignity imposes defense rights against the Government (*Abwehrrechte*), which means that the citizen has the right not to be pestered by State interventions (*Eingriffe*).

The rule when the constitution guarantees human dignity, although there are exceptions, is that any individual has the right to self-determination and self-development without the State's interference.

From another point of view, human dignity, if concretely protected, entails rights to demand provisions from the State (*Leistungsrechte*), as occurs, for example, with the insurance of a minimum living wage (*Existenzminimum*), which serves to safeguard the minimum material preconditions of individual autonomy. [5] [6] The capitalist paradigm that all are free, *de plano*, i.e., despite empirical circumstances – because such freedom would arise from the rationality and the faculty to chose –, does not ponder adequately factual situations that hamper and tarnish consent.

An individual who is devoid from all material means, namely, someone affected by a serious state of economic and material negligence, has her autonomy truly violated, since her scope of action (*Spielraum*) tends to zero. The State should, through actions, protect the factual prerequisites of autonomy, at risk of threatening human dignity. In this scenario, social security is a powerful tool for effecting the factual dimension of human dignity.

For the *Bundesverfassungsgericht*, human dignity (*Menschenwürde*) implies the right of the individual, '(...) in freedom, to determine and develop him/herself' (*in Freiheit, sich selbst zu bestimmen und sich zu entfalten*).[7] The individual should be understood as someone who lives in society and thus is subject to some limits, although maintaining the guarantee of independence (*doch muss die Eigenständigkeit der Person gewahrt bleiben*). One should be recognized as a member of society endowed with intrinsic value, on equal terms and with equal rights (*als gleichberechtigtes Glied mit Eigenwert anerkannt werden muss*). Making human beings mere object of the State is contrary to human dignity (*Es widerspricht daher der menschlichen Würde, den Menschen zum bloßen Objekt im Staate zu machen*). [8]

It is important to notice that the individual who does not possess the minimum material conditions necessary for a dignified life holds no factual or effective autonomy. He lacks autonomy because the sword of Damocles[9] hangs over him everyday, as he struggles to maintain his survival. And from that perspective, the scope of his choice is reduced in such a way that the exercise of autonomy is severely restricted or prevented by circumstances. Indeed, one may affirm that the excessive restriction of autonomy or the inability to exercise it violates the dignity of the individual. The

illegitimate suppression of freedom and the disrespect of physical and moral well-being make citizens unfit for self-determination.[10]

Not only in Germany but also in other countries, human dignity is a constitutional concept associated with the idea of autonomy. It is, in our times, one of the most pervasive concepts in constitutional law in the world.

In addition to being inscribed under the term 'dignity' in the preamble of the United Nations Charter and the Universal Declaration of Human Rights, human dignity is expressly enshrined in many constitutions, such as: Brazilian (art. 1, III), German (art. 1), Portuguese (art. 1), Irish (preamble), Greek (art. 2), Spanish (art. 10), Italian (art. 41), Turkish (art. 17), Swedish (art. 2), Finnish (art. 1), Swiss (art. 7), Montenegrin (art. 20), Polish (art. 30), Romanian (art. 1), Russian (art. 7), Serbian (art. 18th) and others. It should also be noted that human dignity has a prominent place in the Charter of Fundamental Rights of the European Union, proclaimed by the European Parliament in 2000 and made legally binding in most of the European Union in 2009, by the Treaty of Lisbon.[11]

It is worth mentioning that in France, for instance, the dignity of the human person (*dignité de la personne humaine*) is closely linked to the idea of non-degradation of the human being and to the eradication of practices that, although consensual, are the result of a tainted or limited consent. The dignity of the human being is not explicitly prescribed in the 1958 Constitution of the Fifth Republic (*Cinquième Republique*). As it is known, in France, civil liberties and fundamental rights (*Droits de l'homme et libertés fondamentales*) are not in the Constitution itself, but in other parts of the French block of constitutionality (*bloc de constitutionnalité*).[12]

A decision delivered by the *Conseil constitutionnel* in 1971 (*Décision n° 71-44 DC du 16 juillet 1971*) recognizes the constitutional nature of the articles of the 1789 Declaration of the Rights of Man and of the Citizen (*Déclaration des droits de l'homme et du citoyen*) and of the preamble to the 1946 Constitution – the latter is very important when it comes to social rights –, because they have been mentioned in the preamble of the current Constitution, enacted in 1958. One should also mention that the recent introduction, with the force of a constitutional amendment by the *pouvoir constitué*, of the Environment Charter of 2004 (*Charte de l'environnement*) also represents an expansion of the French Constitution.[13]

Human dignity was recognized in France as an implicit corollary of the Declaration of the Rights of Man and of the Citizen and of the preamble text of the 1946 Constitution[14], which, as aforementioned, have constitutional status.

> *2. Considérant que le Préambule de la Constitution de 1946 a réaffirmé et proclamé des droits, libertés et principes constitutionnels en soulignant d'emblée que: "Au lendemain de la victoire remportée par les peuples libres sur les régimes qui ont tenté d'asservir et de dégrader la personne humaine, le peuple français proclame à nouveau que tout être humain, sans distinction de race, de religion ni de croyance, possède des droits inaliénables et sacrés"; qu'il en ressort que la sauvegarde de*

> *la dignité de la personne humaine contre toute forme d'asservissement et de dégradation est un principe à valeur constitutionnelle;*
> *3. Considérant que la liberté individuelle est proclamée par les articles 1, 2 et 4 de la Déclaration des droits de l'homme et du citoyen; qu'elle doit toutefois être conciliée avec les autres principes de valeur constitutionnelle;*
> *4. Considérant qu'aux termes du dixième alinéa du Préambule de la Constitution de 1946 : "La nation assure à l'individu et à la famille les conditions nécessaires à leur développement" et qu'aux termes de son onzième alinéa : "Elle garantit à tous, notamment à l'enfant, à la mère..., la protection de la santé"; (my emphasis)*

Having outlined a brief initial overview, the study itself will be presented next. Among the various decisions worldwide, which interpret and apply the concept of human dignity, the recent decision of the *Bundesverfassungsgericht* is undoubtedly paradigmatic.

3. THE DECISION

According to the decision in question, the benefit paid to asylum seekers (*Asylbewerber*) is incompatible with the *Grundgesetz*, the German Basic Law. The term *Asylbewerber* literally means 'asylum applicant' or 'asylum seeker'. In our language, one can use the term 'supplicant'. This word, though seldom used in contemporary language, represents exactly the idea of the German term. It is no coincidence that the famous play by Greek tragedian Aeschylus was named 'The Suppliants', a title that translates the expression *Hiketides* in ancient Greek.[16] Supplicant, in this sense, is one who pursuits, who requires, who asks.

The legal concept of 'applicant or asylum seeker' is referred to in §1 (1), 1-7, of the 'Act of the Asylum Seekers' Benefits' (*Asylbewerberleistungsgesetz*). All the seven (7) cases stipulated by this Act, which conceptualize what is legally an *Asylbewerber*, refer to non-German nationals. The legal provisions cover numerous types of foreigners, including refugees (*Flüchtlinge*) who managed to travel to Germany and, for various reasons, could not return to their country of origin, although they did not have authorization to permanently stay in German territory.

As the *Bundesverfassungsgericht* stated in its decision, in 1993, when the Act was enacted, the benefit paid to asylum seekers was very limited. According to the original provisions of the Act, the benefit should be paid only to the foreigners who remained more than six (6) months in Germany. On May 26th 1997 and on August 5th 1997, the Act was substantially amended, having its scope considerably extended, which led to the payment of benefits to more individuals.[17] The Court states that, since then, the enforcement of the Act was fundamentally expanded to all foreign nationals who stayed temporarily, without a determined residence status (*grundsätzlich alle Ausländerinnen und Ausländer erfassen, die sich typischerweise vorübergehend, also ohne verfestigten ausländerrechtlichen Status,*

in Deutschland aufhalten).[18] During this second stage, the required time period of stay in Germany was lower than before. The Act was amended again in at least three other occasions – 2004, 2007 and 2011 – in order to adapt to the European Union standards, further increasing the number of foreigners which benefited from it.

Indeed, by current rule, the foreigners who are essentially contemplated in the Act are those who do not have the right of residence or the permanent residence permit (*Aufenthaltsrecht*), albeit they also cannot be deported from Germany. The main reason why this situation occurs is compliance with international law regarding the principle of *non-refoulement*.

This principle prevents countries to return, by deportation, expulsion or extradition, a person who can be subjected to torture, risk of death or other violations and threats of this sort.[19] It is noteworthy that the *non-refoulement* principle is understood as *ius cogens*. In other words, it is a peremptory norm of public international law, which, besides being expressly stated in art. 6 of the United Nations Convention relating to the Status of Refugees, was, before that, a binding and immemorial practice of civilized countries. As a result, this principle is a primary source of public international law.

The foreign literature on the issue indicates that, in many cases, the principle of *non-refoulement* creates a delicate issue, namely, foreigners cannot be sent back to their country of origin, but neither can stay permanently in the country where they reside now.[20] The decision of the *Bundesverfassungsgericht* reaches mainly foreigners in this situation. According to the German Court, Government data illustrates that more than 50,000 *Asylbewerber* fled to Germany because of wars or conflicts in their countries of origin.[21]

An example of this is the case of Asghar Bazarganipour, an Iranian citizen who fled political persecution in his home country and lives in Germany since 1998. Nonetheless, he was denied the right to stay in Germany and since he could not be sent back, because he was subject to persecution and could not be sent to any other country, he remained in Germany. He, like many others, resides in a cubicle of twelve square meters, located in a shelter for foreigners and refugees. Mr. Bazarganipour is forbidden to work or leave the vicinity of the shelter. The lack of permission to stay in Germany on a permanent or quasi-permanent basis implies that he is forbidden to work or to come and go within the German territory.[22]

There are many cases of foreigners in these conditions, and the benefit in question, object of the decision by the *Bundesverfassungsgericht*, is paid to these people. More recently, it is also destined to foreigners in precarious situations, who hope to live and work in Germany. An estimated 130,000 individuals who live in Germany are affected by the decision of the *Bundesverfassungsgericht*,[23] although Government data indicates that this number may be greater than 150,000.[24]

Ghassan Kanoun, a Syrian national, is also in the same described condition. He fled his country to Germany six years ago, and continues in the same situation: refugee without permission to stay.[25]

The benefit usually perceived by the *Asylbewerber* is of only 224.97 Euros.[26] In fact, payments are made depending on the situation of the foreign national. The values provided by the Act, after converted into Euros, are in fact €184.07, €112.48, € 158.50, €20.45 and €40.90, which can (and usually are) summed in order to reach a final value.[27] Overall, the most common value is € 224.97. Even the greatest possible benefit, according to the parameters outlined by the law, appears to be completely insufficient.

Since 1993, the benefit in question was never adjusted. Some foreigners even have to use their benefit (224.97 Euros) to pay fines charged by the German Government as penalty for administrative violations (*Ordnungswidrigkeiten*). This is what happened with the Afghan national, Abdullah Obaid. He was charged 10 Euros a month during several months because he travelled to Germany without any visa or permit. Although he was already offered two job vacancies, he is not allowed to work, because he remains in German territory with a precarious residence permit, which prevents him from leaving the shelter where he lives.[28]

This case is not very different from others. Special reports issued by the German newspaper *Süddeutsche Zeitung* described, in an individualized way and based on interviews and photos, the situation of ten (10) different *Asylbewerber* who presently live in different parts of Germany.

Acknowledging this reality, the *Bundesverfassungsgericht*[29] decided that the value of the benefit paid to this group of people is unconstitutional. For the Court, this amount is evidently insufficient (*evident unzureichend*) and inadequate in light of reality, since it has not been changed since 1993 (*seit 1993 nicht verändert worden ist*)[30] and the cost of living in Germany grew over 30% during this period.[31] It was said that human dignity – in accordance with art. 1, paragraph 1 of the *Grundgesetz* (GG) – combined with the principle of social welfare state (*Sozialstaatsprinzip*) – referred to in art. 20, paragraph 1 GG – safeguards a fundamental right which guarantees a humanly dignified minimum living wage (*Grundrecht auf Gewährleistung eines menschenwürdigen Existenzminimums*).[32] For the Court, it was very clear that the benefit, object of this decision, has the goal of regulating and disciplining, by means of the scope of its application, the security of one's existence (*Das Asylbewerberleistungsgesetz regelt in seinem Anwendungsbereich Leistungen zur Sicherung der Existenz*)[33]. The legislators, however, when establishing the amount of the benefit, did not avail themselves of appropriate, consistent and transparent means.[34]

The idea that such fundamental right covers not only the essential values to a physical and physiological existence, but also the protection and provision of a minimum measure of participation in a political, social and cultural life was thus reinforced. One must ensure the individual's possibility to maintain social and inter-human relationships (*zwischenmenschliche Beziehungen*).

Furthermore, the *BVerfG* reached the conclusion that the fundamental right was to be extended to Germans and foreigners who reside in Germany, on equal value. It was observed that the legislator must consider, when establishing the amount of the benefit, that the minimum living wage configures a human right (*Menschenrecht*). Therefore,

when determining its value, it is not plausible to distinguish foreigners from Germans, based on their residence status in German territory. In other words: the mere fact that the *Asylbewerber* are in precarious conditions in Germany and do not have permission to stay in the country does not mean they have a lower right to human dignity, which is indistinct for everyone.[35]

The Court determined that the only permissible instance of distinction of the value of the benefit lies in the possibility of adapting the amount to the specific needs of a person or family (the number of family members or children of a given family group, e.g.).

In analyzing more thoroughly the benefit paid to the *Asylbewerber*, it was noted that the criteria used were much less detailed than those relating to healthcare law (*Fürsorgerecht*) as a whole. A comparison between the Act whose provisions were declared unconstitutional and the SGB XII[36], the main legal source of German social assistance, demonstrated that the criteria were very different.[37]

The SGB XII takes into account various circumstances of the beneficiaries; children in different age groups, for example, cause changes in the amounts paid. Health conditions of the beneficiaries can also influence the values of the benefit, assuming that the patient needs to acquire drugs and thus requires more money. As a result, a sick person will be supplied with a greater amount than someone who is not in such a situation.

The Federal Government of Germany (*Bundesregierung*) argued, in defense of the contested Act, that the differences were within the scope of the legislator's social-political discretion (*im sozialpolitischen Ermessen des Gesetzgebers*). Under this perspective, it would be allowed to differentiate foreigners with an uncertain residence status (*Ausländer mit ungesichertem Aufenthaltsstatuts*).[38] In a diametrically opposite direction was the opinion of the United Nations High Commissioner for Refugees (UNHCR) about the case, which argued that the German legislature had violated several commandments of international conventions and that the benefit paid was lower than the minimum living wage to be guaranteed based on international law (*eine Unterschreitung des völkerrechtlich zu gewährenden Minimums an Sozialhilfe*).[39] Many entities of all kinds, some German and other international, expressed their thoughts on the case. The contributions of these *amici curiae* are reported in the final decision of the Court.[40]

For the *BVerfG*, everyone is entitled to the minimum living wage, which should be assessed according to the necessity of each individual. It can be concluded that the benefit should have variations, since each individual has specific needs. In Germany, as in Brazil, the benefit that safeguards the minimum living wage is part of social assistance (*Sozialhilfe*) and therefore does not serve, as social insurance, to retribute individuals for previous contributions.[41] In Germany, the benefit is called 'aid to subsistence' (*Hilfe zum Lebensunterhalt*), precisely because any person who fulfills the conditions as described by law is entitled to the benefit.

There are no preconditions (*Vorbedingungen*), in the insurance meaning of that word, to grant the benefit. Therefore, no prior contribution is required. It should also be stressed that the act of concession is legally bound and thus is not subject to the margin of appreciation or convenience of the public administration.

In analyzing the constitutionality of the benefit amount, the *BVerfG* noticed that there were attempts to make the amount paid to *Asylbewerber* more consistent with reality. Therefore, the legislator allowed an adjustment of the figures to be made by regulation or decree (*Verordnung*), so that the benefit could follow the development of living costs. However, in addition to the fact that this project was nothing but an unfulfilled desire,[42] the large increase of prices (*erhebliche Preissteigerungen*) was never used as a parameter to put into effect an increase in the value of the benefit (*Der Gesetzgeber hat bereits in das Asylbewerberleistungsgesetz 1993 eine bis heute geltende Verordnungsermächtigung zur Anpassung der Leistungen an die Entwicklung der tatsächlichen Lebenshaltungskosten aufgenommen, von der jedoch trotz der seither erheblichen Preissteigerungen nie Gebrauch gemacht wurde*).

The *BVerfG* decided that the sub-constitutional or ordinary legislator is obliged to undertake a constant update (*stetige Aktualisierung*), so that the amount of the benefit paid as minimum living wage does not become insufficient to ensure both the physical survival of the individual and a minimum measure of participation in social, political and cultural life (*Mindestmaß an Teilhabe am gesellschaftlichen, kulturellen und politischen Leben*), to which he is entitled, under penalty of violating the fundamental right, which guarantees a humanly dignified minimum living wage (*Grundrecht auf Gewährleistung eines menschenwürdigen Existenzminimums*).[43]

The difference between the benefit paid and the actual cost of living in Germany made the *BVerfG* declare that the situation was clearly beyond the scope of the discretion of the legislator. It was not denied that the discretion of the arrangements (*Gestaltungsspielraum*) regarding the benefit's payments (*Leistungen*) should be mostly left to the legislator.[44] However, the situation examined was beyond the borders of the legislator's legitimate discretion, making it inevitable to declare unconstitutional the provisions of the contested Act, which included, most notably, the amount of the benefit.

Each individual is obligated to provide for himself. However, when he cannot do it, nor has anyone to do it for him, that duty is passed on to the State. The legislator has the responsibility to implement a rule which explains how the State will fulfill this function. And, in this regard, the State has a wide margin of appreciation. Many different possibilities fall within the legislator's zone of proportionality. However, by acting in a deficient and inconsistent manner, the legislator does not act satisfactorily from the constitutional point of view. Thus, he violates the constitutional obligation to determine sufficient parameters to protect the minimum living wage, in which case the sub-constitutional or ordinary law that fails to fulfill his constitutional duty must

be considered unconstitutional (*Wenn der Gesetzgeber seiner verfassungsmäßigen Pflicht zur Bestimmung des Existenzminimums nicht hinreichend nachkommt, ist das einfache Recht im Umfang seiner defizitären Gestaltung verfassungswidrig.*). [45]

One may observe that the benefits paid to *Asylbewerber* are, as a rule, clearly lower than those paid according to Books II and XII of the German Social Security Code (*Die Leistungen nach dem Asylbewerberleistungsgesetz sind – hinsichtlich des dem Regelbedarf vergleichbaren Bedarfs – in der Regel deutlich niedriger als diejenigen nach dem sonstigen Fürsorgerecht des Zweiten und des Zwölften Buches Sozialgesetzbuch*).

A beneficiary of the regular social security system receives, since January 2012, at least € 346.59 for his/hers most basic maintenance.[46] It is noteworthy that this value is intended for a single person, with no children and family, and with no exceptional expenditure under SGB XII. In contrast, one *Asylbewerber*, in the same situation, earns € 224.97. The discrepancy of approximately 35% (thirty five percent) was widely criticized by the *BVerfG*.[47] With regard to the additional amount paid for each child per family, a chart inserted in the decision proves that the discrepancy, depending on the age group, varies between 27% and 54%. Under any circumstances, the additional amount of the *Asylbewerber* Act is always lower than those of the regular social security system.

This implies not only that all German nationals are privileged by the regular social security system and are entitled to better benefits, but also that foreigners with permanent right of residence receive a far better treatment than the *Asylbewerber*. Thus, one may easily perceive the clear discrimination between Germans and foreigners with permanent residence permit, on one side, and those who are in Germany through a precarious and partial authorization, as seen above, particularly the *Asylbewerber*, on the other side. With the advent of the decision, the situation should change.

Facing this question, the Court understood that the German Government cannot lower the benefits' amount for foreigners with a diverse residence status, not even to inhibit or discourage immigration. According to the decision, human dignity, guaranteed in the *Grundgesetz*, should not be relativized because of migration policies (*Die in Art. 1 Abs. 1 GG garantierte Menschenwürde ist migrationspolitisch nicht zu relativieren.*). [48]

Because it is a fundamental human right, which aims at safeguarding the minimum living wage inherent to every person, the Court had to declare that the parameters used by the legislator were incompatible and inconsistent with the Basic Law.

The *BVerfG* declared the respective provisions of the aforesaid benefit unconstitutional. However, noting the impossibility of using the so-called interpretation in conformity with the Constitution (*verfassungskonforme Auslegung*)[49] or a similar method, the Court created a transition rule (*Übergangsregelung*), which is the subject of explanation in the sixth (6th) part of this text.[50]

4. THE RELEVANCE OF THE GERMAN DECISION TO SOME RECENT DECISIONS MADE BY THE BRAZILIAN SUPREME FEDERAL COURT (STF)

Not only the legal arguments invoked by the German Court are important, but also the possibility of, once accepting the plausibility of such arguments, using them in Brazil. In this perspective, the German decision is even more important when one recalls that the Brazilian Supreme Federal Court (STF), in a decision issued on June 4th 2009, recognized the general repercussion[51] of the extraordinary appeal number 587970, whose origin is São Paulo.[52] The appeal was brought by the National Institute of Social Security (INSS) against the judgment issued by the First Chamber of the Special Federal Courts of Appeals of the Circuit of the State of São Paulo, Brazil (*1ª Turma Recursal dos Juizados Especiais Federais do Estado de São Paulo*).

The judgment under appeal, on the merits, upheld the conviction of the National Institute of Social Security (INSS), in order to grant the plaintiff, a foreign resident in Brazil, the *Benefício de Prestação Continuada* (BPC), a social assistance benefit for poor people, referred to in art. 20 of the Organic Law of Social Welfare (LOAS – Federal Act No. 8.742/93).

One of the arguments raised in the First Chamber's decision was, specifically, that the welfare benefit, whose fundamental basis lies in the Brazilian Federal Constitution (art. 203, item V), consists in '(...) a guarantee of minimum wage benefits paid monthly to disabled and elderly people who prove to not have the means to provide for their own maintenance or have it provided by their family, according to the law.'

The provision refers to people as a whole, not only Brazilians. The aspect of nationality is completely dispensable, if one accepts that the provisions stated in the Constitution safeguard the goal of minimum living wage.[53]

Hence, it is stated that the fundamental right is extendable to all. In Germany, a concise term that epitomized this idea was created: *Jedermannsrecht*. Within this context, there are the fundamental rights of anyone or a right of any person (*Jedermannsrecht*), that is, of every human being. Unlike most political rights, which, as a rule, are typical of citizens of a given country, *Jedermannsrechte* are fundamental rights which include, without distinction, all human beings, citizens or not.

In Brazil, it is true that the Constitution stipulates certain objective requirements, such as advanced age or disability, as well as the condition of misery (currently, a family income per capita equivalent to or less than one fourth of the current labor's minimum wage, that is, the lowest possible income a worker can earn monthly in Brazil), which affects the concession of the *Benefício de Prestação Continuada* (BPC). But it must be noted that, once these requirements, which are explicitly provided by the Constitution, are fulfilled, any further distinction is capricious and arbitrary, especially if it creates a distinction based on nationality.

The thesis that there are fundamental rights placed in other parts of the Brazilian Constitution, further than those enrolled in its art. 5, has been recognized for a very long time. If this is true, it seems that the

legal provision contained in the art. 203, item V, which establishes the BPC, is one of these rights. In particular, because it establishes a justiciable public right, implementing principles of the Constitution, such as human dignity and protection of life, liberty and equality.

The German decision is also relevant, if one recalls that the Brazilian Supreme Federal Court concluded the jointly trial of the extraordinary appeals No. 567985 and 580963. The case had been suspended by request of Justice Luiz Fux on June 6th 2012. At the end, the Brazilian Court declared the unconstitutionality of art. 20, paragraph 3, of the Organic Law of Social Welfare (LOAS – Federal Act No. 8.742/93), which required disabled and elderly people to prove that their familiar income was equivalent to or less than one fourth of the current labor's minimum wage, that is, the lowest possible income a worker can earn monthly in Brazil, before they could receive Government assistance and benefits.

The Brazilian Supreme Court said that this amount, used to assess one's necessity, was completely outdated in light of the relevant constitutional provisions, especially art. 203, item V, of the Brazilian Federal Constitution. The first paragraph of article 34 of the Federal Act No. 10.471/2003 (Act for the Protection of the Elderly Person) was also declared unconstitutional.

During the judgment, Justice Gilmar Ferreira Mendes, *rapporteur* of one of the extraordinary appeals, suggested that the unconstitutional provisions remain valid until December 31st 2015, in order that the Brazilian Parliament created new rules. Five Justices, out of eleven, accepted his proposal, but, according to Brazilian law, prospective overruling is only admissible if eight judges agree upon it. Thus, the contested provisions were all declared unconstitutional and void.

5. HUMAN DIGNITY: OTHER DECISIONS MADE BY THE *BUNDESVERFASSUNGSGERICHT*

The decision issued on July 18th 2012 was one of many handed down by the *BVerfG*, which gave consistency and effectiveness to the concept of human dignity.

On February 9th 2010, for example, the *BVerfG* ruled unconstitutional the law that created the program of social security reform, called 'Hartz IV', which altered the rules of the 'unemployment assistance II' (*Arbeitslosenhilfe II*). On this occasion, the Court again manifested itself on the concept of minimum living wage, and prospectively declared some sub-constitutional or ordinary provisions unconstitutional, setting the effects of the decision into the future.[54] It was determined that, among others, the Basic Law compels the State to guarantee, for everyone, the material requirements of a dignified physical existence and a minimum participation in social, cultural and political community.[55] This means not only that the State should refrain from taxing the goods of those who have only the minimum living wage, but also that it is obliged to give conditions, considered minimal, for the free development of the personality among those who lack them.[56] [57] [58]

The decision of 2010, on the Hartz IV, was specifically mentioned by the Court in its ruling on the asylum seekers. It was also invoked, in the lower courts, by litigants whose demands originated the asylum seekers decision.[59]

Since 1951, the *BVerfG* understands that there is, 'evidently', a close link between the minimum living wage and human dignity.[60] In his famous article on human dignity, published in 1956, which represented a landmark in the study of the subject in Germany, Günter Dürig mentioned the protective order against an attachment or seizure of property (*Pfändungsschutz*), which allows a debtor to keep those items that are necessary for his life (*lebensnotwendige Sachen*) and his labor wages (*Arbeitseinkommen*), provided, respectively, in §§ 811 and 850 of the German code of civil procedure (ZPO), as sub-constitutional standards of fulfillment of the constitutional right to human dignity.[61] [62] [63]

As Volker Neumann explains, the minimum living wage covers both the physical existence of the human being (food, clothing, household utensils, housing, heating, hygiene and health), as well as the maintenance of relations between people (*zwischenmenschliche Beziehungen*) and a minimum participation in social, cultural and political life (*Das Existenzminimum umfasst sowohl die physische Existenz des Menschen (Nahrung, Kleidung, Hausrat, Unterkunft, Heizung, Hygiene und Gesundheit) als auch die Pflege zwischenmenschlicher Beziehungen und ein Mindestmaß an Teilhabe am gesellschaftlichen, kulturellen und politischen Leben*). [64]

This minimum participation is not measured *sub specie aeternitatis*; in fact, it varies according to the living costs in a given society and the specific needs of one or more individuals. [65]

The costs which are considered essential are, first, the expenses that affect survival itself. Thus, the value of the minimum living wage will depend on the costs of food, housing, clothing and others, all at a level that ensures the physical subsistence of the individual. It is also essential that the costs of a small participation, though not overly incipient, in political, social and cultural life be taken into account. Otherwise, the guarantee of the material requirements of a dignified human existence would be ignored (*Pflicht zur Sicherung der Mindestvoraussetzungen für ein menschenwürdiges Dasein*).

In the *BVerfG* decision on Hartz IV[66], according to the remarks made by Volker Neumann, protection was granted to, on one side, the physical or physiological minimum living wage, and, on the other, to the sociocultural minimum living wage (*Gewährleistet ist einerseits das physische oder physiologische Existenzminimum, andererseits das soziokulturelle Existenzminimum*).[67]

While a value that corresponds to the concrete minimum living wage has not been established, which led some to criticize the decision[68], one notices that the criteria that should be used by the legislator when setting a specific value were clearly outlined. Moreover, the possibility of a constitutional court to declare unconstitutional the rule which stipulates the minimum living wage in a non-transparent (*nicht offenkundig*) manner was explicitly recognized. In other words, when

legal prescriptions concerning the minimum living wage lack the consistency (*Folgerichtigkeit*) required by the constitutional requirement of equality, then they are unconstitutional.

This is particularly important if one takes into account that, in Germany, it is common to say that the social network (*soziales Netz*) takes care of everyone, literally, from the cradle to the coffin (*von der Wiege bis zur Bahre*), that is, from birth to funeral expenses, if necessary.

The German legal literature defends the so-called principle of individuation (*Grundsatz der Individualisierung*), which consists in harmonizing the needs of the person or family benefited and the value of the corresponding benefit.[69]

One cannot grant material support to those who are eligible to work and are able to earn their own income by labor force. Raimund Waltermann explains that the 'aid to subsistence' benefit (*Hilfe zum Lebensunterhalt*) should also not be given to those who, although not being able to work, have the means to provide for their needs; who, therefore, should not be considered to be, according to legal parameters, in a condition of immediate need (*Bedürftigkeit*), at the risk of breaching the subsidiarity precept (*Grundsatz der Subsidiariät*).[70] After all, the individuals have, in principle, self-responsibility (*Eigenverantwortung*) for their subsistence, and it is the State's responsibility to provide it only in situations of actual indispensability.[71]

The benefit, which aims at ensuring the minimum living wage, must always entail a value which is considerably lower than the monetary importance that the beneficiaries could earn in the labor market, if they were able to work.

In short, this means that the value of the benefit must not be so high that it encourages full idleness or discourages a possible resumption of work activities. It aims at keeping alive the possibility of the beneficiary to return to work. In order for this to happen, Peters affirms that the amount paid must maintain this possibility attractive, which implies preserving a distance or gap between what is paid and what that person would win if he/her were economically active, receiving labor income (*Einkommen*).[72]

Ri'in Karen Peters says that, in practical terms, this means the following: if a given couple with three children receives the 'aid to subsistence' benefit, it should not pay more than the income earned by an analogous family (*vergleichbare Familie*), whose economically active members work normally. This difference should be enough to function as an incentive to work.[73]

It is important to point out that, until December 31st 2010, there was a legal prescription[74] which expressly envisaged the precept of the distance or gap between the value of the benefit and what the beneficiary would receive in the labor market. The repeal of the prescription, effective since January 1st 2011, does not change the need to observe this distance or gap.

Furthermore, for the *BVerfG*, the minimum living wage guarantee also implies in a ecological minimum to live (*ökologisches Existenzminimum*), to be precise, the minimum ecological requirements for survival on Earth.[75] [76]

It is possible to conclude, all things considered, that the minimum living wage originates from a protection of individual freedom. The social dimension of the State is, at heart, liberal, but not in the commonly used sense of the term, but rather in the sense of factual autonomy.

In this perspective, it seems that Hans-Jürgen Papier, former President of the *BVerfG*, was right when he declared, in the *Karlsruher Verfassungsdialog*, that the ultimate evaluation of democracy is freedom. In this sense, equality serves to safeguard that such freedom is exercised in equal measure and thus the welfare state, rather than oppose liberalism, embodies it. There is a shift from a defective liberalism, founded on a formal concept of freedom, to one based on a factual-material-effective concept of freedom.[77]

In Germany, for example, the 'unemployment benefit' is due while the insured is unemployed. With the new reforms implemented by the Hartz-IV program, one can receive the 'unemployment benefit I' during a period of time and subsequently, if the individual remains unemployed, he/her can receive the 'unemployment benefit II', which involves the payment of a lower amount of money. To a certain extent, the idea is to encourage the individual to seek work and facilitate the funding system. In any case, while continuing involuntarily unemployed, the individual is entitled to an unemployment benefit.[78]

It is acknowledged, therefore, that certain material conditions are essential to every human being, in order to maintain a minimally decent life.[79] This is one of the main conclusions that one can extract from the German social security system. On the other hand, it should be noted, also, that the *BVerfG* has delivered important decisions on that matter, which often gave new dimensions to the subject and to the effectiveness of the human dignity concept.

The decision of July 18th 2012 was no different. By stating that foreigners are also entitled to a benefit of greater value than the one that was in force and that distinctions between foreigners and Germans, in particular, are unjustified, because it is a fundamental human right, the German court, once again, changed the scenario prevailing until then.

6. THE PROSPECTIVE OVERRULING REGARDING THE DECLARATION OF UNCONSTITUTIONALITY

The effects of the decision rendered on July 18th 2012 are also noteworthy. Instead of using one of the traditional versions of prospective overruling, the *BVerfG* created a specific and appropriate transition rule for the case.[80]

In Germany, as in Brazil, an Act or statute that is unconstitutional is, as a rule, null and void. Therefore, its effects are also null and void. This means that the actions performed based on the unconstitutional law should all be undone, as if the law had never existed. After all, unconstitutional law is no law at all.

However, for a long time, the mitigation or modulation of the nullity or voidness has been admitted. In some cases, nullity has even been totally excluded, so that, in name of the rule of law, predictability and legal certainty, acts performed on the basis of an Act regarded as unconstitutional are entirely preserved as valid. Substantial arguments are used to defend this possibility, since the mere declaration of nullity or voidness, if carried out indiscriminately and thoughtlessly, can cause severe negative impact on the political, economic, legal, social or cultural *status quo*.

However, the decision which is now analyzed, went beyond what normally occurs in prospective overruling regarding the declaration of unconstitutionality of a given Act, because it not only procrastinated the effects of the declaration of unconstitutionality, but truly modulated or manipulated them, setting different rules according to the circumstances identified by the Court in the concrete case.

The *BVerfG* recognized, as already stated, that the legislator was obliged to issue new Acts in order to adequate the value of the benefit paid to the asylum seekers to the demands of the *Grundgesetz*. On the other hand, for many years the benefit had been paid according to unconstitutional standards. This would, eventually, imply the payment of all monetary differences of what was paid and what should have been paid. For a long time, the benefit had been paid in violation of what the *BVerfG* had just decided. In some cases, the Constitution was not complied with or was insufficiently complied with. Hence, all that had been paid since the time the Act first came into effect, or at least since mid-2000, would have to be recalculated. This would be the obvious conclusion of the Court's finding, that € 224.97 Euros are not (and were not since a long time) enough to ensure the minimum living wage for an individual guaranteed by the German Basic Law.

Notwithstanding, the *BVerfG* also asserted that, although it was possible to notice that the Act was clearly unconstitutional, the Court was not responsible for correcting the amount of the benefit. This is, constitutionally, an obligation of the legislator, who, in possession of the technical minutiae and of the social and economic circumstances, is able to find and fix a value that corresponds to an adequate minimum living wage.[81]

There is, in this standard, several contingencies and technical data that must be analyzed within the Parliament discretion, under the scrutiny of the democratic debate.

Although several possibilities exist, it is certain that any choices made by the legislator must be compatible with what was established by the Court, with arguments and criteria defined by it. The benefits will diverge according to the specific and factual-empirical needs of each individual, transparently regulated by law[82], as well as being sufficient to meet the expenses provided by the *BVerfG* as essential to a decent life.[83] International conventions signed by the Federal Republic of Germany and mentioned by the Court in its decision should also be taken into consideration when fixing the *quantum* of the benefits, especially when referring to children.[84]

Within this scenario, there is no doubt that the mere statement of the Act as null and void would create a serious problem, because it would leave a legal vacuum. Nevertheless, if one recognizes a greater scope of legislative discretion within cases involving the fixation of benefits' amounts, one should also conclude that it is not the Court's responsibility to fill this vacuum. The greater the legislator's margin of appreciation, the more self-restrained should the *BVerfG*'s control be.

In order to continue within this self-restrained control (*zurückhaltende Kontrolle*), the Court stipulated a transition rule (*Übergangsregelung*), which implies the attribution of both prospective and retroactive effects to the decision.[85]

Firstly, the *BVerfG* refrained from declaring the nullity of the Act, although it acknowledged that this would have been the natural and logical effect of the declaration of unconstitutionality. As a result, an appeal or request was made to the legislator to properly adjust and replace the unconstitutional Act.[86] In this regard, the ruling has prospective effect.

However, if it had done only that, all those who claimed in the lower courts, that the benefit amount was negligible and, therefore, unconstitutional, would only receive fairer amounts after the enaction of the new Act, even if they had filed law suits before that. Moreover, it would take time to approve and enact the Act, meaning that, for some indefinite and unpredictable period of time (*nicht absehbar*), the *Asylbewerber* would continue to receive the same amount of benefit.[87]

In regard of the nurturing issue, which concerns the survival of the individual and the protection of his existence, the *BVerfG* considered that it should adopt a more suitable solution; especially because the amount that was being paid no longer seemed acceptable.

The *BVerfG* decided to implement the dispositions of the regular social security system, by analogy, arguing that, otherwise, what was constitutionally guaranteed – that is to say, the minimum living wage – would continue without guarantee (*da das grundrechtlich garantierte Existenzminimum sonst nicht gesichert ist*).[88] The SGB XII provides in section 28, that a federal statute stipulates, in a detailed and specific way, the amount of benefits as well as their criteria and variations. This statute is called the 'Statute for verification of the parameters of need according to paragraph 28 of the SGB XII' (*Gesetz zur Ermittlung der Regelbedarfe nach § 28 des Zwölften Buches Sozialgesetzbuch* – RBEG).

While the new Act, which will fix what was considered unconstitutional, is not enacted, the RBEG rules should be applied to the *Asylbewerber*. That decision only creates a transition rule, without replacing the legislator's decision.[89] In the transition period, some parts of the Act will remain in force. However, most parts of it – regarding the cost of clothes, food, etc. – will no longer be applied, in order to apply, by analogy, the RBEG rules.[90]

The transition rule virtually excludes the possibility of unequal treatment between Germans or foreigners who have residence permit and *Asylbewerber*.[91] The transition rule shall remain in force until a new rule is established by the legislator.[92] In the case of those who claimed in

court, if their decisions have not been judged as final, the transition rule will be applied in their cases retroactively, up until January 1st 2011.[93] The Act which will be enacted will only be effective in the future. [94]

No period prior to 2011 will be affected by the decision and unpaid installments before that year cannot be claimed based on the *BVerfG*'s decision. When it comes to a decision whose effects are delayed in time (*Dauerwirkung*), the Administration must undo all that was done on the basis of unconstitutional acts. Therefore, it would be obliged to reimburse the *Asylbewerber* for almost everything that was ever insufficiently paid, since the administrative acts that denied a greater payment are contrary to law (*rechtswidrige Verwaltungsakte*), because they are unconstitutional.[95]

However, in order to secure legal certainty, what has already been paid before 2011 will be maintained. Henceforth, the transition rule will be applied. Those, whose demands have not yet reached a final decision, may have the transition rule applied retroactively to January 2011 in order to receive the financial differences relating solely to this period. In the case of the mother who claimed in favor of her daughter, questioning amounts paid between January and November of 2007, it may be concluded that no differences are due to be paid, since the contested period is located before 2011. One should also indicate that, since 2010, the child in question is a German citizen and has not received the benefit paid to the *Asylbewerber* for a while. Nevertheless, for thousands of others, the decision not only will have a significant effect, as will change their lives substantially.

As described, the prospective overruling of the declaration of unconstitutionality undertaken in this case is hybrid. On the one hand, the decision is prospective, as it leaves with the legislator the task of editing laws in order to repair unconstitutional defects presented by the Court. But, while this assignment is not accomplished, the transition rule adopted by the *BVerfG* will persist. The regular social security rules will, therefore, be applied, by analogy, so that German citizens, foreigners with residence permit and *Asylbewerber* are all treated fairly. This transition rule will have retroactive effects for those who are still litigating in lower courts, up until January 2011. For anyone else, between now and the time the new Act is enacted by the legislator, the transition rule will be valid and will be used to solve the cases and controversies that arise.

7. FINAL COMMENTS

Given what has been described, especially in the third (3rd) part of this text, about the relevant points of the decision and the legal arguments underlying it, one may conclude that the unconstitutionality of the Act which establishes the benefit amount paid to foreigners seeking asylum, i.e. with no residence permit and who cannot be deported from Germany, is a consequence of the protection of human dignity, which entails the guarantee of a corresponding financial or monetary amount, capable of ensuring, effectively, the minimum living wage.

This is what ensures the effective legal and practical compliance with human dignity, in its factual and empirical dimension. On the other hand, considering what was described in the sixth (6th) part of this study, one observes that, in the decision analyzed, the prospective overruling regarding the declaration of unconstitutionality of the mentioned Act was truly and meticulously modulated or manipulated. After all, the German Court found a special and particular solution to solve the singular problems arising from this complex case. This involved the assignment of both prospective and retroactive effects to the decision.

>> ENDNOTES

[1] In Germany, there are several special courts, such as the Labour, Electoral and Military Jurisdiction in Brazil. The German legal system includes an Administrative Jurisdiction, a Social Security Jurisdiction, a Financial Jurisdiction and a Labour Jurisdiction. The Administrative Jurisdiction (*Verwaltungsgerichtsbarkeit*) decides, mainly, on matters that comprise judicial control of administrative acts – the French Administrative Jurisdiction, for instance, also includes, unlike the German legal system, the tort's liability of the State (Rosenberg/Schwab/Gottwald, 1991: 8). The Social Security Jurisdiction (*Sozialgerichtsbarkeit*) is responsible for the legal control of agencies responsible for social security in Germany. The German legal system also includes the Financial Jurisdiction (*Finanzgerichtsbarkeit*), for the control of acts of officials linked to taxation, and the Labour Jurisdiction (*Arbeitsgerichtsbarkeit*), for collective and individual conflicts between employees and employers.

[2] *BVerfG*, 1 BvL 10/10.

[3] *BVerfG*, 1 BvL 10/10 (60).

[4] *BVerfG*, 1 BvL 10/10 (66).

[5] Michael/Morlok, 2012: 255.

[6] Bumke/Voßkuhle, 2008: 56 f.

[7] BVerfGE 45, 187.

[8] BVerfGE 45, 187.

[9] See the *Tusculanae Disputationes* (Book V, 62), from Cicero: "*Satisne videtur declarasse Dionysius nihil esse ei beatum, cui semper aliqui terror impendeat?*" Unofficial translation by the author of this text: "Does not Dionysius seem to have made it sufficiently clear that there can be nothing happy for the person over whom some fear always looms?"

[10] Michael/Morlok, 2012: 103.

[11] The binding force of the Treaty of Lisbon regarding the Charter of Fundamental Rights of the European Union does not encompass the United Kingdom and Poland (Machado, 2010: 30).

[12] Robert/Duffar, 2009: 58, 258.

[13] Robert/Duffar, 2009: 388, 787.

[14] Israel, 1998: 338.

[15] Rousseau, 2010: 247.

[16] Euripedes, 1994.

[17] *BVerfG*, 1 BvL 10/10 (5-6).

[18] *BVerfG*, 1 BvL 10/10 (7).

[19] Crawford, 2012: 406,501.

[20] Crawford, 2012: 418.

[21] *BVerfG*, 1 BvL 10/10 (15).

[22] Wagner, 2012.

[23] Wagner, 2012.

[24] *BVerfG*, 1 BvL 10/10 (15).

[25] PREUß, 2012.

[26] The original provision included amounts in German Marks, which were converted, in this text and in the decision of the Federal Constitutional Court, into Euros. Note that inflation and the increase of living costs have made the values completely insufficient.

[27] *BVerfG*, 1 BvL 10/10 (45).

[28] PREUß, 2012.

[29] Hereinafter, *BVerfG*.

[30] *BVerfG*, 1 BvL 10/10 (106).

[31] *BVerfG*, 1 BvL 10/10 (109).
[32] *BVerfG*, 1 BvL 10/10 (107).
[33] *BVerfG*, 1 BvL 10/10 (17).
[34] *BVerfG*, 1 BvL 10/10 (116).
[35] *BVerfG*, 1 BvL 10/10 (99).
[36] Book XII of the German Social Security Code, the *Sozialgesetzbuch* (SGB).
[37] *BVerfG*, 1 BvL 10/10 (46-48).
[38] *BVerfG*, 1 BvL 10/10 (73).
[39] *BVerfG*, 1 BvL 10/10 (74).
[40] *BVerfG*, 1 BvL 10/10 (74-82).
[41] Waltermann, 2011: 231.
[42] *BVerfG*, 1 BvL 10/10 (111).
[43] *BVerfG*, 1 BvL 10/10 (88, 90).
[44] *BVerfG*, 1 BvL 10/10 (88-89).
[45] *BVerfG*, 1 BvL 10/10 (91).
[46] *BVerfG*, 1 BvL 10/10 (113).
[47] *BVerfG*, 1 BvL 10/10 (56).
[48] *BVerfG*, 1 BvL 10/10 (121).
[49] Through this method, the German Court can declare notional unconstitutionality, that is, that the statute is unconstitutional to the extent that it purports to do X, Y, and Z. In other words, the Act remains valid, but some interpretations of it are discarded as unconstitutional.
[50] *BVerfG*, 1 BvL 10/10 (65, 70).
[51] Acknowledging the general repercussion of a case or controversy is similar to granting the *writ of certiorari*. It involves a decision issued by the Brazilian Supreme Federal Court (STF), allowing an extraordinary appeal to be submitted to the Court. On the merits of extraordinary appeal No. 587970, STF has not reached a decision yet.
[52] STF, Full-bench decision, RE 587970/SP, *Rapporteur* Justice Marco Aurélio, judged on 25.VI.09, published in DJe on 2.X.09.
[53] Regarding the link between the minimum living wage and human dignity in Brazilian legal literature, see, among many others, Bitencourt Neto, 2010; Sarlet, 2011; Barcellos, 2008; Tavares, 2003.
[54] Bastide, 2010/2011.
[55] *BVerfG*, 1 BvL 1/09.
[56] In Brazil, such preconditions are tied to the so-called *Benefício de Prestação Continuada* (BPC), established by art. 203, item V, of the Brazilian Federal Constitution and by the Organic Law of Social Welfare (LOAS).
[57] Borges Silva, 2011/2012.
[58] See, as well, Worms, 2012.
[59] *BVerfG*, 1 BvL 10/10 (64).
[60] BVerfGE 1, 97.
[61] Dürig, 1984: 142.
[62] In this direction, see Badura, 2012: 136,353.
[63] On the obligation of the legislator not to tax wages that do not exceed the minimum living wage, see BVerfGE 82, 60/85.
[64] Neumann, 2010: 2.
[65] Neumann, 1995: 10.
[66] *BVerfG*, 1 BvL 1/09.
[67] Neumann, 2010: 2.

[68] Könemann, 2005: 116.
[69] Waltermann, 2011: 233.
[70] Waltermann, 2011: 236.
[71] Pattar, 2012: 144 f.
[72] Peters, 2012: 296.
[73] Peters, 2012: 296.
[74] § 28, (4), SGB XII, currently repealed.
[75] BVerfGE 39, 1.
[76] Stern, 2006: 53.
[77] The videos of the speech, in its entirety, are available in the following webpage: <http://www.youtube.com/watch?v=aM1oigyi6tE> Last visited on August 15th, 2012.
[78] Waltermann, 2011: 231.
[79] See, in this context, the already mentioned decision of the Federal Constitutional Court on the Hartz IV program: *BVerfG*, 1 BvL 1/09. The main statements of the ruling were epitomized, in English, in a report of the German Court, available at: <http://www.bundesverfassungsgericht.de/en/press/bvg10-005.html> Last visited on August 15th, 2012.
[80] On the various possibilities of prospective overruling while declaring the unconstitutionality of an Act or statute, see, among others, Blanco de Morais, 2011: 259 f.; Marinoni, 2012: 1045 f.; Mendes, 2010: 357 f.; Mendes, 2012: 510 f.
[81] *BVerfG*, 1 BvL 10/10 (92, 93).
[82] *BVerfG*, 1 BvL 10/10 (95).
[83] *BVerfG*, 1 BvL 10/10 (93).
[84] *BVerfG*, 1 BvL 10/10 (94).
[85] *BVerfG*, 1 BvL 10/10 (124).
[86] This type of exhortation to the legislator consists in an *Appellentscheidung*. Regarding this subject, see Yang, 2003; Urbano, 2012: 80 f.
[87] *BVerfG*, 1 BvL 10/10 (125).
[88] *BVerfG*, 1 BvL 10/10 (125).
[89] *BVerfG*, 1 BvL 10/10 (127).
[90] *BVerfG*, 1 BvL 10/10 (130).
[91] *BVerfG*, 1 BvL 10/10 (132).
[92] *BVerfG*, 1 BvL 10/10 (136).
[93] *BVerfG*, 1 BvL 10/10 (139).
[94] *BVerfG*, 1 BvL 10/10 (137).
[95] *BVerfG*, 1 BvL 10/10 (139).

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REVIEW ESSAYS
// ARTIGOS-RESENHA

MORAL THEOLOGY FOR HEDGEHOGS: RONALD DWORKIN'S THEORY OF JUSTICE

// TEOLOGIA MORAL PARA OURIÇOS: A TEORIA DA JUSTIÇA DE RONALD DWORKIN

Alexandre Araújo Costa

>> ABSTRACT // RESUMO

After decades of studies that emphasized the necessity of a moral reading of the law, the American philosopher Ronald Dworkin published in 2011 the book Justice for Hedgehogs in which he explicitly presents his theory of justice. This paper analyzes the theory exposed, showing the structure of Dworkin's arguments, showing how he adopts an Aristotelian methodology (which elaborates interpretations able to attribute meaning to effective social practices) that leads to the Platonic conclusion that affirms a fundamental unit of values. It is held at the end of this ethical project is not consistent because the analysis of effective practices do not to lead to the recognition of the unity of the Good, but only to the recognition that the liberal tradition adopted by Dworkin has a universalist discourse based on the existence of a unitary concept of Good. Thus, the moral understanding of the morality proposed by Dworkin generates a discourse that is more theological than philosophical, because it maintains its validity in denying the possibility of a philosophical critique that questions the moral assumptions of the author. // Após décadas de estudos que enfatizaram a necessidade de uma leitura moral do direito, o filósofo americano Ronald Dworkin publicou, em 2011, o livro *Justice for Hedgehogs*, em que ele apresenta explicitamente sua teoria da justiça. O presente artigo analisa a teoria exposta, evidenciando a estrutura dos seus argumentos, mostrando como Dworkin adota uma metodologia aristotélica (ao elaborar interpretações capazes de dar sentido às práticas sociais efetivas) que o conduz a uma conclusão platônica (ao afirmar a unidade fundamental dos valores). Sustenta-se, ao final, que esse projeto ético não é consistente, eis que a análise das práticas efetivas não conduz ao reconhecimento da unidade do bem, mas apenas ao reconhecimento de que a tradição liberal em que Dworkin se insere tem um discurso universalista que se baseia na existência de uma noção unitária do bem. Assim, a autocompreensão moral da moralidade proposta por Dworkin gera um discurso de matriz mais teológica que filosófica, pois baseia sua validade na negação da possibilidade de uma crítica filosófica que coloque em questão os pressupostos morais assumidos pelo autor.

>> KEYWORDS // PALAVRAS-CHAVE

Ethics; Ronald Dworkin; Platonism; Aristotelianism; Skepticism. // Ética; Ronald Dworkin; Platonismo; Aristotelismo; Ceticismo.

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I. THE UNITY OF VALUES

In 2011, after decades of studies that emphasized the necessity of a moral reading of the law[1], the American philosopher Ronald Dworkin published a book entitled "Justice for Hedgehogs", in which he presents his ethical theory with an ambitious and honest approach. It is ambitious because its main objectives contradict a great deal of the theoretical production of the last century, advocating the existence of value judgments that are objectively correct and sustaining the unity between ethical, moral and political values. It is honest because such objectives are clearly defined in the initial paragraphs and are pursued throughout almost 500 pages of a transparent argumentation in relation to its assumptions and consequences. Albeit I disagree with almost all of Dworkin's assumptions, which also leads me to disagree with the conclusions of his work, I have great admiration for the transparency with which he sought to highlight his assumptions and uphold his positions.

His starting point is simple and well-articulated with the empiricism that marks the British approach to moral philosophy since the beginning of modern times: *there are social value practices which need to be interpreted*. Away from the rationalist influences of Kantianism, which sought to define inalterable and transcendental criteria of morality, Dworkin endeavored to offer to his contemporaries a theory that would give a suitable explanation to the actual lives of the people who make moral judgments on a range of different situations and consider these analyses to be true since they are based on justice parameters that are objectively valid. According to the American author, this is the *ordinary view* that most of us support more or less unreflectively[2].

Dworkin adopts this ordinary view and seeks to uphold it against two groups of thinkers that criticize it. The first encompasses those who accuse it of being imprecise, since people tend to overly trust their moral intuitions, and highlight that the absence of a critical perspective leads to the reproduction of prejudices. These are the thinkers from a Socratic background, who consider common sense to represent the shadows in the wall of a cave, and support the necessity of seeking true illumination through rational procedures. Dworkin calls them internal skeptics as they believe in the existence of an objective morality (thus having an internal approach to morality), but doubt that common sense can be able to elucidate it.

Dworkin's theory opposes this rationalism through a reaffirmation of the human principle that there is an insuperable void between deontic judgments and actual judgments, making impossible a factual demonstration of the deontic validity of any statement. He recognizes that it is not possible to rationally demonstrate that certain moral opinions are true or false, which brings his conception dangerously close to the perspective supported by the other group of critiques of the ordinary view: the external skeptics, who believe it is impossible to judge values from objective truth criteria. Dworkin expressly rejects this external skepticism for considering it incompatible with effective moral

practices, given that even the most skeptical of philosophers is oriented according to "some limited integrated set of opinions that carries visceral authenticity"[3].

He then asks to the skeptics: if you consider the beliefs that you live by as authentic beliefs, "what kind of hesitation and doubt would then make sense? Why shouldn't you simply believe what you then believe? Really *believe* it?"[4]. This fragment of the epilogue reveals the basic premise of the Dworkinian argumentation: *we should believe in our beliefs*. This assumption is the opposite of the Socratic position that constitutes the distinctive mark of occidental philosophy: *question your beliefs and trust your reason*. This position was explicitly reaffirmed by René Descartes, who inaugurated the philosophical approach of modernity, stating that only a hyperbolic doubt could lead us to the truth, as humans take as the truth all that they have learnt by custom and by example[5] and, thus, they can believe with equal intensity in correct affirmations and well-grounded prejudices.

While philosophers have spent two and a half millennia seeking to understand what reason can tell us about moral values, Dworkin twists this question and asks what our moral values require from our reason. His answer is that morality demands us to believe in the truth of our moral convictions and that we shall act according to our most viscerally authentic beliefs. Even if we know that our moral values derive from the interaction between our genetic tendencies, our culture and our personal history, the morality in which we are immersed demands us to treat moral values as objectively valid[6]. The *authentic conviction* about *objective values* that *must be observed* forms the basis of the moral virtue that Dworkin calls *responsibility*[7],which is in the core of his theory of justice as it is based on this criterion that he refutes the skeptics. To Dworkin, questioning the existence of objective moral criteria is a sign of *irresponsibility* as skepticism distances us from the behavior that ordinary view considers morally required.

This line of argumentation leads Dworkin to circularity, as he seeks to ground morality in morality itself through the affirmation that we have the *moral duty* to believe in our *moral convictions*. It is necessary to recognize that one of the great achievements of *Justice for Hedgehogs* is in the fact that Dworkin highlights this circularity, clearly sustaining that his moral categories "are drawn from within morality – they are themselves moral judgments"[8] and countering the modern thesis that "something other than value must underwrite value if we are to take values seriously"[9].

Despite this transparency being admirable, it is important to note that it ends up promoting a peculiar overvaluation of faith, as Dworkin attributes a positive moral value to the capacity that people have of considering that their beliefs are objectively true. In fact, he does not use the word *faith*, but affirms the necessity of taking our convictions seriously, given that "we can seek through about morality only by pursuing coherence endorsed by conviction"[10]. This does not mean an immediate canonization of intuitive assurances, given that he recognizes that

"our convictions are initially unformed, compartmentalized, abstract and therefore porous"[11], and that is why he advocates that it is necessary to create a critical interpretation that promotes "a thorough coherence of value among our convictions"[12]. This systematization strategy is not a coincidence; it is fully compatible with the criteria of *integrity* that composes the legal hermeneutics supported by the author[13].

This ideal of coherence cannot be reduced to the formalist systematics that inspired the modern attempts to anchor moral values solely on rationality. To Dworkin, the virtue of responsibility does not only demand the moral convictions system to be coherent, but it also demands it to be viscerally authentic, as morality needs to be compatible with "what feels natural to us as a suitable way to live our lives"[14]. This is where Dworkin more directly opposes the philosophical tradition that uses the category of *reason* as the theoretical instrument capable of questioning our most visceral beliefs. Instead of creating concepts aimed at identifying and correcting the distortions and prejudices that are present in common moral concepts, he seeks to establish a coherent system *from* the disarticulated and uncritical set of moral conceptions that are present in common sense. Instead of highlighting the philosophical virtue of doubt and encouraging a critical analysis of our authentic visceral values, he proposes that we anchor ourselves to our authentic values and concludes by saying that all thinkers that promote a systematic questioning of the *ordinary view* are *skeptical*. For this reason, in the book *Justice for Hedgehogs*, Ronald Dworkin does not seem to present a proper *moral philosophy*, but a *moral theology*, i.e. a dogmatism that explains the demands imposed by the moral virtue assumed by the author.

In this theology, the fundamental virtue is *responsibility*, which demands from us a dogmatic belief in the obligations that move our lives more viscerally. This construction allows to elegantly settle the philosophical difficulty consistent in justifying the reason why people have the obligation to act according to the imperatives of the good. This difficult question was approached by Plato through the establishment of the necessary links between duty and desire: he argued that we desire the happiness of our immortal soul, which will be awarded or suffer punishment according to the morality of our actions, and therefore we should seek to behave with fairness.[15] A modern reading of this argument is present in Kant, who replaced the desire in the Platonic equation for rationality: mankind belongs both to the sensitive and the intelligible world, what makes it mandatory for us to follow the moral rules dictated by reason[16]. This thesis, based on the existence of a rational soul, seem little attractive to the contemporary laic sensibilities, which tend to admit Hume's diagnosis in the sense that there is no such thing as an objective obligation, given that "the sense of justice and injustice do not derive from nature, but has an artificial - although necessary - origin from education and human conventions"[17].

Dworkin clearly notices the challenge presented by the human distinction between facts and values, and tries to overcome this difficulty with an alternative: he admits that Hume is correct in the sense of the

impossibility of rationally demonstrating moral objectivity, but sustains that Hume's conception when "properly understood, supports no skepticism about moral truth but rather the independence of morality as a separate department of knowledge, with its own standards of inquiry and justification"[18]. This support of the autonomy of morality allows Dworkin to develop the idea that we are morally required to believe in the objectivity of our moral judgments, given that it would be irresponsible to develop a theory of justice detached from a theory of moral objectivity[19]. Therefore, even if the skeptics' position could be cognitively justifiable, it would be morally condemnable for not taking seriously the necessity of acting responsibly.

But why should we be morally responsible? In order to answer this question, Dworkin shifts from a field that he defines as *moral* (our obligations towards others) to the field of *ethics*, where the requirements for living a desirable life are defined. He recalls the Aristotelian argumentation on *eudaimonia* (good life), starting from the tautological affirmation that all men want a desirable life, in such a way that a good life can be considered something *good per se*. And, inspired by Aristotle's argumentation on moral excellence, he sustains that *eudaimonia* is not only an existence full of pleasures, but that of a *dignified* life.

According to Dworkin, "we must find the value of living – the meaning of life – in living well" and "dignity and self-respect – whatever these turn out to mean – are indispensable conditions of living well"[20]. This dignity is dogmatically defined based on two intertwined principles: on one side, the principle of *authenticity*, which demands people to identify the values they consider to be valid more instinctively; and on the other side, the principle of *self-respect*, which demands people to seek in practice the realization of their authentic values[21]. "Together, these two principles offer a conception of human dignity", which Dworkin uses as a criterion to define the nature of morality, given that acts are only considered unfair when they harm the dignity of another person[22]. Thus, the combination of the principles of dignity results in the moral virtue of *responsibility*: the commitment with the realization of values in which we believe.

At this point, Dworkin's argumentation follows the same structure which has marked his work, especially in the field of interpretation of the law: he analyses the responses that have been given to problems in practice, and uses them to construct an interpretation that translates them as best as possible[23]. This is exactly the methodology that Aristotle, as shown by Martha Nussbaum, uses to establish a theory that is always in agreement with the *phainómena*, i.e. the present current opinions we are used to call common sense[24]. Although Aristotle recognizes that common perceptions may be radically wrong, they are the starting point he uses to establish a philosophical theory which identifies their limitations and dilemmas, and which can allow the construction of a conception that transcends them, but somehow preserves them[25]. Instead of mechanically repeating the traditional assumptions, he seeks to identify in the heart of tradition its immanent principles (which would not be accessible by

other means, as advocated by Platonism) in order to construct ethical criteria which allow the best possible translation of this tradition itself. This commitment with the identification of the best possible interpretation offered by tradition is what Dworkin defines as responsibility.

After defining responsibility in the field of ethics, the author extends its definition to a field that he calls morality, using a Kantian approach: our self-respect generates, in parallel, the respect towards all other human beings[26]. After covering this aspect, he soon transfers equal moral consideration to the field of politics, defining that political legitimacy needs to be grounded on a principle of equal concern, which he considers to be morally justifiable, and on a principle of respect towards the individual responsibilities which guide ethical behavior. To Dworkin, "the basic understanding that dignity requires equal concern for the fate of all and full respect for personal responsibility is not relative. It is genuinely universal"[27]. And as politics defines the law, legal norms should be interpreted in order to translate the sense of justice "not because we must sometimes comprise law with morality, but because that is exactly what the law, properly understood, itself requires"[28].

With this, Dworkin unifies the multiple facets of value within society (ethical, moral, political and legal spheres), subjecting all of them to the virtue of responsibility, which implies the objective obligation of seeking in our coexistence (i.e. in morality, in politics and in the law) the consolidation of the values of equality and responsibility. Therefore, Dworkin considers the only responsible (i.e. morally correct) position that of people who are linked to an ordinary view: "what worries them is not whether moral claims can be true but which moral claims are true; not whether we can, but whether we do, have good reason to think what we do"[29]. Although Dworkin attaches himself to this perspective, he accepts the criticism of external skeptics in the sense that moral truth cannot be comprehended as some sort of correspondence to established facts. However, he simultaneously argues that "we cannot escape, in how we think, an assumption that value exists independent of our will", as this is part of the "inescapable phenomenology of value in people's lives"[30].

As the interpretative perspective of Dworkin is compromised by how common sense understands morality, he finds it necessary to develop a concept of an actual moral truth, eventually talking about a *moral epistemology*[31]. He could as well have given this moral truth another name (such as validity or legitimacy), as he clearly recognizes that it has a different meaning from the scientific one. However, as ordinary view considers this objective validity to be *the truth*, Dworkin adopts this designation and seeks to interpretively understand what common sense considers to be *the truth* in the moral field. His conclusion is that a moral judgment is true when it is the result of a responsible reflection, understood as an interpretation that systematically integrates the suitable moral values concerning a given issue.

At this point, the perspective supported by *Justice for Hedgehogs* deviates from the architecture developed by Aristotle in his *Nicomachean Ethics*, which presents a catalogue of virtues which need to be applied

with prudence[32]. The virtue of *phrônesis* is exactly knowing how to identify the *topoi* correctly and making suitable moral judgments from them. In this context, justice is not translated as the quality of an act, but the quality of a person. To Dworkin, on the other side, responsibility is not the characteristic of a person, but of an action: an action may be qualified as responsible when it observes certain criteria. And the solution that he proposes is systematic: a reflection is responsible when it is capable of integrating all conflicting *prima facie* values in an interpretation that excludes tensions between them by promoting their unity. This thesis of the unity of values is well-summarized by Smith: "what one domain of value requires of us must be consistent with (indeed, support) what other domains of value require of us"[33].

Aristotle was aware that such a Platonic unity of values was nothing less than a formal illusion[34]. Dworkin, on the other side, considers the pursuit of unity a moral obligation, as "responsibility seeks coherence and integration"[35]. Although the ordinary view is not reflective enough to encompass the explicit assumption that moral values form a unified system, it considers each moral value to be objectively correct and, therefore, they should all be correct simultaneously. The result of this idea is the belief defined as "the hedgehog's faith that all true values form an interlocking network, that each of our convictions about what is good or right or beautiful plays some role in supporting each of our other convictions in each of those domains of value"[36].

Dworkin's conception converges with the Platonic idea that a moral analysis only makes sense if there is a unified notion of the Good. This position leads him to define that responsible interpretation should "knit values together"[37] in such a way that the result of the interpretation is the extinction of conflicts of value in a holistic system. Thus, even if Aristotelians may be cognitively right in assuming the radical plurality of social values and the conflicting nature of values of justice, each and every one of us is morally obliged to live as if morality was an objectively binding unified system of values.

This belief in the objectivity of values prevents Dworkin's theory to enter the field of relativism, given that the ordinary view is not perceived as a historically constructed moral theory, but as an effectively correct perspective. With that, he could consider cultures that do not share the same aspects as the North-American culture (which is the culture of reference when he talks about *us*) to be wrong, since his referential moral framework lacks values that justify such discrimination. "They share the concept of justice with us, but – at least so we can sensibly suppose – they misunderstand that concept profoundly. There is no relativism in this story, only error on their part."[38]

II. BETWEEN PLATO AND ARISTOTLE

Dworkin's focus on the moral virtue of responsibility may be understood as an Aristotelian rebellion against the hegemony of Platonism. In

modern times, the Platonic sensibilities tend to what Amartya Sen calls institutional transcendentalism: the search for identifying a universal legitimacy criterion and constructing institutions capable of realizing it[39]. This conception considers that a reflection on human rationality is capable of identifying universal criteria of justice which, once clarified, could be used as the fundamental criterion for moral and legal analyses. This is the essence of all contractualism, from Hobbes to Rawls, which seeks to ground objective values from an original imaginary situation in which people would act in a perfectly rational way.

Dworkin is in the opposite direction of this tendency, returning to the Aristotelian thesis that we need to understand the intelligible from the sensible. Only a careful analysis of actual social practices can create an understanding of the values underneath it, and that is why he gives so much importance to an interpretative approach: it is not about a rational reflection that reveals universal values, but about understating effective social practices from the creation of models that are able to attribute meaning to such practices. At this point, he moves away from the Greek and modern metaphysics and assumes a radical historicist position: the interpretation of the sensible is always historically determined and is therefore incapable of revealing categories outside that historical context.

This is a true hermeneutic position which dates back mainly from Gadamer[40], as Dworkin admits that we are immersed in a tradition, as "we share social practices and experiences in which these concepts figure"[41]. Such perspective recognizes that values are elements of our interpretation and that, as such, value disagreements are not actual conflicts in relation to the facts, but in relation to the meaning that we attribute to them. Therefore, these conflicts cannot be resolved by taking as a reference an absolute value that serves as an Archimedean argument, but instead the shared hermeneutic horizon from which we interpret reality. In this context, an interpretation is consistent based on how it can articulate all the relevant elements within a unified narrative.

This unity is relevant, but it cannot be taken as something to be discovered though careful observation, but instead as an understanding that is developed through a reflection that follows certain parameters which Dworkin calls *theory of interpretation*. At this point, he moves away from the Gadamerian hermeneutics and approaches classic hermeneutics, which we can call *dogmatic* as it is aimed at defining canons capable of orienting the interpretative exercise. Gadamer developed a phenomenology of interpretation, showing how it operates and formulating categories in order to understand our own interpretative activity. Gadamer, however, vehemently refutes the possibility of identifying external parameters for the interpretation of traditions. He does not deny the existence or the importance of such criteria, but only argues that they are part of a given tradition and therefore cannot integrate a general philosophy of interpretation.

In the degree of abstraction of Gadamer's theory, the hermeneutic canons of a tradition are perceived as its integral part, and not as part

of the interpretative categories which conform with our own capacity of comprehension. Therefore, such criteria may be studied from an external perspective, which analyses the methods in which such criteria were established and how they are articulated, but without committing to the validity of such parameters. As well-demonstrated by the philosophers linked to the Vienna Circle, and Kelsen in particular, validity is an intrasystematic category: there is no universal normative validity, as the category itself refers to a given historical system which recognizes the validity of the norm[42].

The awareness of the relativity of values is at odds with the social use we make of them, as value categories are used in dogmatic analyses which presume the mandatory aspect of the norms and values that compose it. It is for that reason that Kelsen supported that we should conciliate our theoretical awareness of the relativity of values with our practical necessity of participating in discussions that presume the validity of norms, treating the rules that integrate an effective tradition as objectively valid[43]. More than that, he noticed that our normative discussions are usually uncritical, as we tend to treat moral and legal norms as valid, without noticing that this validity cannot be demonstrated, but only presumed. To Kelsen, Hart[44] and positivists in general, once we perceive this mythical structure of normative discussions, we can choose to adopt an external or internal perspective.

An external perspective to the system does not mean a neutral and objective perspective, but only a focus that does not presume the validity of the norms addressed. A religion sociologist could make statements on the typical beliefs of Buddhists or on Christian mythology without presuming the veracity of the religious stories or the veracity of their commandments. But this does not mean that he speaks from an empty place, as the researcher develops a discussion based on the sociological system, which has its own categories and interpretative canons. Besides, adopting an internal perspective does not necessarily imply a sincere and visceral commitment from the thinker in relation to the value system in which they operate. An atheist sociologist of religion may debate with a catholic bishop on the correct sense of certain religious dispositions in an argumentation that only makes sense within an established discussion area. A positivist judge could question the suitability of a normative interpretation of certain hermeneutic canons even acknowledging that the validity of the interpreted norm cannot be demonstrated.

From an external perspective, we can evaluate the existence of a system, explain its structure and show how it operates. With this focus, it is not possible to discuss if a given norm is valid *per se*, but only if it is recognized as valid by the people who operate the system itself. The validity of this kind of external observation of morality (independently of calling it ethics, moral philosophy or meta-ethics) is questioned by Dworkin, who affirms that morality can only be comprehended from an internal perspective. This is an important observation, as the debate on the validity of a normative proposition is always an internal discussion on the system, as the validity criteria are all internal. Thus,

it is not possible to have an external discussion on the moral meaning of an action, given that value questions can only be answered through value judgements.

This distinction between external and internal perspective is denied by Dworkin, who upholds the inexistence of an external perspective to morality. By denying the existence of "nonevaluative, second order, meta-ethical truths about value"[45] he supports that all meta-ethical discussions are necessarily moral debates. In this sense, it would be unavoidable to assume that there are objective moral values, given that this is an element that involves all moral discussions, as this is how we live morality itself: "it is how we think"[46].

This link with our effective moral practices and discussions is important for the theory since it bases itself on the interpretation of these social phenomena. However, this hermeneutic approach leads to a peculiar fact: our moral discussions are not seen as historical or subject to interpretation. And with that, we return to the Platonic argument that, either these discussions make no sense at all, or the objective values assumed in our moral discussions do necessarily exist. Faced with this dilemma, Plato supports that the existence of the Good is a logical necessity, as its inexistence would lead to the absurdity of denying the sense of morality as a whole[47]. Dworkin, on the other hand, argues that the existence of objective values is a moral necessity, as the need to take moral seriously demands from us the assumption that "the moral and other principles on which we act or vote are objectively true"[48].

This is the point around which Dworkin's arguments gravitate, where he effectively recognizes to go around in circles: the moral discussions which integrate our social practices make reference to objective values and, therefore, they impose the moral obligation of recognizing the objectivity of values. In short, the Dworkinian thesis is that there is an objective moral obligation of recognizing the objective validity of morality itself. And that is why he considers that the people who do not recognize this moral truth are not ignorant (which would be a cognitive judgement), but irresponsible (which is a moral judgement).

Fortunately, he recognizes on the first page of the book that this idea is a belief: "it proposes a way to live"[49]. Thus, the book does not have the intention to rationally fundament the necessity of moral engagement, but only to explore the philosophical consequences of a certain moral engagement. This position prevents Dworkin from establishing a dialog with the skeptics, and he simply disregards the skeptical argument for not being compatible with the belief that he assumes. Well, since Plato, philosophy has been a dialog that needs to include skeptics, as philosophical arguments should have an objective validity and not only a circumstantial one. Dialogs which are based on value grounds and do not admit questioning are more properly dogmatic than philosophical, what makes the thesis supported in *Justice for Hedgehogs* better qualified as theology than philosophy.

III. AGAINST SKEPTICISM

Just as in theology books, Dworkin presents his dogmatic truths as if they were supported by unquestionable evidence. In the beginning of the introduction, he describes what the principles of a legitimate government are – *equal concern and personal responsibility*[50] – without any justification. In the beginning of Chapter II, he postulates: "that there are truths about value is an obvious, inescapable fact"[51], since even the people who deny the existence of objective values consider that they are postulating an objective truth about values. In order to explain this opinion, Dworkin defines as ordinary view the perspective of the people who make moral judgments from the assumption that their analyses are objectively true since they are based on moral criteria which are objectively valid. As he intends to make an interpretative theory, which gives meaning to effective moral practices, this description of the ordinary view is very important as the author considers that "most people more or less unthinkingly hold that view"[52].

And the moral discourse is normally unreflective. It fails to discuss the bases of morality, but takes certain principles as valid, focusing only on the practical consequences of the application of such criteria. In Dworkin's words, "on the ordinary view, general questions about the basis of morality — about what makes a particular moral judgment true — are themselves moral questions"[53]. The people involved in this discussion may ask themselves about the veracity of moral propositions, such as "abortion is a morally condemnable act", and that statement will be considered true or false according to its correspondence with the moral values whose validity are considered to be evident.

The problem is that many people or groups consider a range of different values to be evident. In this context, the only possible debate is that which revolves around what are the morally-binding norms. Followers of different religions, for example, may discuss between themselves on what are the true requirements of morality, and they are equally immersed in the ordinary view. Each one of them will consider that their own conceptions are objectively correct and that people who think differently are simply wrong because of their incapacity of recognizing the values that are actually valid. And that is why the Mayans would sacrifice children in the 15th Century, Africans would sell their enemies as slaves to Europe in the 16th Century, and the Nazis would kill homosexuals in extermination camps in the 20th Century.

Dworkin clarifies that this ordinary view has a series of critiques, who not only propose concurrent ordinary views to the dominant one, but who also question the ordinary view as a whole. A first line of critiques considers that ordinary view does not offer a suitable justification of the moral values considered to be objective, and that it is necessary to develop a more solid argument for their justification which is not only based on intuition or tradition, but which is grounded on rationality itself. From Plato to Dworkin, this has been the main function of moral philosophers: the search for rational evidence that certain values are objectively valid.

This category of critiques is called by Dworkin internal skeptics, who consider that the ordinary view typically leads to error for taking prejudices of our own culture as evident, mixing shadows with reality inside a Platonic cave.

Another category of critiques is that of the *external skeptics*, who doubt the very possibility of making true moral judgments. To these thinkers, there is no such thing as moral evidence, be it from an intuitive or rational nature. Therefore, they do not assume that the ordinary view leads to evaluation mistakes, but to a fundamental deception: the assumption that there are values which are objectively valid. These people have their moral convictions and tend to defend them with the same intensity as the supporters of the ordinary views, but they do not consider it possible to justify their subjective convictions based on an objective argumentation[54].

The external skeptic, therefore, is the moral equivalent of the agnostic. They may even have their own subjective belief in a given deity, or sense that there is a higher force that guides nature, but they are skeptical about the possibility that reason could show something about the divine world. Agnosticism does not necessarily imply skepticism towards the existence of gods or the validity of religions, but only to the capacity of reason of clarifying the truths about metaphysics. Therefore, the ordinary view faithfully believes that their god is the real god, while the internal skeptics believe in a true moral code and think that their "arguments for holding it true are suitable arguments"[55], and the external skeptics deny the possibility of existing moral commandments which are objectively valid.

To the external skeptics, Dworkin prepares an interesting trap: discussing the validity of moral commandments, even if it is with the purpose of denying them, seems to lead them to enter a moral discussion, as "they draw on the same kinds of arguments, and they claim truth in just the same way"[56]. When an external skeptic affirms that "no one ever has a moral obligation because there are no queer entities that could constitute a moral obligation", Dworkin considers this to be a moral affirmation, just as the affirmation that the position of heavenly bodies do not influence people's lives would be an astrological one. For that reason, he sustains in Chapter III that "any sensible moral skepticism must be internal to morality"[57].

This is an interesting argument, but it is not less fallacious because of that, as it is based on a peculiar redescription of the argument of the external skeptics. According to Dworkin, the external skeptics evaluate the veracity of specific moral propositions (such as "abortion is moral" and "abortion is immoral") and argue that there are no suitable reasons to prefer any of the two assumptions, which would then lead us to sustain indetermination (impossibility to decide) in the field of morality, which by itself is a moral argument. But in fact, this is not what the external skeptics sustain, although this is what moralists understand.

A moral agnostic would say: there are no moral commandments that are rationally valid as reason is inattentive to values. And there are no

commandments which are objectively valid since there are no objective veracity criteria beyond human rationality itself. In fact, this is usually not a statement on morality, but on normative statements in general, which can be developed within a context where the moral repercussion of a given statement is irrelevant.

The fact that a statement has a moral repercussion does not mean that this is a first-degree moral statement, as it is not part of a moral discussion. In order to understand this, we can make an analogy with medicine. Imagine that a doctor is arguing with another doctor on the reasons why a given person passed away. One of them supports that the woman had a stroke and, because of that, she lost control of the vehicle she was driving. The other one argues that she lost control of the vehicle because she probably fell asleep and the stroke happened because of the adrenaline discharge she received when she woke up at the time of the crash. This is a relevant scientific issue, and not a legal one.

It is clear that defining the cause of the accident (the mishap of a stroke or the imprudence of driving when feeling asleep) has impacts in the legal consequences of the case (to compensate occasional victims?) and in the moral evaluation (would the driver be guilty of having run over someone?). But that does not mean that the positions of the examiners analyzing the case would constitute suitable moral or legal opinions. The conclusions of the examiners are interpreted differently by different moral or legal systems, resulting in different consequences. It is clear that the investigation itself may have been requested for moral or legal reasons, but this does not change the fact that the medical, physical or biological statements cannot be transformed in legal arguments just because of that.

They respond to different interpretation systems, to different languages that have their own validity/veracity criteria, whose existence may impact in the field of moral and legal duties (a medical report of brain death could allow the removal of an organ), but it is a very different thing to state that because of this they may contain first-class legal or moral statements. This seems to be Dworkin's mistake in analyzing the position of the external skeptics and I believe this mistake originates from an inadequate characterization of the moral and legal spheres.

Judges look at the world from an internal perspective to the law, in such a way that they measure the relevance of different situations in view of their legal impact. Adopting this internal perspective, it is possible to identify a certain domain of the law, formed by all the elements that have legal implications. This area may be composed of facts (such as birth), intentional behaviors (such as an attack) and statements (such as a contract), and they are all relevant in the interpretation: the law makes them relevant. This is very different from identifying a legal discussion, which talks specifically about the *legal meaning* of these acts.

Defining morality or the law as a discussion, adopting a linguistic reference, implies a much more restricted view on what law and morality are. This is the typical distinction of people who distinguish ethics from meta-ethics and who distinguish a normative discussion on legal

facts (the law) from a theoretical discussion on the normative discussion itself (the science of the law). These distinctions only make sense when we adopt these discussions as a reference, and this is the typical distinction made by external observers, who are interested in perceiving the particularities of a given social discussion practice.

Opting for a non-linguistic reference, defining the law or morality as a domain (or field or world or environment or any other similar concept), leads to a perspective where the limits are less well-defined and where facts could pertain to a wide range of different domains. This approach is typical of internal discussions, which analyze the world according to the relevance of the phenomena in order to evaluate a given interpretation system. This perspective tends to mix the notions of *pertinence* and *repercussion*, and this is Dworkin's confusion.

When a cosmologist states that the position of heavenly bodies does not have any influence in defining an individual's personality, this is a statement that does not integrate the domain of astrology. The scientist does not have astrological categories as his starting point, he does not share its dogmas and he does not see the world from its interpretation keys. On the other hand, if a cosmologist states that heavenly bodies do not have any influence on the soul of an individual, he would be abandoning the domain of physics: his statement would leave the scientific sphere and enter esotericism, religion or other areas of mystical aspect, where the notion of *soul* would then make sense. But when a scientist limits himself to affirming that the influence of existing physical interactions between humans and the Pisces constellation cannot have a relevant impact on the physical constitution of a person, he makes a *physical* denial, and not an *astrological* one, with regard to a given fact.

Clearly, this is a statement that may have an impact on astrology, once it implies the denial of certain astrological interpretations. An astrologist may sincerely dedicate himself to refuting the affirmations of the scientist and uphold the existence of the relation the scientist has denied. This possibility of an astrological denial of the scientific affirmation does not change the argument of the scientist into an astrological argument, although it is clearly possible to discuss the astrological implications of the affirmations of a physicist, psychologist or biologist.

This is Dworkin's mistake, which derives from his manifested option, from the first line of the book, for an internal perspective to morality. He considers that all statements that have any impact on his own moral judgement have a moral nature, and, in that sense, he does not accept an external point of view to morality. To Dworkin, considering that even the most skeptical of skeptics could talk about the validity of moral positions, even if it is to deny the objective validity of any value judgment, then the skeptics are not truly skeptical towards morality and should admit the existence of some form of moral truth. Admitting this kind of argument would lead us to the deception of calling the physicist an astrologist who denies the scientific validity of astrology.

Therefore, Dworkin's initial statement is correct, but it is an empty statement: from the common moral vision, the position of the skeptics

cannot be morally sustained. This is equivalent to supporting that, from the common theological view, the position of agnostics and atheists cannot be sustained. These are tautological statements, and Dworkin's option for this kind of conception represents a narrowed choice: since ordinary view considers itself to be objectively correct, Dworkin ends up supporting that it is not morally acceptable to question this correction. He labels internal skepticism all criticism directed to his value assumptions and also external skepticism all criticism directed to his belief in the moral truth. Instead of dialoguing with these "skeptics", Dworkin seeks closure by upholding the impossibility of having a productive debate on the validity of the conceptions he considers to be authentic and worthy of respect. With that, the only field which remains open to moral debate is the discussion with non-skeptics: an internal discussion aimed at defining the best manner of integrating common sense values to a coherent system.

IV. CONCLUSION

Philosophically, Dworkin's moral theory is unbalanced. He promotes an attempt at harmonizing Platonic and Aristotelian elements, but the result is an internal contradiction which he tries to overcome inconsistently through the introduction of the moral notion of *responsibility*. The final result is a Platonic conception, as he upholds the unity of the good as a necessary requirement to a rational understanding of the world. However, the method he applies is Aristotelian: the development of an intuitive perspective, which creates interpretations capable of attributing meaning to effective social practices. The problem is that the analysis of effective practices does not correspond to the unity of the Good, as both Plato and Aristotle knew well.

The unity of the Good is a logical necessity for the world to have an objective meaning and, being a logical necessity, it cannot be built on the sensible world. But more than that: the sensible world is made of shadows and, therefore, it is not reasonable to expect that a careful analysis of institutional practices will lead to the understanding of the Good. Against this necessity, Dworkin argues that we should not analyse good from logic, but from morality itself, which leads to a circularity which he expressly admits: the objective criteria of justice can only be based on the objective criteria of justice itself.

And what if such criteria do not exist? Dworkin escapes from this question with the argument that it contradicts our effective moral practice. The option for an interpretative perspective intentionally attaches us to these moral practices, requiring philosophers to develop a theory that could explain our moral experience instead of denying our basic moral intuitions. In fact, we behave as if objective justice existed and our moral discussions would only make sense from an argumentation system that involves objective moral criteria. After all, as Dworkin states, "it is how we think"[58]. Therefore, the role of the philosopher should be to

interpret such practices by making theories that are capable of recognizing that they are not absurd.

Aristotle was well-aware that this interpretative construction of morality does not lead to a unitary idea of the good, but to a multiplicity of excellences that take as fundamental criteria the behaviour of the people who are recognized as excellent. Dworkin, on his turn, believes that the Aristotelian exercise of creating a self-comprehension of the moral tradition is necessarily capable of showing a unitary notion of the good, given that only such a conception would fully realize our own morality's pretention of being objective.

With that, what he proposes is a moral discussion capable of articulating the dominant moral values in liberal and democratic societies in the beginning of this 21st Century. This is a moral discussion (in the sense that it is attached to certain value beliefs) and not an ethic one (in the sense that it reflects on the structures of moral discussion) and even more evidently not a meta-ethic discussion (in the sense that it reflects on the reflections about ethics). More than that, this is a discussion that denies the own validity of ethics or meta-ethics, i.e. a philosophical reflection that could lead to the weakening of moral values, a consequence that should be avoided by any responsible thinker. As stated by Dale Smith, Dworkin upholds "that morality is a separate domain of inquiry from science and metaphysics and that any moral argument must ultimately stand or fall on moral (not metaphysical or scientific) grounds"[59].

This argument resembles quite well an excerpt from Utopia in which More supports the freedom of worship, but at the same time excludes from the political life any of those who deny the existence of an after-life because citizens of Utopia look at them "as scarce fit to be counted men, since they degrade so noble a being as the soul, and reckon it no better than a beast's: thus they are far from looking on such men as fit for human society, or to be citizens of a well-ordered commonwealth; since a man of such principles must needs, as oft as he dares do it, despise all their laws and customs".[60]. The belief in the inexistence of an after-life is not subdued for being a cognitive deficiency but a moral one.

This narrowing of the discussion in the field of morality has its own strategic advantages, but it represents a denial of the possibility of having a debate about the inexistence of gods outside the theological arena. Metaphysics only make sense within metaphysics, and Dworkin's proposition that we should accept moral validity based on moral validity itself corresponds to a political gamble on the theological virtue of faith.

>> ENDNOTES

[1] Dworkin, 1996: 2
[2] Dworkin, 2011: 28.
[3] Dworkin, 2011: 419.
[4] Dworkin, 2011: 419.
[5] Descartes, 1985: 40.
[6] Dworkin, 2011: 149.
[7] Dworkin, 2011: 103.
[8] Dworkin, 2011: 10.
[9] Dworkin, 2011: 17.
[10] Dworkin, 2011: 120.
[11] Dworkin, 2011: 108.
[12] Dworkin, 2011: 108.
[13] Dworkin, 2003.
[14] Dworkin, 2011: 104.
[15] Plato, 1993: 621d.
[16] Kant, 1964: 433.
[17] Hume, 2002: 191.
[18] Dworkin, 2011: 17.
[19] Dworkin, 2011: 8.
[20] Dworkin, 2011: 13.
[21] Dworkin, 2011: 203.
[22] Dworkin, 2011: 204.
[23] This position is originally presented in *Taking Rights Seriously* (1977) and further developed in later works, such as *Law's Empire* (1986).
[24] Nussbaum, 2009: 210.
[25] Nussbaum, 2009: 216.
[26] Dworkin, 2011: 255.
[27] Dworkin, 2011: 338.
[28] Dworkin, 2011: 415.
[29] Dworkin, 2011: 100.
[30] Dworkin, 2011: 214.
[31] Dworkin, 2011: 100.
[32] Aristotle, 1992, books III e IV
[33] Smith, 2012, 385.
[34] Aristotle, 1992, 1098a.
[35] Dworkin, 2011: 113.
[36] Dworkin, 2011: 120.
[37] Dworkin, 2011: 101.
[38] Dworkin, 2011: 171.
[39] Sen, 2011: 24.
[40] Gadamer, 1999.
[41] Dworkin, 2011: 6.
[42] Kelsen, 1991: 235.
[43] Kelsen, 1991: 78.
[44] Hart, 1994.
[45] Dworkin, 2011: 11.

[46] Dworkin, 2011: 10.
[47] Plato, 1997: 75c.
[48] Dworkin, 2011: 8.
[49] Dworkin, 2011: 1.
[50] Dworkin, 2011: 2.
[51] Dworkin, 2011: 24.
[52] Dworkin, 2011: 28.
[53] Dworkin, 2011: 28.
[54] Dworkin, 2011: 36.
[55] Dworkin, 2011: 37.
[56] Dworkin, 2011: 24.
[57] Dworkin, 2011: 25.
[58] Dworkin, 2011: 11.
[59] Smith, 2012: 384.
[60] More, 2010: 116.

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CASE NOTES AND COMMENTARIES
// COMENTÁRIOS DE JURISPRUDÊNCIA

SAME-SEX UNIONS: LEGAL RECOGNITION OF COMMON LAW UNIONS BETWEEN SAME-SEX PARTNERS

// UNIÕES HOMOAFETIVAS: RECONHECIMENTO JURÍDICO DAS UNIÕES ESTÁVEIS ENTRE PARCEIROS DO MESMO SEXO

Luís Roberto Barroso

>> ABSTRACT // RESUMO

The present paper deals with the State's obligation to provide legal recognition to affectionate relationships between same-sex partners. For that purpose, it will analyze the constitutional principles applicable to this hypothesis – equality, liberty, human dignity and legal certainty –, as well as the current parameter applied in the realm of family law for the recognition of family entities, which is precisely the one of affection. In its final part, the article will present two possible legal solutions that lead to the same result: the extension of the application of the legal regime of civil unions to same-sex unions. // O presente trabalho trata do dever estatal de dar reconhecimento jurídico às relações afetivas entre pessoas do mesmo sexo. Para tanto, será feita uma análise dos princípios constitucionais aplicáveis à hipótese – igualdade, liberdade, dignidade da pessoa humana e segurança jurídica –, bem como do parâmetro vigente no âmbito do Direito de Família que é, precisamente, o da afetividade. Ao final, serão apresentadas duas soluções jurídicas que conduzem ao mesmo resultado: a aplicação do regime da união estável às uniões homoafetivas.

>> KEYWORDS // PALAVRAS-CHAVE

Same-sex civil unions; legal recognition; constitutional principles; civil unions // Uniões homoafetivas; reconhecimento jurídico; princípios constitucionais; união estável

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1. INTRODUCTION

1.1 BACKGROUND

In 2007, while the General-Prosecutor of Brazil was Dr Antonio Fernando de Souza, a group of Federal Prosecutors wanted to urge him to file a constitutional lawsuit seeking the legal recognition of same-sex unions. I was contacted on behalf of this group by Daniel Sarmento, who had been my student during his undergraduate and graduate studies, and who was building a successful academic career with the State University of Rio de Janeiro (UERJ). Their request was that I develop a study that could lay the foundation for filing this lawsuit before the Federal Supreme Court (STF). In essence, the goal was to get same-sex common law unions to be regulated under the same legal regime dedicated to conventional common law unions between opposite-sex couples. At that time, the General-Prosecutor of Brazil chose not to bring the lawsuit. The study I had elaborated was then published as an academic paper in several law review journals[1].

Some time after that, the General-Prosecutor of the State of Rio de Janeiro, Lúcia Léa Guimarães Tavares, contacted me to say that the State Governor Sergio Cabral had learned about the study and, since the General-Prosecutor of Brazil had decided not to file the lawsuit, he would like to do so himself. She then asked me whether I could adapt the text, converting it into a lawsuit to be filed by the State Governor of Rio de Janeiro. I promptly accepted the assignment.

1.2. STRATEGY

Having the Governor bring this lawsuit involved some degree of complexity. The General-Prosecutor of Brazil has what is called "*universal standing*" in presenting direct lawsuits before the STF. That is, he can question any laws or raise any issues independently of the matter or the people affected. The State Governor, on the other hand, although he is also listed by Article 103 of the Constitution – which identifies those who have the right to bring direct lawsuits before the STF –, has what is called "*special standing*". This means that he has to demonstrate that the question under discussion has specific and particular impact within the State in order to meet a STF criterion known as "*thematic pertinence*". In light of that, to justify the filing of the lawsuit by the State Governor, it was necessary to identify a typical state-level issue involved. In that attempt, I have found the State Decree-law 220, of 18.07.1975 – the Statute of Civil Servants of the State of Rio de Janeiro –, which included dispositions that determined the right of leave in case of illness of a family member or to accompany a spouse in a work assignment, apart from other social security benefits to the family members of the civil servants. This was the missing link: the Governor needed to determine whether the definition of spouse or family member should include or not partners in same-sex unions. His interest on the matter was then justified.

1.3. THE LAWSUIT THAT WAS BROUGHT

Once again, the action was filed as a Claim of Non-Compliance with Fundamental Precept – ADPF (*Arguição de Descumprimento de Preceito Fundamental*). The main reason was that the provisions of state legislation relevant to the request for interpretation according to the Constitution dated prior to the Constitution of 1988, which, at least in principle, would make it impracticable to file a direct action of unconstitutionality. In any event, in case the STF were to reject the ADPF – considering STF's requirements still remain somewhat enigmatic –, I also asked that the lawsuit be alternatively received as a direct action of unconstitutionality (ADI), for the purpose of interpreting Article 1723 according to the Constitution, which regulates common law unions, determining that its incidence also comprised same-sex unions. The lawsuit was filed in February 2008 and identified as ADPF 132. Afterwards, while occupying the position of interim General-Prosecutor of Brazil, Dr Deborah Duprat filed herself a new lawsuit with the same request. Her initiative was justified because in the lawsuit filed by the Governor, as previously explained, the thesis of equivalence between common law unions and same-sex unions would only be valid within the State of Rio de Janeiro. Having been brought during a court recess, the lawsuit was later forwarded to then President of the STF, Minister Gilmar Mendes, who accepted it not as an ADPF, but as a direct action of unconstitutionality (ADI 142).

Both lawsuits started to be jointly examined on the 4th of May 2011. During the first semester of 2011, I was abroad, on a sabbatical period as a Visiting Scholar at the University of Harvard in the United States. However, I had guaranteed to the General-Prosecutor of the State of Rio de Janeiro that I would be present for the judgment in case it was scheduled to take place while I was out of the country. And so I did, flying from Boston to Brasilia to take part in this court session, which also extended through the 5th of May.

2. MAIN ARGUMENTS AND ISSUES DISCUSSED

2.1. SUMMARY OF IDEAS ON WHICH THE LAWSUIT WAS BASED

2.1.1. SAME-SEX RELATIONSHIPS AND THE LAW

In recent decades, culminating a process of overcoming prejudice and discrimination, a number of people started to fully express their sexual orientation and, as a result, have publicly manifested their same-sex relationships. In Brazil and around the world, millions of same-sex couples live in long lasting and continuous partnerships, characterized by affection and a shared life project. Social acceptance and legal recognition of this fact are relatively recent and, consequently, there are uncertainties about how the Law should deal with this issue.

In this scenario, it is natural to arise, with urgency, the issue of the legal regime of same-sex unions. As a matter of fact, these partnerships exist and will continue to exist, independently of positive legal recognition from the State. If the Law remains indifferent, from this will emerge an undesirable situation of uncertainty. However, more than that, the indifference from the State is only apparent and reveals, in reality, an opinion of worthlessness. If it emerged – as it did – a state decision to give legal recognition to informal affectionate relationships (i.e. independently of marriage), the non-extension of this regime to same-sex unions translates into a lesser consideration for such individuals. This nonequivalence is unconstitutional for a number of reasons.

2.1.2. PHILOSOPHICAL GROUNDS

The proposed action was grounded on two philosophical arguments. The first one is that homosexuality is a fact of life. Be it considered an innate or acquired condition, derive it from social or genetic causes, the sexual orientation of an individual is not a free choice, an option between different possibilities. Furthermore, it should be noted that homosexuality – and the same-sex affectionate unions originating from it – do not violate any legal norms nor is capable of affecting the lives of others. Except, of course, when these third parties want to impose a "righteous" lifestyle – their own – to other individuals.

The second philosophical argument of the lawsuit filed consisted on the recognition that the role of the State and the Law in a democratic society is to ensure the development of the personality of all individuals, enabling each and every one of them to carry out their own licit personal projects. The State cannot and should not practice or legitimate any prejudice or discrimination, falling to it, on the contrary, the obligation to firmly fight these practices, providing support and security to vulnerable groups. Political and legal institutions have the mission to embrace – and not to reject – those who are victims of prejudice and intolerance.

2.1.3 LEGAL GROUNDS

The lawsuit was developed around two main theses. The first one is that a set of constitutional principles impose the inclusion of same-sex unions into the legal regimen of common law unions, for it consists in a species amid the genre. The second thesis is that, even if were it not an immediate consequence of the constitutional text, the equivalence of legal regimes would arise from a rule of hermeneutics: where the Law is absent, the legal order should be integrated through the use of analogies. As the essential characteristics of common law unions established by the Civil Code are present in same-sex common law unions, the legal treatment should be the same, or else it would create an unconstitutional discrimination.

The principles in question are equality, liberty, human dignity and legal certainty. The analogy principle, in its turn, imposes the extension

to hypotheses not specified by the legal order of the norms applied to an analogous situation. Well then: the situation that better compare to affectionate unions is certainly not the *de facto association*, in which *two or more* people join efforts for a common purpose, in general of financial nature. The more suitable analogy, as can be easily seen, is the common law union, a situation where two people share a common life project, based on affection. This is the key-concept in the analysis of the theme: it is above all the *affection*, and not sexuality or financial interests, which determine same-sex relationships and which deserves the protection of the law.

2.2 STANDING AND FORMAL REQUIREMENTS OF THE ADPF

2.2.1. STANDING AND THEMATIC PERTINENCE

One chapter of the initial petition was dedicated to demonstrating the standing and the thematic pertinence. The ideas elaborated – already briefly anticipated in the presentation of the strategy adopted for the case – were the following. In light of Article 2, I of Law 9882/1999, standing for the ADPF rests on the individuals entitled to bring direct actions of unconstitutionality, listed under Article 103 of the Federal Constitution[2]. This list includes State Governors.

As for the thematic pertinence, I defended that in the State of Rio de Janeiro there is an expressive number of civil servants who are part of same-sex common law unions. Given this fact, both the State Governor and the Public Administration are faced with relevant issues regarding the norms regulating leaves of absence based on illness of a *family member* or to accompany a *spouse*, as well as on social security[3] and social assistance matters. The lack of legal definition on the application of such norms to same-sex union partners subject the Governor, as Head of the Public Administration, to legal consequences before the State Government Accountability Office, the Public Prosecutor's Office and the State Judiciary regardless of the interpretative approach it were to take on the matter. Furthermore, after the Constitution of 1988 and the subsequent legislation, which have significantly expanded the system of judicial review of the constitutionality of laws in the country, it seems inadequate for the Head of the State Executive Branch to adopt a given potentially controversial interpretation without first presenting the question, though the appropriate channels, for the appreciation of the Federal Supreme Court.

Apart from these reasons – which would already be sufficient –, there are thousands of same-sex affectionate partnerships in the State of Rio de Janeiro. It is therefore natural and legitimate that the State Governor, as an elected public official, should also represent the interests of that segment of society. It should be noted that the claims related to the matter herein discussed disembogue before the State Judicial Branch, which has been pronouncing diverging decisions on the matter. The settlement of this issue by the Federal Supreme Court would therefore have – as it did – a positive impact on state institutions and on the residents of the state.

Established the standing and thematic pertinence, it was also important to demonstrate the presence of the formal requirements for the ADPF.

2.2.2. FORMAL REQUIREMENTS OF THE ADPF

Law 9882/1999, which regulates the process and judgment of Claims of Non-Compliance with Fundamental Precept (ADPF)[4], covered two possible modalities for this instrument: autonomous and incidental claim. The claim we filed was of *autonomous* nature, defined by the *caput* of article 1 of the law, which reads:

> *Art. 1°. The claim established by §1° of article 102 of the Federal Constitution will be brought before the Federal Supreme Court, and will have as object to avoid or repair offenses to fundamental precepts, resulting from acts of the State.*

The autonomous ADPF is an action analogous to the direct actions already instituted by the Constitution, through which abstract and concentrated judicial review is brought forth before the Federal Supreme Court. Its singularities include, however, a more limited parameter of control – it is not applicable to all constitutional norms, but only to fundamental precepts – and a broader object of control, comprising the acts of the State in general, and not only those of normative nature. There are three conditions for the suitability of an autonomous claim: (i) threat to or violation of fundamental principle; (ii) acts of the State capable of causing an offense; (iii) the inexistence of any other effective means capable of remedying the offense.

(I) THREAT TO OR VIOLATION OF FUNDAMENTAL PRINCIPLE

Neither the Constitution nor the legislation has determined the sense and reach of the expression "fundamental precept". Nonetheless, there is substantial consensus in legal doctrine that this category encompasses the fundaments and objectives of the Republic, as well as the fundamental political decisions, object of Section I of the Constitution (Articles 1 to 4). The fundamental rights are likewise included in this typification, comprising, in general, the individual, collective, political and social rights (from article 5 onwards). Norms listed as entrenchment clauses (article 60, §4) or directly deriving from them should be equally added to the roll. And, finally, the federalist constitutional principles (Article 34, VII), whose violation would justify a decree of federal intervention.

As it will be analyzed in further detail, in the issue presented in the lawsuit discussed herein, the following fundamental principles were violated: the principle of human dignity (article 1, IV), one of the fundaments of the Republic; the fundamental rights to liberty and equality (article 5, *caput*), reinforced by the statement that one of the fundamental purposes of the Brazilian State is the promotion of a society free and without prejudices (article 3, IV); and the principle of legal certainty

(Article 5, *caput*, also understood as an immediate consequence of the rule of law[5]).

(II) STATE ACT

As a consequence of express reference by article 1 of Law 9882/1999, the acts which may be the object of an autonomous ADPF are those originating from the State, including those of normative, administrative or judicial nature. In the hypothesis explored herein, as already mentioned, the State acts that violate the fundamental principles in question are of normative and judicial nature. The normative acts consist in Article 19, II and V, and article 33 (including its ten items and its sole paragraph), all from Decree-law 220/1975 (Statute of Civil Servants of the State of Rio de Janeiro), which reads:

> *Art. 19 – Leave will be granted:*
> *(...)*
> *II – in case of illness of a family member, with full payment and benefits in the first 12 (twelve) months; and two thirds of those for another 12 (twelve) months maximum;*
> *(...)*
> *V – without payment, to accompany a spouse elected for the National Congress or transferred to serve in another place if a military officer, civil servant, or regular employee of a state or private company; (Text according to Law No. 800/1984).*
>
> *Art. 33 – The Executive Branch will provide social security and assistance to their employees and their families, including:*
> *I – family allowance;*
> *II – sick pay;*
> *III – medical, dental, hospital and pharmaceutical assistance;*
> *IV – real-estate financing;*
> *V – housing allowance;*
> *VI – educational assistance for dependents;*
> *VII – treatment for accident at work, professional illness or compulsory institutionalization for psychiatric treatment;*
> *VIII – funeral-assistance, based on the salary, remuneration or payment;*
> *IX – pension in case of accidental death at work or professional illness;*
> *X – compulsory insurance plan to complement income and pensions.*
> *Sole paragraph – the family of the employee is composed of the dependents who necessarily and provably live at their expenses.*

The provisions transcribed above provide rights to the family members of civil servants – such as medical assistance and funeral assistance – or to civil servants themselves in view of events that could happen to members of their family. In this second scenario, for example, is included the leave of absence offered to civil servants for illness of a family

member. It was uncontroversial that such rights should be extended to civil servants in heterosexual common law unions. However, there is uncertainty whether these can be applied to same-sex unions. The proponent of the lawsuit portrayed herein understands so, but this thesis is not unanimous.

The legal acts that have motivated the filing of the ADPF were represented by the set of decisions rendered by the State Appellate Court of Rio de Janeiro, which have predominantly denied the equivalence between same-sex unions and conventional common law unions. In fact, several decisions have denied the possibility of attributing the status of family entity to such unions. This is confirmed by the following example:

> *RELATIONSHIP BETWEEN HOMOSEXUAL MEN. COMMON LAW UNION. DECEASED PARTNER. REQUEST SEEKING HABILITATION AS PENSIONIST. REGIME OF COMPLEMENTARY SOCIAL SECURITY. ABSENCE OF SUITABLE REGISTER AS DEPENDENT. DENIED. DECISION APPEALED. Although clearly established, for a long time, the homosexual relationship between two men do not fall into the provisions of Law No. 8.971/94 based on an allegation of the existence of a common law union. Especially because, the Constitution, in article 226, establishes that the family, basis of the society, enjoys special protection from the State, specifying under paragraph 3 that in order to enjoy protection from the State, the common law union between man and woman is recognized as a family entity and the law should facilitate its conversion into marriage. This constitutional principle, therefore, is aimed at unions between people of opposite sexes and not people of same sex. On the other hand, in the absence of records showing the plaintiff's register as dependent of the associate before the respondent for the purpose of receiving the requested benefit (post-mortem pension), and being clear, likewise, that this benefit is different from the one contracted on page 29 (peculium proposal), it is clearly evident that the request should be denied*[6].
>
> *Declaratory action. Seeks recognition of common law union between homosexuals. Recognition denied. Neither the Federal Constitution of 1988 nor Law 8.971/94 protects the request under appeal. The concept of family is not extended to same-sex unions. Without demonstration of shared effort, the division of the estate or habilitation to take part in the inventory of one of the partners, now deceased, should not to be considered. Sufficient grounds. Appeal denied*[7].

Although there were occasional decisions to the contrary, the fact is that the majority of the case law violates the fundamental rights of the individuals involved, reason why the proponent has asked the Federal Supreme Court to recognize this fact and reform this orientation.

(III) INEXISTENCE OF ANY OTHER EFFECTIVE MEANS CAPABLE OF REMEDYING THE OFFENSE (SUBSIDIARITY OF ADPF)

The requirement of "inexistence of any other effective means capable of remedying the offense" does not derive from the instrument's constitutional definition, having been imposed by Article 4, §1 of Law 9882/1999. As widely known, the doctrine and the Federal Supreme Court case law have been building the understanding that the verification of subsidiarity in each case depends on the efficacy of the "other means" referred in the law, i.e. the kind of solution that the other possible means would be able to carry out in the hypothesis[8]. The other means should be able to provide similar results to those that could be obtained through an ADPF.

Well then, the decision on the ADPF has binding effects and efficacy towards all, elements which, as a rule, could not be obtained through a subjective action. Furthermore, if the ADPF were to be impeded whenever an appeal or subjective action was applicable, the role of the new action would be entirely marginal and its purpose would not be fulfilled. Based on that, in view of the objective nature of the ADPF, the analysis of its subsidiarity should take into account the other objective actions already consolidated in the constitutional system. This is the understanding that has been prevailing in the STF[9].

In the case presented herein, the impugnation was foremost directed towards a state law prior to the Constitution of 1988. Following the traditional line of the Court's case law, this object is not susceptible to impugnation by any other objective action, being certain that only a mechanism such as the ADPF would be capable of avoiding the offense more generally, putting an end to the state of unconstitutionality deriving from the discrimination of homosexual couples. Likewise, there were no objective actions that could be filed against the case law precedents issued by the State Judiciary in violation to the fundamental principles noted herein.

3. THE FUNDAMENTAL PRECEPT VIOLATED AND THE SOLUTION IMPOSED BY THE LEGAL SYSTEM

3.1. FUNDAMENTAL PRECEPT VIOLATED

As mentioned, the acts of the State – especially judicial decisions – that denied legal recognition of same-sex unions directly violated a significant set of fundamental principles, which included: human dignity, the equality principle, the right to freedom, from which the protection of private autonomy is derived, and the principle of legal certainty. A concise explanation of each of these violations is presented below.

3.1.1.EQUALITY PRINCIPLE

The Federal Constitution of 1988 consecrated the equality principle and expressly condemned all forms of prejudice and discrimination.

These values are mentioned in the preamble of the Constitution, which announces the purpose of building a "pluralist and fraternal society, free from prejudices". Article 3 renews this intention and gives it unquestionable normative power, announcing the "construction of a free, just and solidary society" and the "promotion of the well-being of all, without prejudice based on origin, race, sex, skin color, age or any other forms of discrimination" as the fundamental purposes of the Republic. The caput of Article 5 reaffirms that "all are equal before the law, without distinction of any nature". The constituent has also included explicit text rejecting racism[10] and discrimination against women[11].

This set of norms is explicit and unequivocal: the Constitution forbids all forms of prejudice and discrimination, binomial where the disregard or discrimination based on the sexual orientation of individuals has to be included[12]. Although these considerations are already sufficient to show the clear defect of unconstitutionality arising from the non-recognition of legal effects to same-sex unions, two supplementary observations are noteworthy.

Firstly, it is a fact that the STF case law recognizes without question the possibility of direct application of the principle of equality to rebuke discriminatory practices, even where there is no infra-constitutional legislation on the specific issue. And that even extends so far as to impose to individuals the duty to not discriminate[13], overcoming eventual considerations on the private autonomy of the parties involved. With much more reason, thus, the Court should not hesitate to prevent discrimination practiced by the State itself, which not only recognizes the obligation to abstain from violating fundamental rights but also has a positive duty to act in their protection and promotion[14].

Secondly, it is imperative to conclude that the offense to the principle of equality, in the hypothesis, occurs in a direct manner, affecting its essential core. In fact, although the principle cited involved several nuances and complexities, the contested act violates its most traditional and elemental content, related to formal equality. In simple terms, it deals with the prohibition of the legal system to give different treatment to people and situations which are substantially the same. Such mandate is not merely directed to the legislator, also requiring interpreters to avoid the production of concrete discriminatory effects when establishing the meaning and reach of the law. In certain situations, observed the semantic limits of the normative texts, they should also proceed *correctively*, carrying out the interpretation of laws according to the Constitution, exactly as requested in the present lawsuit.

This does not mean that all and any disequalizing is invalid. On the contrary, to legislate is nothing more than to classify and to distinguish people and facts, based on the most varied criteria. Besides, the Constitution itself establishes distinctions based on multiple factors. What the principle of isonomy imposes is that the fundament of the disequalizing be reasonable and its purpose be legitimate[15]. In this sense, it is worth noting that certain criteria are considered especially suspect by the

constitutional order, such as those based on origin, sex and skin color (art. 3, IV). Within the genre category the sexual orientation is certainly implied. In case of a suspect classification, a heightened argumentative burden is imposed to those who intend to support it.

In any event, however, there shouldn't be a need to enlist reasons to prevent differentiated treatment. The logic is exactly the opposite. Where there is no legitimate reason that requires the distinction, the general rule should be equal treatment. With the caveat that, in a pluralist and democratic State, such reasons should be supported by arguments of public reason and not by particular world views of moral or religious nature. Even when endorsed by a great number of followers or even the majority, it is a fact that such conceptions are not mandatory and therefore cannot be imposed by the State.

In the case under analysis, there is no constitutionally protected principle or value that is promoted by the non-recognition of affectionate unions between same-sex partners. On the contrary, what happens is a direct violation of the constitutional purpose of instituting a pluralist society that is opposed to prejudice. Not by coincidence, the main arguments invoked in an attempt to support the disequalizing fail for their lack of coherence[16], enter the domain of clear intolerance[17] or are based on religious conceptions[18]. While certainly deserving respect, they cannot be coercively imposed by a laic State.

In this sense, the violation of the principle of equality is truly evident, with not a single argument valid in the public domain capable of justifying the legal non-equivalence of affectionate unions based on the sexual orientation of its partners.

3.1.2 RIGHT TO FREEDOM, FROM WHICH PRIVATE AUTONOMY ARISES

The rule of law should not only formally guarantee to individuals the right to choose between different licit projects of life, but should also provide objective conditions for the conduction of these choices[19]. Freedom, in its general facet, is a requirement for the development of personality. However, some manifestations of freedom have even closer connections with the formation and development of personality, deserving heightened protection[20]. This is the case, for example, of religious freedom, freedom of thought and freedom of expression. And, also, the freedom to choose the people with whom a person wants to maintain a relationship of affection and partnership with. In its full, with all the consequences normally attributed this *status*. Not clandestinely.

From the principle of liberty derives the private autonomy of each individual. Denying to an individual the possibility of fully living their own sexual orientation means to deprive them from one of the aspects that give meaning to their existence. As previously underlined, the exclusion of same-sex relationships from the regime of common law unions would not simply create a gap, a space not regulated by the law. This would actually be an active form of hindering the exercise of freedom and the development of personality by an expressive number of people,

depreciating the quality of their projects of life and their affections. That is, making them less free to live their own choices.

There is no doubt that private autonomy can be limited, but not capriciously. The principle of reasonability or proportionality, vastly applied by the STF, requires the imposition of restrictions to be justified by the promotion of other legal values of the same hierarchy, equally protected by the legal order. In this case, since this is related to the existential dimension of private autonomy, only reasons of special relevance – such as the need to reconcile it with the core aspects of another fundamental right – could justify balancing to accommodate conflicting interests.

What happens, however, is that the non-recognition of same-sex common law unions does not promote any legal value that should be safeguarded in a republican environment. On the contrary, it only serves certain particular conceptions, which may even majoritarian, but which should not be imposed as legally binding in a democratic and pluralist society guided by a Constitution that condemns all and any form of prejudice. This would be a form of *perfectionism* or moral authoritarianism[21], typical of totalitarian regimes, which do not restrict themselves to organizing and promoting a peaceful living, but which have the pretention to shape *suitable individuals*[22]. In short, what is lost in terms of freedom is not reverted in any benefit to any other constitutionally protected principle.

3.1.3 PRINCIPLE OF HUMAN DIGNITY

It is impossible not to recognize that the issue discussed herein involves a reflection on human dignity[23]. Among the several possibilities within the meaning of the idea of dignity, two of them are recognized by conventional knowledge: i) no one can be treated as a means to an ends, and each individual should be considered an end unto themselves[24]; and ii) all personal and collective projects of life, when reasonable, are worthy of equal respect and consideration and deserve equal "recognition"[25]. Not recognizing unions between same-sex partners simultaneously violates these two nuclear dimensions of human dignity.

Firstly, this exclusion functionalizes relationships based on affection to a given project of society, which though certainly majoritarian, it is not legally mandated. Affectionate relationships are seen as a means to realize an idealized model, structured in the image and likeness of a particular moral or religious conception. The individual is, therefore, treated as a means to carry out a project of society. They are only recognized when molded to their traditionally attributed social role: the one of a member of a heterosexual family, dedicated to procreation and to child rearing.

Secondly, discrimination against same-sex unions is equivalent to not bestowing equal respect to an individual identity by affirming that a given lifestyle should not be treated with the same dignity and consideration attributed to the others. The idea of *equal respect* and *consideration* is translated in the concept of "recognition", which should be attributed to individual identities, even when they represent a minority. The

non-recognition is translated into discomfort, leading many individuals to deny their own identity at the expense of great personal suffering. The distinction analyzed herein, by not conferring equal respect to same-sex relationships, perpetuates the dramatic exclusion and stigmatization which homosexuals have been subject throughout History, characterizing a real and official policy of discrimination. It therefore characterizes a clear violation of human dignity.

3.1.4 PRINCIPLE OF LEGAL CERTAINTY

The principle of legal certainty involves the protection of values such as the predictability of conduct, the stability of legal relationships and the protection of trust, indispensable to the peace of mind and, by extension, to social peace. The importance of legal certainty is strongly recognized by the Federal Supreme Court case law, even justifying, in certain circumstances, the maintenance of the effects of acts considered to be unconstitutional or the extension of their effects despite the gravity of the defect they sustain. It is not even necessary to approach these extremes in order to conclude that the exclusion of same-sex relationships from the legal regime of common law unions, without a similar specific regime, unequivocally generates legal uncertainty. The demonstration of this argument is simple.

The union of same-sex partners is licit and will continue to exist, even if doubts about their legal framework linger. This scenario of uncertainty – supported by different manifestations of the State, including conflicting judicial decisions – affects the principle of legal certainty, both from the perspective of the relationship between partners and from their relations with others. That is, it creates problems for the people directly involved and for society.

Partners in same-sex relationships are, of course, primarily affected. Developing a shared project of life tends to create existential and patrimonial repercussions. In light of that, it is natural that the parties would want predictability on subjects such as inheritance, community property, obligations of mutual assistance and alimony, among others. All these aspects are balanced into the treatment given by the Civil Code to common law unions[26]. Its extension to same-sex relationships would have the ability to overcome legal uncertainty on the matter.

Likewise, the lack of definition on the applicable regime also affects third parties that establish statutory or business relationships with any of the partners in a same-sex partnership[27]. The first group identifies specifically the relationship between the State and civil servants, which involves a series of rights attributed to civil servants and their family members, such as the right to leave of absence – in case of illness of the spouse or to accompany them when they are transferred –, the right to include the partner in their group health insurance plan, to funeral assistance, sick pay, and many others. These rights are already guaranteed to civil servants in common law heterosexual affectionate unions, in such a way that the only discussion here is on the legitimacy of discriminating against individuals based on their sexual orientation.

In a business environment, it should be noted that, as a rule, people living under common law unions need the authorization of their partners to, for example, alienate property and offer guarantees. There will also be questions on the patrimonial responsibility for individual debts or debts shared by the partners. There are legal uncertainties, therefore, regarding the formalities and aspects of substantive law involving the relationships between same-sex partners and third parties. Even if those relationships are not directly affected by the definition of the legal regime applicable to civil servants, it is certain that this tends to be taken as an indicative element and, in any case, the legal system should safeguard internal coherence.

In this sense, it is necessary to provide a real legal framework to same-sex affectionate unions. It is perfectly possible to interpret the current law in order to achieve this result and there is no other value of constitutional stature to point in the opposite direction. This is another reason why the ADPF had to be accepted. After these considerations on the substance of the fundamental principles violated in the hypothesis, the initial petition deepened the discussion on the possible solutions in light of the constitutional system.

3.2. THE SOLUTION DIRECTLY IMPOSED BY THE APPROPRIATE APPLICATION OF THE AFOREMENTIONED FUNDAMENTAL PRINCIPLES: THE INCLUSION OF SAME-SEX UNIONS INTO THE LEGAL REGIME OF COMMON LAW UNIONS

The fundamental principles described in the aforementioned lawsuit are vested with undeniable normative relevance and should be directly applied to the case in question, determining that same-sex relationships be submitted to the legal regime of common law unions. The direct application of the constitutional principles does not give origin to further controversies, being admitted by the STF case law. Regarding the principle of equality, as previously mentioned, there is even precedent of direct application to private relationships, despite the inexistence of specific infra-constitutional legislation. Much more reasonably, thus, such principle should be imposed to the State itself, preventing it from promoting inequality between individuals on the basis of unreasonable criteria.

In light of this conclusion, it is necessary to provide the provisions indicated in the Statute of Public Civil Servants of the State of Rio de Janeiro with an interpretation according to the Constitution in order to recognize that the rights therein listed should also be applicable to same-sex unions. Likewise, it falls on the STF the responsibility to declare that, in light of the current constitutional and legal order, same-sex unions should receive the same legal treatment given to conventional common law unions by the courts, or else reiterated violations of fundamental principles would then arise.

One last observation should be made: the conclusion reached herein is not affected by article 226, §3º, of the Constitution, which expressly protects common law unions between men and women[28]. As well known, this provision intended to permanently dismiss any form of discrimination against

female partners, consolidating a long line of evolution which has symptomatically began with judicial decisions. It would not make any sense to interpret it in a contrary sense, broadening its meaning and converting it into an exclusionary norm, i.e. the exact opposite of its original purpose. Such interpretation would be clearly incompatible with the already mentioned fundamental principles, and should be completely dismissed.

3.3. AN ALTERNATIVE SOLUTION: RECOGNIZING THE EXISTENCE OF A NORMATIVE GAP, TO BE INTEGRATED BY ANALOGY

The Law has the intention of regulating all relevant social situations, even where no specific norm exists. For that purpose, methods of integration of the legal system are established, such as analogy, resort to custom, and the general principles of Law. This argument is uncontroversial and does not require additional comments.

Based on this, it was sustained that even if the STF understood it to be impossible to directly apply the aforementioned fundamental principles to regulate same-sex relationships, the undeniable fact is that there is an actual situation that requires legal treatment. As mentioned, the existence of a homosexual orientation, which is unarguably licit, produces as unavoidable consequence the emergence of same-sex affectionate unions, which are, therefore, equally licit. Within these unions, or at least throughout their duration, existential and patrimonial relationships are established, with repercussions to the parties involved and to third parties. It would be at least anachronistic to pretend that this situation does not exist, keeping same-sex partners and individuals who establish relationships with them in a real legal limbo.

The application of integration methods to the case is then natural and intuitive. Conventional knowledge shows that analogy consists in the application of a legal norm conceived for a given situation to a similar one, not envisioned by the legislator. For the use of analogy to be appropriate, it is necessary that the two situations present the same essential elements, which would warrant a given legal treatment. It is exactly what the hypothesis under discussion is.

In fact, the essential elements of common law unions are identified by the Civil Code itself, and are present both in heterosexual and homosexual unions: lasting and peaceful cohabitation, moved by the intention to constitute a family entity. As well know, the contemporary doctrine and case law note that the family should serve as a suitable environment for the development of its members, having as characteristic traits the communion of life and mutual assistance between the parties, in both emotional and practical terms.

Well then, it seems impossible to deny the presence of such elements in same-sex unions without incurring in prejudice against homosexual individuals. It would be similar to affirming that such individuals are incapable of establishing bonds of affection and trust. It would be similar to affirming, in short, that they are incapable of feelings of love and partnership. No argument of public reason could endorse statements like these.

For all these reasons, it would be natural to extend the legal regime of common law unions, established by article 1723 of the Civil Code to same-sex unions. It should be noted that this is not only a matter of interpretation of legislation, but of interpretation of the infra-constitutional legislation according to the constitutional principles, an activity the STF has carried out in several opportunities. It should also be registered that such solution has already been adopted in several judicial decisions. As an example, see the following excerpt by the Federal Regional Court (TRF) of the 4th Region:

> *The exclusion from social security benefits based on sexual orientation, besides being discriminatory, withdraws from the state protection individuals who, in light of a constitutional imperative, should be embraced. To debate the possibility of disrespecting or causing damage to someone based on their sexual orientation would be equivalent to give an undignified treatment to a human being. It is simply not possible to ignore the personal condition of the individual, which legitimately composes their personal identity (in which, without question, the sexual orientation is included), as if this aspect had no relation with human dignity. The notions of marriage and love have been changing throughout Western History, assuming plural and multifaceted notions and shapes of manifestation and institutionalization, which in a movement of permanent transformation place men and women before different possibilities of realizing their affectionate and sexual exchanges. The acceptance of same-sex unions is a world phenomenon – in some countries more implicitly – with the broadening of the understanding of the concept of family within the already existing rules; and in others more explicitly, with changes to the legal system in order to legally encompass affectionate unions between same-sex partners. The Judicial Branch cannot ignore the social transformations which, for its own nature, often anticipate legislative changes. Once recognized, based on an interpretation of the guiding principles of the national Constitution, the possibility of accepting same-sex unions within the concept of family entity and rebuking any actuarial constraints, the treatment of the Social Security Office towards same-sex couples should be equivalent to that of heterosexual common law unions, requiring from the former the same conditions required from the latter in order to prove the affectionate links and presumed economic dependence between the couple (art. 16, I, of Law n.º 8.213/91), when processing requests for death insurance and reclusion aid*[29].

4. THE REQUESTS THAT WERE MADE

Based on the arguments previously exposed, the ADPF that was filed presented a precautionary request for an injunction, a main request and a subsidiary one, which are described below.

4.1. PRECAUTIONARY REQUEST

When filing the request for preliminary injunction, it was argued that the presence of the *fumus boni iuris* – i.e., of sound legal basis – was demonstrated throughout the explanation. The *periculum in mora*, on the other hand, it was sustained, was manifested in (i) the risks for the Governor and the Public Administration, who are daily subject to making decisions which could give reason to lawsuits and, more than that, criminal procedures and (ii) the denial of fundamental rights to partners in same-sex legal relationships, who are subject to the *res judicata* of their correspondent lawsuits. For these reasons, the Court was asked to give a preliminary injunction to declare as valid any administrative decisions that provide equal treatment between same-sex unions and common law unions, and to halt the progress of lawsuits and cease the effects of legal decisions denying such rights.

4.2. MAIN REQUEST

The main request asked the Court to declare that the legal regime of the common law unions should also apply to same-sex relationships, either as a direct consequence of the fundamental principles underlined herein – equality, liberty, dignity and legal certainty –, or by analogous application of article 1723 of the Civil Code, interpreted according to the Constitution. As a consequence, the Court was requested: (i) to interpret the above cited state law – article 19, II and V, and article 33 of Decree-law 220/1975 – according to the Constitution, guaranteeing the benefits established in it to partners in common law same-sex unions; (ii) to declare that any legal decisions which deny the mentioned legal equivalence are in violation of the fundamental principles.

4.3. SUBSIDIARY REQUEST

Finally, subsidiarily and as an alternative in case the Court understood that the ADPF could not be accepted in the hypothesis, the proponent requested that the lawsuit be accepted as a direct action of unconstitutionality, considering that its main purpose is the constitutional interpretation of (i) articles 19, II and V, and 33 of Decree-law 220/1975 (Statute of Public Civil Servants of the State of Rio de Janeiro), as well as (ii) article 1273 of the Civil Code, in order to determine that these provisions were not to be interpreted so as to prevent the application of the legal regime of the common law unions to same-sex unions, guarantying its extensive application, otherwise at the risk of unconstitutionality.

With respect to the norms regulating the pre-constitutional state law, it was emphasized that the prevailing logic of the Court, reinforced in ADI 2, is that a law prior to the Constitution that is incompatible with it, was therefore revoked. Consequently, it would not be possible to admit its impugnation through a direct action of unconstitutionality, of which final purpose is the withdrawal of the norm from the system. If the norm

already lacks any effects, it would not make sense to declare its unconstitutionality. This line of thinking, however, is not valid when the request is for interpretation according to the Constitution. What happens is that, in this case, it is not asked that the norm be withdrawn from the legal system and it is not sustained that the law is unconstitutional from an abstract perspective. The norm remains valid, with whichever interpretation is given by the Court.

5. RESULTS[30]

On May 4th and 5th of 2011, ADPF 132 and ADI 142 were jointly judged before a courtroom full of advocates for the cause. To everyone's somewhat surprise an unpredicted unanimity was formed. It is certain that the body language displayed by one vote or another – about three, I would say – were showing some degree of discomfort, if not opposition. Well, but this stays off the minutes. In the entry of judgment, written with the usual care and sensitivity, Minister Carlos Ayres registered:

> *PROHIBITION OF DISCRIMINATION AGAINST INDIVIDUALS ON THE BASIS OF SEX, BE IT IN TERMS OF THE DICOTOMY MAN/WOMAN (GENDER) OR IN TERMS OF THE SEXUAL ORIENTATION OF ANY OF THE TWO. THE PROHIBITION OF PREJUDICE AS A CHAPTER OF FRATERNAL CONSTITUTIONALISM. CELEBRATION OF PLURALISM AS A SOCIAL, POLITICAL AND CULTURAL VALUE. FREEDOM TO EXERCISE ONE'S SEXUALITY UNDER THE CATEGORY OF FUNDAMENTAL RIGHTS OF THE INDIVIDUAL, EXPRESSION THAT MANIFESTS THE AUTONOMY OF THE WILL. RIGHT TO INTIMACY AND PRIVATE LIFE. ENTRENCHMENT CLAUSE. The sex of an individual, unless otherwise determined by implicit or express constitutional provision, is not sufficient as a factor of legal nonequivalence. Prohibition of prejudice, in light of item IV of article 3 of the Federal Constitution, as it directly contradicts the constitutional objective of "promoting the well-being of all". (...) Recognition of the right to sexual preferences as a direct manifestation of the principle of "human dignity": right to self-esteem on the most important aspects of an individual's consciousness. Right to the pursuit of happiness. Normative leap from the prohibition of prejudice to the proclamation of the right to sexual freedom. The concrete exercise of sexuality is part of the autonomy of the will of natural persons. Empirical exercise of sexuality in the domains of intimacy and privacy are constitutionally protected. Autonomy of the will. Entrenchment clause.*

As a consequence of these premises, the vote was concluded in the following terms, granting the request made by the proponent:

> *On the merits, I judge both actions under evaluation to be appropriate. For that reason I provide the interpretation of article 1723 of*

> *the Civil Code according to the Constitution to exclude any meaning that could prevent the recognition of long lasting, public and continuous unions of same-sex partners as a "family entity", understood as a perfect synonym of "family"; recognition which should be made following the same rules and the same consequences of heterosexual common law unions.*

6. WHAT NO ONE CAME TO KNOW

Shortly after the lawsuit was filed, a request to abandon its proceeding was presented. The request did not come from the General-Prosecutor of the State, let alone me. And, most certainly, it was not formulated by someone from the field, since the Federal Supreme Court case law is clear that, at that point, abandonment is not possible in objective actions. Once filed, the proponent cannot decide on its continuity or not, as it is treated as a matter of public interest. The surprising fact is that the request had been made on behalf of the Governor, with undue and unauthorized use of his password for online petitioning! It was never investigated who committed this audacity.

As the Rapporteur, Minister Carlos Ayres Britto, vehemently read his vote, full of images and symbols, Toni Reis, President of the Brazilian Association of Lesbians, Gays, Bisexuals, Transvestites and Transsexuals (ABGLT), who was sitting beside me, commented with excitement: "Wow, this guy really knows this stuff".

>> ENDNOTES

[1] See Barroso, 2007:5-167.

[2] Federal Constitution (CF), art. 103: "The direct action of unconstitutionality may be brought by: I – the President of the Republic; II – the Board of the Federal Senate; III – the Board of the House of Representatives; IV – the Board of the State Legislative Assembly; V – State Governors; VI – the General-Prosecutor of Brazil; VII – the Federal Council of the Brazilian Bar Association; VIII – political parties represented in the National Congress; IV – labor union confederations or class entities of national relevance."

[3] Specifically regarding social security rights, the matter was regulated by state law 5034/2007.

[4] Previous to the promulgation of this law, the understanding of the Federal Supreme Court was against the self applicability of this measure. See STF, Full Court, AgRg in Pet. 1.140/TO, decision on 31/05/1996, DJ 02/05/1996.

[5] In this sense, as an example, see STF, Full Court, MS 22.357/DF, decision on 27/05/2004, DJ 05/11/2004. "The passing of more than ten years from the granting of the injunction. 5. Obligation to observe the principle of legal certainty as a sub-principle of the rule of law. Need of stability of situations originated from administrative decisions. 6. Principle of reliability as an element of the principle of legal certainty. Presence of a legal ethics component and its application to legal relationships of the public law".

[6] TJRJ, 3rd Câmara Cível, 2006.001.5967-7, decision on 28/07/2007 DJERJ 28/09/2007.

[7] TJRJ, 9th Câmara Cível, AC 2005.001.2803-3, decision on 09/03/2006 DJERJ 29/03/2006. In the same lines, see TJRJ, 17ª Câmara Cível, AC 2007.001.44569, decision on 28/11/2007 DJERJ 19/12/2007.

[8] See, e.g., STF, Full Court, ADPF 17, decision on 13/06/2002, DJ 07/03/2003.

[9] STF, Full Court, ADPF 33, decision on 07/12/2005, DJe 16/12/2005.

[10] CF, art. 5º, XLII: "the practice of racism is a crime without the possibility of bail and not subject to statute of limitations, subject to imprisonment according to the terms of the law".

[11] CF, art. 5º, I: "men and women are equal in rights and obligations, according to the terms of this Constitution".

[12] See Silva, 2005:48.

[13] The case law of the STF provides the following example: "(...) I. – The appellant, for not being a French citizen, although working for a French company in Brazil, was not subject to the Company's Personnel Statute, which provides benefits to employees and whose applicability is restricted to employees of French nationality. Offence to the principle of equality: C.F., 1967, art. 153, § 1º; C.F., 1988, art. 5º, caput. II. – The discrimination based on attribute, quality, internal or external characteristic of the individual, such as sex, race, nationality, religious belief, etc. is unconstitutional (...)". (STF, Full Court, RE 161243/DF, decision on 07/10/2009, DJ 17/12/1999). For the legal doctrine on the private efficacy of the fundamental rights, see Sarmento, 2004.

[14] On the so-called duty to protect, see Gonet Branco/Mártires Coelho/Mendes, 2007:257: "Another important consequence of the objective dimension of fundamental rights is impose the duty to protect by the State against breaches of the Public Branches themselves, originating from individuals or other States".

[15] Barroso, 2006:161.

[16] It is the case, for example, of the argument that same-sex unions should not be recognized for the impossibility of procreation. For long time now it has been uncontroversially understood that the central element of common law unions and the concept of family itself are the affection and the purpose of living together with mutual respect and support. Coherently interpreted, the argument based on the impossibility of procreation should also deny recognition to unions formed by sterile couples or even to those who simple do not want to have children.

Strictly speaking, it should even deny the status of family to single-parent families. This goes against the entire theoretical development experienced by family law with the influx of the Constitution of 1988, characterized by the prevalence of affection in detriment of rigid hierarchical structures aimed solely at the reproduction of traditional patterns.

[17] This is the case of traditional stigmas such as the ideas that homosexuals would, by nature, be promiscuous or unworthy of trust.

[18] In this domain, it is relevant to mention the arguments of disrespect to a certain "normal" standard of morality or towards Christian values. The legal order counts on norms and instruments to prevent prejudicial behavior against third parties. Exiting this field, it is necessary to recognize that the establishment of moral standards has already justified, through the course of History, several forms of social and political exclusion, using the discourses of medicine, religion or the direct repression by the power. As for Christian values, this discussion is certainly relevant within the internal domain of religious confessions, which are free to peacefully manifest their beliefs and convictions. It is not, however, an argument capable of justifying discriminatory practices by a laic State.

[19] It should be noted that for an individual of homosexual orientation, the choice is not between establishing relationships with people of the same sex or the opposite sex, but between abstaining from their sexual orientation or living it secretly. People should have individual freedoms that cannot be curtailed by the majority, by the imposition of their own morality. On this subject, see Barroso, 2006:161.

[20] Sarmento, 2004:241: "With respect to existential freedoms, such as privacy, freedom of communication and expression, freedom of religion, freedom of association and freedom of profession, among many others, there is a strengthened constitutional protection, because from the Constitution's prism these rights are indispensable to ahuman life with dignity. These freedoms are not simple instruments of promotion of collective goals, as valuable as they are".

[21] Nino, 2005:205: "The opposite conception of the principle of autonomy, as presented in this section, is usually called 'perfectionism'. This conception supports that what is good for one individual and what satisfies their interests does not depend on their own wishes or choices on how to live their lives, and that the State can, through a number of means, give preference to interests and lifestyles which are objectively better." (non-literal translation)

[22] Nino, 2005:205:"The modern totalitarian State, which intervenes in all aspects of life and which can be exemplified by the Stalinist Russia or the Nazi Germany, claims to realize its political, economical and social ideas even in the private domain (...). In the modern totalitarian State, there is an attempt to subject to the objectives of the State and put at its service not only the economy, the labor market and professional activities, but also the social life, the free time, the family, all beliefs and all culture and customs of the people".

[23] Harmatiuk Matos, 2004:148: "The existing dignity in same-sex unions has to be recognized. The contents encompassed by the value attributed to human beings show that everyone is capable of freely expressing their personality, according to their intimate desires. Sexuality is within the realm of subjectivity, representing a fundamental perspective of the free development of personality; and sharing the daily aspects of life in long lasting and stable partnerships seems to be a primordial aspect of the human experience".

[24] This is, as it is well known, one of the maxims of the Kantian categorical imperative, ethical propositions which go beyond utilitarianism. See Kant, 1951; Honderich, 1995:589; Lobo Torres, 2005; Terra, 2005.

[25] Taylor, 2000; Lima Lopes, 2003.

[26] CC, art. 1725: "In common law unions, except where there is a written contract between the parties affirming otherwise, partial community property regime applies with respect to their estate".

[27] On this subjecte, see Borghi, 2003:60 e Veloso, 1997:86-7. It is worth noting that the authors deal with heterosexual common law unions. However, once same-sex unions are recognized, the same logic would apply.

[28] CF, art. 226, §3°: "For the purpose of the State's protection, the common law union between a man and a woman is recognized as a family entity, and the law should facilitate its conversion into marriage".

[29] TRF4, 6ª T, AC 2000.71.00.009347-0, decision on 27/07/05, DJ 07/10/05.

[30] The oral arguments provided in the occasion are available at: <http://www.youtube.com/watch?v=ECIWP1c9-Vg>.

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THE RECOGNITION OF STABLE CIVIL UNIONS BETWEEN SAME SEX PARTNERS AS A FUNDAMENTAL RIGHT BY CONSTITUTIONAL JUSTICE

// RECONHECIMENTO DA UNIÃO ESTÁVEL HOMOAFETIVA COMO DIREITO FUNDAMENTAL PELA JUSTIÇA CONSTITUCIONAL

Leonardo Martins

>> ABSTRACT // RESUMO

In its ruling concerning the interpretation of the institution of family law established by the constituent from 1988 (article 226, § 3 of the Brazilian Constitution) and reiterated practically *ipsis litteris* by the civil legislator from 2002, the Federal Supreme Court (STF) intended to present a political and legal mark in favor of a (fair) political claim. With its strategic attempt to give a systematic interpretation for this specific constitutional provision, aiming to make the special constitutional protection to heterosexual unions go beyond its restrictive meaning to also encompass homosexual unions, the STF did not reach its goal, especially not from the juridical and constitutional point of view and probably also not from the political point of view, as evidenced by the comments developed in this article. Especially embarrassing is the lack of comprehension or the misunderstanding by the Court about the reach of fundamental rights, which must serve as its decision-making parameter and, especially, the distinction between fundamental rights of freedom and equality, on one hand, and institutional guarantees, on the other, as in the case of the institution of stable civil unions. In addition, as it has been happening lately in the STF's jurisprudence, the use of the legal-dogmatic figures with Germanic origin known as "interpretation according to the Constitution" remains skittish. It has also been recurrent some rhetorical excesses, with barely disguised supposed erudition and mastery of German constitutional law. This article reveals the theoretical, legal, dogmatic and methodologically rigorous approach given by the Federal Constitutional Court of Germany to a very similar case, compared to which the dogmatic and political deficiencies and inconveniences in the STF's ruling here in question become clear. It is not about being pro or against the judicial activism of the STF under politically controversial issues, but requiring some accuracy, at least legal-dogmatic and methodologically speaking. The Federal Supreme Court also - and specially - has this burden. // Em sua decisão a respeito da interpretação do instituto de direito de família criado pelo constituinte de 1988 (art. 226, §3°, da Constituição Federal) e reiterado, praticamente *ipsis litteris*, pelo legislador civil de 2002, o Supremo Tribunal Federal (STF) pretendeu apresentar um marco político e jurídico em prol de uma (justa) reivindicação política. Com sua estratégica tentativa de interpretação sistemática do dispositivo constitucional específico, visando a fazer com que a especial proteção constitucional às uniões heterossexuais escapasse do seu teor restritivo para abarcar também as uniões homossexuais, o STF não logrou alcançar seu objetivo; especialmente não do ponto de vista jurídico-constitucional e, provavelmente, também não do ponto de vista político, como demonstram os comentários desenvolvidos no artigo. Sobretudo, causa constrangedor espanto a falta de ou a má compreensão pela Corte do alcance dos direitos fundamentais que devem servir como seu parâmetro decisório, e, principalmente, da distinção entre direitos fundamentais de liberdade e igualdade, de um lado, e garantias institucionais, como é o caso do instituto da união estável, de outro. No mais, como tem ocorrido frequentemente na jurisprudência do

STF, o uso da figura jurídico-dogmática, de origem germânica, da "interpretação conforme a Constituição" continua sendo leviano. Também foram recorrentes alguns exageros retóricos, mal disfarçados com suposta erudição e domínio do direito constitucional alemão. O presente artigo descortina a apreciação teórica, jurídico-dogmática e metodologicamente rigorosa de problema muito semelhante pelo Tribunal Constitucional Federal alemão, com base na qual as deficiências dogmáticas e inconveniências políticas apontadas na decisão em pauta restam claras. Não se trata de ser pró ou contra o ativismo judicial do STF no âmbito de questões politicamente controvertidas, mas de se exigir certo rigor, pelo menos jurídico-dogmático e metodológico. Também e precipuamente o STF tem esse ônus.

>> KEYWORDS // PALAVRAS-CHAVE

Constitutional protection of the stable civil union; stable civil union between same-sex couples; institutional guarantees as a category of fundamental rights; interpretation according to the constitution. // Proteção constitucional da união estável; união de pessoas do mesmo sexo; garantias institucionais como categoria de direito fundamental; interpretação conforme a Constituição.

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>> ACKNOWLEDGEMENTS // AGRADECIMENTOS

This article represents the partial result of the research carried out at the Humboldt University, Berlin, between December, 2011, and February, 2012. This research could only succeed thanks to the support of the *Alumni* Program of the *Alexander-von-Humboldt-Stiftung* (AvH), to which I express my gratitude. // O artigo representa um resultado parcial de pesquisa realizada na Humboldt University, Berlin, entre dezembro de 2011 e fevereiro de 2012. Tal pesquisa só foi possível graças ao fomento do Programa para *Alumni da Alexander-von-Humboldt-Stiftung* (AvH). À AvH, meus mais distintos agradecimentos.

1. INTRODUCTION[1]

Wrapped in constant and seemingly endless scandals, the largest political body of the Brazilian state and society, the National Congress with its two houses, is increasingly giving political space to the Brazilian Supreme Federal Court (STF), which, as the guardian of the constitution, also has to apply it as a court of last resort. The STF's decisions have the known binding and *erga omnes* effects when handed down in abstract normative control.

There is not on the political and institutional horizon a reversal of this trend. STF, acting as the newest protagonist of the Brazilian political scene, supplies legislative loopholes and corrects unconstitutional judgments. But, moreover, STF often goes beyond its constitutional powers and even works, in some cases, as a new constituent power - especially when it simply ignores some legal-hermeneutical canons and applies formulas that are momentarily convenient for the court, like the assertion of constitutional mutation[2].

This STF's activism (for the most critical: decisionism) has served to elicit relevant sociopolitical debates, which should have been hatched priorly before the instances of representative democracy and its complementary deliberation. This is the case of the ruling that is going to be briefly discussed here.

In the face of such diagnosis it is the duty of the legal and scientific community to critically check the development of the Brazilian Supreme Federal Court's jurisprudence, especially when dealing with the concretization of fundamental rights. They must do so with all severity, autonomy, and without political concessions, which are, *par excellence*, totally foreign to the social science subsystem. This, of course, with all due respect that the court and its members individually deserve.

2. CASE SYNOPSIS

In an action of abstract constitutional control (Direct Unconstitutionality Action), it was requested that the Article 1.723 of the Brazilian Civil Code was interpreted according to the Constitution, so that the effects of the so-called stable civil union were extended to gay couples[3]. It was sought to establish a broad interpretation of the phrase "between a man and a woman" existent in the article in question, despite its explicit exclusionary character, so that not only heterosexual couples could have their union recognized by the state[4].

In a previously proposed action (ADPF 132[5]) which was judged alongside with the one now being commented (ADI 4277[6]), the extension of pension benefits granted to homosexual partners was sought, through the Statute of Public Servants of the State of Rio de Janeiro (Articles 1 and 2 of the State Law 5.034/2007), for other social spheres and states[7], giving homosexual partners the same legal status as those other public servants who are in heterosexual stable civil unions. Notwithstanding

the questions listed below, concerning the legal legitimacy of creating a civil institution by a court un-backed by legal or constitutional dispositions, is already questionable if, to grant the requests made in the first legal actions over the matter (they in fact represent one of the two reasons given by the Governor of Rio de Janeiro in ADPF 132[8], it would be necessary an abstract extension of the effects foreseen by the constituents for the stable union between man and woman to homosexual couples[9] . This question will be left open for future research [10].

3. THE REASONING BEHIND THE COURT'S OPINION

3.1 PRELIMINARILY: THE LACK OF A COLLEGIATE OPINION

Checking the reasoning behind STF's decisions is not an easy task mainly because of the absence of a collegiate writing[11]. Often, not even the headnotes are instructive, because through them it is not always possible to form a system with all the opinions or legal grounds produced in the votes of the members of the court who participated in the case. Unanimous judgment of the collegiate court that show the operative part of the decision are, with the same uncomfortable frequency, based on varied reasoning that sometimes even are mutually contradictory[12].

Nevertheless, references to the "reasoning behind the ruling" here take into account the arguments produced specifically in the rapporteur's vote. It is possible to assume that this is the member of the court who more intensively analyses the legal and constitutional issues raised by the case. Besides this plausible assumption, this prominence of the rapporteur's vote finds reason in the Internal Rules of the Court (Article 93 of RISTF).

3.2 DECISION, EFFECTS AND SYNOPSIS OF THE RAPPORTEUR'S OPINION

ADPF 132 was received, by unanimous decision, as ADI 4277. On the merits, which has known *erga omnes* and binding effects, also by unanimous decision, it was upheld[13]. In summary, according to the decision, all the effects of stable civil unions between heterosexual couples were extended to homosexual couples, because the last would also configure a "family entity" in the sense of the Article 226, § 3, of the Brazilian Constitution. Among the rights arising, would be the "right of adoption," under the Article 227, § 5, of the Brazilian Constitution.

Regarding the main motives that led him to this conclusion, the rapporteur listed several constitutional provisions that were violated by a literal interpretation of the Article 1723 of the Brazilian Civil Code and of the Article 223, § 3 of the Brazilian Constitution itself, such as human dignity (Article 1, III); political pluralism (Article 1, V) - which he understands as socio-political-cultural - forbidden discrimination based on sexual orientation (Article 3, IV); equality - which he coins as

"civil-moral" (Article 5, heading); legality (Article 5, II); intimacy and privacy (Article 5, X)[14].

4. CRITICAL READING

4.1 APORIA E OMISSIONS

The rapporteur's vote did not face the object of the constitutional evaluation from the specific constitutional parameter applicable to the case, namely Article 226, § 3 of the Brazilian Constitution. Firstly, the argument about non prohibited conduct does not have the power to establish a new interpretation for the exhaustive content of the before mentioned constitutional article and its section. Not being prohibited merely implies that the behavior cannot be sanctioned and not that the state should ensure to that same conduct special protection of institutional nature. At this point, it ignores the function and precise scope of the principle of legality, as a subsidiary negative fundamental right - or a fundamental right of defense as commonly translated by Brazilian doctrine from the Germanic concept of *Abwehrrecht* - against state intervention[15].

Also in relation to converting the stable civil union into marriage as seen in the Article 226, §3, in fine, of the Brazilian Constitution, the legal position is that of recognizing the existence of free discretion in law making including not only the general conversion of stable civil union into marriage but also the legislative possibility to extend the institution in a way to include gay couples. The designers of the Constitution fixed both formal and material parameters necessary to give legitimacy to the exercise of the three classics state functions, beginning with the legislative. Given the supremacy of constitutional norms, the invoked argument of legality becomes strange, since the Constitution is not the locus of the legal prohibition of private conducts[16].

From this legal-dogmatic misconception around the constitutional principle of legality, it has been said that a legal uncertainty may arise and open space to new (and undue) provocations to STF. That is because it was derived from the principle of legality, which refrains state measures potentially harmful to the fundamental rights (*status negativus*), a positive effect (*status positivus*) that it does not have. Having the parameter of constitutional legality been incorrectly used and interpreted, a subsequent legal consequence of a failure to verify legislative measure using this parameter has no way to be upheld. So far, there is no verifiable legislative omission from a constitutional parameter.

There is also no way to verify a mismatch between the object of examination, the article 1723 of the Brazilian Civil Code, and the only applicable constitutional parameter, which is the article 226, §3 of the Brazilian Constitution, since the first virtually reproduces the content of the last[17]. This absence of incompatibility raised the most radical *aporia* of the ruling. However, the constitutional provision under discussion does not prohibit the ordinary legislator from using their democratic legitimacy

and discretion and extend the institution of stable civil union to homosexual couples. Only in the face of the legislator it does makes sense to talk about the absence of prohibition, as will be seen below in the reconstruction proposal under the light of comparative law.

It is also not the case to prohibit *de facto* unions between homosexuals or to sanction any conduct relevant to their sexual autonomy, but it is a matter regarding the legal institutionalization through the creation of a private-legal institute. The civil legislature may at any time change the content of art. 1723 of the Civil Code, removing the expression "between a man and a woman."

Nevertheless, given the purpose of avoiding possible parliamentary revocation or exemptions, it is necessary the expression of constituent power shown through a constitutional amendment in such a way to also remove from the text of art. 226, §3 of the Brazilian Constitution that restrictive expression. Such amendment would change the constitutional parameter and have the effect of raising unconstitutionality by omission in light of the new order of protection aimed at the legislator and unequal treatment in the face of the article 5, *caput* of the Brazilian Constitution[18].

Also, the "interpretation according to the Constitution" - an operative decision-making technique for mitigating the effects of *res judicata* created by the German Constitutional Law and abused repeatedly in the jurisprudence of the Brazilian Supreme Federal Court[19] - requires broad discussion among the various possible interpretations and the court must choose one that is the most compatible with the applicable constitutional parameters.

The debate between the possible interpretations according to the Constitution was not made in this case - it virtually never occurs in other cases in which the necessity of such interpretation is alleged, in the votes of all members of the Court who participated in the trial. There was therefore a misuse of this technique that allows modulating effects of *res judicata*, which in German Constitutional Law, from which it derives, has the function of preserving the law from a declaration of nullity. In Brazilian constitutional jurisprudence, the use of this technique has been serving to the usurpation of legislative powers by the Supreme Federal Court[20].

Other constitutional parameters brought in the rapporteur's vote as well as in the votes of other Ministers are either not relevant nor applicable in the case at hand. They should not have argued, for example, about gender equality violation because female and male gay couples are treated equally by the law[21] or about possible violation of general equality because the configuration of the ordinary family law reflects the sociopolitical evolution of a legal institution, subject to public debate and the relative legislative discretion[22].

There is also no way to bring the fundamental right to special equality against specific kinds of discrimination as a constitutional parameter in this case (art. 5°, *caput* c.c. art. 3°, IV da CF). It is possible to arrive at this conclusion in three steps. First, comes the idea that from this systematic application of the Brazilian Constitution can derive not only the duties of state abstention (non-discrimination), as well as state duties of positive

discrimination. Second, the list of prohibited *discrimina* existent in art. 3, IV, of the Brazilian Constitution which, dialectically, can be used to legitimize positive discrimination ("affirmative action"), does not mention discrimination by "sexual orientation" and is not exhaustive ("[...] and any other forms of discrimination"), thus, the discrimination based on sexual orientation or sexuality as an element of autonomy relevant to the free development of personality is also prohibited. Third: there is no connexion, however, between the configuration of the institute of marriage and stable civil unions perpetrated by the legislature in accordance with its traditional view of marriage and the discrimination on grounds of sexual orientation of individuals or social groups, because logically any homo or bisexual individual can marry, since they meet the conditions laid down for everyone[23]. The sexual orientation is irrelevant to marry. There isn't a *tertium comparationis* on this legal situation under which persons or groups of persons of heterosexual orientation and persons or groups of persons of other different sexual orientations could be subsumed into and therefore suffer from an unequal treatment hardly constitutionally justifiable. Very different is the case of the prohibition of marriage between people of different ethnic groups, social classes or religions[24].

4.2 LEGAL AND DOGMATIC CONTENT OF THE FUNDAMENTAL RIGHTS TO MARRY AND TO ENTER A CIVIL UNION INSERTED IN THE 226 ARTICLE OF BRAZILIAN CONSTITUTION IN THE LIGHT OF GERMAN COMPARATIVE LAW (ART. 6, I GG)

Unlike the German Constitution - whose art. 6, I GG states that "marriage and family are under the special protection of the state law" - the Brazilian one (art. 226, caput) only submitted the family, as "foundation of society", to a "special state protection." Marriage appears only in §1° and 2° of the before mentioned constitutional article in the Brazilian and the constituent has definied it only as civil and guaranteed its gratuity(§1) and the extent of the effects of civil marriages to religious ones in accordance with infra constitutional law (§2).

The difference is significant for two reasons: firstly, to the interpretation of marriage as an axiological decision of the original constituent power that is clearly present in the German Constitution system, but absent in the Brazilian one; secondly, to the recognition of the functional difference between marriage and family with similar effects in both systems and with great relevance to the case under discussion.

In both normative-constitutional systems, however, the similarities have prevalence. As marriage is "at once a social and legal construction"[25] and at the heart of its concept is the image of the civil (bourgeois) mundane marriage entrenched by legal forms, it has, as a fundamental right enforceable against all state agencies (including the holder of the legislative function), at least two of the three functions or dogmatic categories identified in German.

As a negative right (*Abwehrrecht*), it houses several individual capacities beginning with the choice to marry with whom and when, besides

the free configuration of married life without state intervention. As such, it resembles personal rights that act as subsidiary rights in relation to it. However, it is as an institutional guarantee and as an objective order that marriage binds the legislators in order to force them to give it legal form as a civil and family law institution. In order to do so, the legislators have a wide conformation discretion but are forbidden to simply not shape it or to do so in such a far way from the concept of marriage: the legislator must observe the structural principles derived from the constitutional concept of marriage.

The legislator shall, when configuring the institution, observe the structural principles derived from the constitutional concept of marriage. To these structural principles belong undoubtedly those listed by the Federal Constitutional Court of Germany and corroborated by specialized literature in the face of the legal and constitutional order of that country: because marriage is a communion in principle (but not without exceptions) for life, signed under state's participation, that binds a man and a woman with intent and promise of reciprocal solidarity, its conceptual attributes are: a) state participation b) principle of indissolubility intentioned and c) heterosexuality[26].

The third function or dogmatic, category, however, that is relevant to the fundamental right of marriage - assuming here the character of fundamental right of the article 226, §3 of the Brazilian constitution[27] and its axiological decision and derivative duty of special protection of marriage - is not present in the Brazilian constitutional system. This is corroborated by the previously mentioned Brazilian Constitution's article and section, which admits another kind of married life: the stable civil union between man and woman.

The result in a legal-dogmatic view is setting the legislator completely "free" to end the privilege of the life form inherent to the traditional marriage that, in an axiological neutral manner, especially when it comes to sexuality or sexual orientation, was submitted to special protection in the German law system to fulfill the reproductive function, while protecting the family has always fulfilled the function of socialization in order to foster community solidarity (*Einstandsgemeinschaften*), not necessarily intrinsically connected by blood ties.

That is the reason why there is an elementary legal-dogmatic misconception in the appellate decision as well as in the reasoning of the Minister's votes. They do not recognize that marriage or stable civil union are fundamental rights whose content are not, at least solitary, an individual or collective behavior. They are not exercised and exhausted in conducts of the holder of the right ("natural" freedom) all as strictly fundamental as others rights of freedom. It is, rather, a normative fundamental right. More precisely speaking, the area of protection of such fundamental rights (marriage, inheritance, property, etc.) is coined normatively (*normgeprägterSchutzbereich*)[28].

Thus, even if the stable civil union is a social fact, as the tenure inserted in the legal protection of the fundamental right to property, its legal protection is marked by a legal civil institution, i.e., coined by juridical

norms. It is not, therefore - at least as an institutional guarantee - a right to liberty whose purpose is to oblige all State bodies and its traditional functions to refrain from intervening actions not justified by constitutional limits, with the performance of the principles of legality and, in theoretical and constitutional perspective, distributive justice[29].

When the Brazilian Supreme Federal Court's appellate decision brought the parameter of the fundamental right of equality, it did not show its relevance or suitability as an applicable parameter to the juridical-constitutional situation nor held a genuine examination of normative constitutionality. Besides the absence of a essential *tertium comparationis* for applying the fundamental right to general equality as constitutionality test's parameter, there is a general absence of unequal treatment on the basis of gender, the prohibition of discrimination "of any kind" present in the art. 3, IV, of the Brazilian Constitution does not guarantee the desired equivalence. This common genus (*tertiumcomparationis*) under which different forms of life can be compared could only be the marital status that is rightly stated by the standards of the institutions of marriage and stable civil union between man and woman, both backed constitutionally.

As a special rule prohibiting discrimination, it only prohibits discrimination against married and partners in a stable civil union, especially in regard to singles[30], assuming therefore legal situations already institutionalized by the ordinary legislator. So that, materially, the intended equating is solely relevant to the legislators that configure the institution on laws under the constitution in a fashion that is guided by tradition and evolution of this same civil institution which, par excellence, answers the historical transformation of social values bypassing the problem of negative discrimination or even positive discrimination for the purposes of the "area of social life" (area of "regulation") pertinent to the dogmatic of the fundamental right to equality (art. 5, art caput cc. 3, IV of the Brazilian Constitution)[31].With regard to the fundamental rights of personality backed in the article 5, *caput* and the article 5, X of the Brazilian Constitution, especially in the most interesting sense for the present case, which is the one of self-determination that includes arguably sexual orientation and free choice by the composition of a family according to the self-understanding of the holders, attention must be given to the function of such fundamental rights specifically for the State duty they order.

As in German constitutional law (art. 2 I GG), it is also a duty of abstention that may have exceptions and additions given the opportunity to re-subjectification, which is recognized by the dogmatic study of the State's duty of protection in the face of risks to the freedoms of the individuals. The verification that this is a duty of abstention is a consequenceof the content and the systematic interpretation of constitutional devices brought to the agenda. The Brazilian constitutional framers defined the general freedom (article 5, caput) as a subsidiary fundamental right and some of its concretizations stated in the article 5.X as "inviolable", indicating that your recipients, i.e., state organs holding any of the three state functions, should refrain from intervening in the free exercise of these rights without constitutional justification.

A systematic interpretation involving both, the negative right to freedom and the fundamental right to marriage (stated in the article 226 of the Brazilian Constitution) also in its sense of a negative right (*Abwehrrecht*), can bring forward commandments of abstention or at least justified intervention. These commandments have, in practice, though occasionally, the power to produce effects very similar to the ones produced by heterosexual marriage and stable civil union, for example, the freedom to choose the partner, time to start a union, internal configuration (distribution of family roles), etc.

In its role as a negative right, marriage encompasses such capacities, as seen above, and it does not require the presence of intimate relations as a structural element– obviously it also does not matter if this kind of relation happens between persons of same or opposite sexes. This represents an impassable taboo to the state: any action to intervene in this subject would not be constitutional and therefore would represent a violation of the freedom here in comment[32].

Much less agreement deserves the lightly and abused statement around the relevance of a non-legislative setting for a legal institution necessary to the observance of the fundamental principle of Brazilian Federal Republic, the dignity of the human person, as it prescribed by the article 1.III of the Brazilian Constitution.

Besides the lack of legal method observed in this and others relevant macro-policy decisions, the systematic interpretation suggested by some members of the Court - according to which the specific and mandatory rule of the article 226, 3rd section of the Brazilian Constitution should not apply because of the alleged violation of the dignity and other constitutional principles – goes beyond the boundary of compliance with minimal standards of legal rationality.

Indeed, notoriously, it is impossible to solve alleged antinomies between a specific rule and many others generic pointed (as constitutional principles) that are at the same hierarchical level[33] with reference to the generic rule. There was a clear reversal of the doctrine *lex specialis legi generali derrogat*[34]. Moreover, were brought various constitutional provisions that were used as rhetorical figures to defend these political theories.

Therefore, in a legal-dogmatic manner, the Article 226, 3rd section of the Brazilian Constitution contains only one constitutional mandate which is intended, primarily, to the legislators (*Gesetzgebungsauftrag*)[35] obligating them to set, in juridical norms, a special protection to the heterosexual stable civil union, recognizing the historical social fact about the high number of heterosexual couples who constitute a family in absentia of marriage.

Moreover, with this political-constitutional choice, the original constituent power of the Brazilian Constitution, differently to what the original constituent power of the German Constitution did, relativized the constitutional protection of marriage itself. This involves recognizing that a legislative action for the establishment of the institution of stable civil homosexual union could not be questioned as to its constitutionality, much less the performance of the derived constituent that

had the intention of broadening the protective order of art. 226, 3 °, of the Brazilian Constitution extending it also to homosexual couples.

4.3. DE CONSTITUTIONE FERENDA ET DE LEGE FERENDA

The legal-dogmatic conclusions shown above can cause bewilderment. For the advocates of equating the effects of heterosexual stable civil unions to the homosexual ones, it does not matter what state political institution effectively defended their desideratum, if the Brazilian Supreme Federal Court or the Congress. So it is understandable the good repercussions that the ruling in comment has had among the supporters of the cause in question. However, the equalization, which is more than welcome, can only be imposed consistently in the legal point of view with the performance of the ordinary legislator, at least, and perhaps one day with the performance of the derived constituent power. When that happens, such equalization will not risk being handled by the free discretion of the legislative policy of Congress.

Beyond the legal and dogmatic problem, the way in which the equalization was obtained affects the consistency of the political system as revealed by the evolution of the German TCF's who constantly converses with the Federal Camera (Bundestag), despite their competence to repeal unconstitutional laws.

Before the decision here widely reported and whose structure was reproduced in the Annex - in the context of family law some fundamental rights are closely related to their interpretation and definition[36] - the German TCF was gradually judging unconstitutional standards from provocations due mainly to the patriarchal characteristic of the BGB and giving time for the legislature to promulgate rules according to the GG in the context of family law. The focus was on defining the standards of fundamental rights first with lower frequency of the Article 2.I, often also in combination the Article 2.I and the Article 1.I (free development of personality and order of observance and protection of human dignity), the Articles 3.I, 3.II and 3.III GG (general equality and equalities special - seal of discrimination) and finally with the Article 6 GG (protection of marriage, family, children's education etc.). This raised a palpable and consistent evolution of family law in this regard[37].

After a decision which ruled that the legislative creation of an institute know as "registered partnerships" for same-sex couples was compatible with the German Constitution, specially in regard to the parameter of the order of special protection of marriage and family (Article 6, I, GG), the Federal Constitutional Court of Germany remained being provoked to answer similar cases, mainly through the concrete control proposed by judges and courts instances (Art. 100 GG I), in order to assess the compatibility of provisions of the new law that created the institute but now, in the face of other parameters, like the special equality (ban discrimination) stated in the Article 3, III, the GG and the free development of personality plus the duty to respect and protect the dignity of the human person (art. 2 I cc art. 1 I GG).

The Federal Constitutional Court of Germany ruledas unconstitutional, for example, court decisions that interpreted in the context of social security some previdenciary[38]. The court was also mainly provoked through concrete constitutionality control proposed by judges and courts instanciais (art. 100, I GG) to assess the compatibility of specific articles from the law of public records for transsexuals (TSG)[39].

Several devices from TSG, even theoretically, implied in discrimination against transgender people and therefore they have been dismissed by the TCF in a consistent and dogmatically rigorous manner in at least four decisions (the last one was enacted in February 2013)[40]. Finally, on February 19th this year of 2013[41], the TCF judged, from reputable procedural provocations of concrete constitutional control[42] and constitutional complaint[43], articles from the law concerning registered partnerships between persons of the same sex (LPartG), namely section 9, VII, which was inserted in 2004. As a result, this section of the law was ruled as incompatible with the article 3, I of German Constitution (general equality). It was questioned in both procedures jointly examined if the inserted the section 9, VII, LPartG would be compatible with the German Constitution in respect to the extent of the prohibition to the registered partners of the legal possibility of one of the partners adopting the child that the other previously adopted (called "successive adoption" - *Sukzessivadoption*) because the section 1742 of the BGB (German Civil Code) states the possibility of successive adoption while the section 9, VII LPartG only allowed the adoption of the partner's biological child (adopting a stepson - *Stiefkindadoption*). Certainly, TCF judges dispensed, in this case, the label of "progressive" simply because they do not respond politically for their decisions unlike the members of the Congress.

When creating an institute parallel to the stable civil union between opposite-sex couples because of a particular social relevance, namely, the existence of many informal unions without proper marriage, especially among the poor population, the Brazilian original constituent power relativized the very importance of marriage. It is and still should be in the Brazilian Constitution an institute of private law only for the sole purpose of preventing its repeal by the civil legislator[44].

Nevertheless, keeping in mind the Brazilian *Realpolitik*, the assertion that it is up to the federal legislators to conform the institution of marriage, according to their discretion and based on democratic legitimacy, provokes understandable dissatisfaction, because the result is to recognize that the failure to set up a legal institution that meets the demands of a particular political milieu is not, in itself, discrimination, much less a violation of human dignity.

Political claim must be brought, however, to the parliament trough political parties and must be submitted to public and democratic debate. Trying to judicially forge a legal institution that satisfies the desideratum of a minority is not legally ordained, and also little indicated politically. If the legal-constitutional dogmatic does not serve the intended purpose of equalization, it could possibly start a rapidly search for a theoretic mission of the constitutional justice as a mean to uphold decisions

from the constitutional justice that are against the majority. And this, in its turn, could give rise to minority's interests and could guarantee the legitimacy of a Supreme Federal Court's decision, which sometimes sanctifies and sometimes demonizes the constitutional text.[45]

However, legal certainty for gay couples, mentioned in one of the vows, can be at least partially achieved by contracts and wills. Therefore, it is not necessary for those couples to dispense with the law that should regulate many details that are subject to parliamentary deliberation, properly accompanied by the public opinion and by the opinions of experts. Rather, it is the judicial decisionism that causes legal uncertainty.

There is no doubt that the constitution framers and ordinary legislator departed from the traditional concept of marriage with not only a Christian inspiration as a first step to starting a family ("increase and multiply"), but also with a Greek one (*oikos*)[46].

However, regardless the scope of the concepts of marriage or stable civil union, the concept of "family" even in the sense of the Article 226, caput, of the Brazilian Constitution (not only: "family entity" in the sense already given by its apparently weakened the section 3) can be interpreted to encompass all modern and alternative family forms, given its relevance in the perception of the fundamental rights of personality of any single or double or community solidarity (polygamy) especially concerning filiation and adoption.

Not that there is a fundamental right to adopt, not even for heterosexual couples that are married or living in a stable civil union. It is a matter concerning the child's interests (such as a limit to the negatives fundamental rights: freedom and equality in its broad sense). In this case. any prohibition or unequal treatment suffered by homosexual person or couple necessarily imply an unconstitutional violation of freedom and, more often, discrimination based on sexual orientation.

Surely, this is not enough for those appropriately seeking a broader equalization. This equalization can serve as a tool to combat discrimination and homophobia occurring in various social subsystems and expressed in the streets by cowardly attacks and may represent an optimistic prognosis, however, but still lacks a lot of empirical data. Such a prognosis is not relevant to the interpretation of the legal and constitutional parameters of freedom, equality and dignity of the human person so frivolously brought and interpreted by the Brazilian Supreme Federal Court.

In addition to that, extreme cases of homophobia linked to serious crimes consummated or attempted (murder, body injury, among others) do not fade the Brazilian Supreme Federal Court's ruling and perhaps even produce the opposite effect of awakening the "fighting spirit" to use an ideological euphemism dear to the extremist conservative right.

That the state fulfills its duty of protection in the face of attacks from individuals (here: Schutzpflichten) through a legislative policy, particularly criminal legislation-consistent is essential for the protection of the fundamental right of freedom.

As the euphemism "*salonfähig*" (socially acceptable) of "homoaffection" suggests, seems to be important satisfying an understandable

desideratum of the milieu, but not actually fighting violence against expressions of sexuality between persons of the same sex based on deeply rooted social prejudices.

In a tropical country and in times of exacerbated celebration of the sexuality, what is needed is a social environment in which people of the same sex can express *in public* and in the same way as heterosexual couples their sexuality without fear of being assaulted by any hypocritical on call who wants to see such sexuality restricted (because here anyway is a matter of "affect" and "affective") to four walls[47]. If laws alone can foster such an environment is a question that will be left open. But certainly by court decisions supposedly well intentioned it cannot be done.

Proclaiming as the reasoning of a judicial ruling things that look like "encrypted messages", such the unintelligibility of what is meant by them, as the one that states the existence of an "inseparable unity between the genital tract of the human person and herself" does not contribute, therefore, to what really matters to both the milieu and the community as a whole. Nothing makes up for the lack of civilized political debate. The desired consistency cannot be achieved by a court ruling, which seems more concerned to establish a supposed progressive institutional image than to legitimate their legal and constitutional mission.

ANEXX:

COMPARISON BETWEEN THE STRUCTURES OF THE RAPORTEUR'S VOTE IN ADI 4277 AND FEDERAL CONSTITUTIONAL COURT OF GERMANY'S DECISION ON THE CONSTITUTIONALITY OF LPARTG (OR LPARTDISKBG)

A juridical and constitutional decision well grounded on constitutional law in force today cannot do without a good structure, whose first elements are the constitutional parameters stated in specific constitutional provisions. Constitutional control presupposes clarity about the two standards that must be compared based on hierarchical criteria: the object(s) and the parameter(s). They are not mere references to implicit or explicit principles in the constitution, to the infamous "spirit" of the "democratic", "citizen oriented", "solidary" constitution or to any other adjective that would give a decision a rational-legal status and therefore, turn it into a correct decision.

The comparison between the structures of the rapporteur's vote in ADI 4277 and the equivalent Federal Constitutional Court of Germany's decision fully demonstrates the juridical-dogmatic shortcomings commonly found in the Brazilian Federal Supreme Court' decisions. The case decided by the German court was an abstract constitutional control submitted to the conservative minority comprising parliamentary Centre-Right party (CDU) against a law that created the institution of registered partnership for homosexual couples parallel to the institution of marriage for heterosexual couples in order to benefit those people who could not get married since there had been a denial of any constitutional mutation around the traditional scope of matrimonial union. The main parameter was the article 6, I of the German Constitution which states the special protection of marriage by the state that could be theoretically threatened by a rival institution like the novel registered partnership established by the ordinary legislator for homosexual couples.

I. THE STRUCTURE OF THE RAPORTEUR'S VOTE IN ADI 4277

The rapporteur's vote was structured in 37 sections, numbered as it usually is in the instruments used by the parts in juridical actions:

1. Sections 1 to 6 (or 15 to 19 when considering the first 14 sections of the report):
   - Procedural adequacy and thematic relevance: in the case: the procedural interest of acting from the Governor of the State of Rio de Janeiro is present according to the vote of the rapporteur.
   - Juridical possibility of what is being requested in the action? "Interpretation according to the constitution"of the articles being discussed.
   - Knowledge of the ADPF as an ADI after the following text: "In short, we are dealing with a kind of judicial dissent that reflects the

> historical fact that nothing bothers more people than the sexual preference of others when such preference does not correspond to the social norm of heterosexuality. It is the perennial attitude of a conservative reaction to the ones that in the unfathomable domains of affect loosen up the shackles of the ship called heart. "

2. Section 7 (20): "The requests asking that the article (article 1723 of the Brazilian Civil Code) be interpreted according to the Constitution deserve to be upheld. Homoaffective unions characterized by durability, not being hidden, continuity and longing for forming a family are supported by the Constitution.

3. Sections 8 and 9 (21 and 22): Analysis of the term "homoaffective"

4. Section 10 (23): "I now move to the proper constitutional view in the merits of the actions". References to the article 3, IV of the Brazilian Constitution and to others that also mention men and women.

5. Section 11 (24): "It is (...) a normative laboring at the site of most natural differentiation between the two types of the human species (...) although both modalities relate to the same animal kingdom, as opposed to vegetable and mineral kingdoms. "

6. Sections 12 to 16 (25-29): Differences between the sexes and the article 3, IV of the Brazilian Constitution. Interpreting the good of all and prohibition of prejudices. "There are an inseparable unit between the genital tract of the human person and the this same person" (Section 16).

7. Sections 17 to 20 (30-33): Function of law as a social control technique and "intentional silence" existent in the Brazilian Constitution in the face of the use of sex to erotic stimulation, carnal conjuction and biological reproduction corresponding to the general negative kelsenian rule according to which "everything that is not legally prohibited or required is legally permitted ", which corresponds to the article 5, II of the Brazilian Constitution. It is up to each person's free will the use of their sexual organs.

8. Section 21 (34): Sexual preference as "emanation of the principle of human dignity (article 1, III of the Brazilian Constitution)".

9. Sections 22 to 24 (35-37): The use of sexuality corresponds to the exercise of other fundamental freedoms like intimacy and privacy (article 5, x of the Brazilian constitution)

10. Section 25 (38): Summary.

11. Sections 26 to 30 (39-43): "... one wonders if the Brazilian constitution withholds from homoaffective couples (...) the same protective regime that from its text can be seen in favor of heteroaffective ones (...) ". Verbatim reproduction of the articles 226 and 227 of the Brazilian constitution. Interpretation of the article 226 of the Brazilian Constitution. "From all this prescriptive language structure (...), jump to the evidence that the most important part is the head of the article 226, alluding to the institution of family, because only to it (...) was awarded a special clause concerning state's protection". Facticity of the family concept. "Complex social institution in the subjective sense." Follows a kind of ode to the family as a place of realization of fundamental rights.

12. Sections 31 to 34 (44-47): Family as "true continent to all else". That is why "it must work as a guide to the articles into which the chapter VII unfolds, according to the transcription priory made". The "constitution does not make the slightest differentiation between the family formally built and the one that only exists in real world facts". Non-reductionist interpretation of the family concept. Protection of the family made by homosexual couples must be full and not "more or less". It is concluded with a mention to a verse attributed to the medium Chico Xavier: "otherwise we will be on risk of being just more or less like a person".

13. Sections 35 and 36 (48-49):

– From this "normative concept of family as society's base and as creditor of special state protection [let us move to] the interpretation of each one of the emblematic institutions that unfold from the article 226 of the Brazilian Constitution." (p. 42/49).
– The article 226, section 3 from the Brazilian Constitution "refers to the social-cultural-religious tradition of the western world of which the Brazil is part of". But: "civil marriage, in fact, is stated in the Brazilian Constitution without any mention to the nouns 'men' and 'women'.
– The original constituent wanted only to reinforce the fundamental equality between men and women in face of the brazilian patriarchalism.
– Several metaphors appear next and the phrase "do not use the letter of the constitution to kill its spirit."
– Identity between the concepts of "family entity" and "family." There is no "subfamily".
– Heterosexual couples do not have the right to not being legally equated to gay couples, "since their heteroaffection itself does not make them superior in anything."
– Family status is also given to single parents and their children. Adoption of minors should be extended to homoaffective couples, because even singles can adopt (reference to the articles 5 °, II; 3 ° and 5 °, § 1 from the Brazilian Constitution).

14. Section 37 (50): Conclusion: both actions were upheld to give the article 1723 of the Brazilian Civil Code an "interpretation according to the Constitution in order to delete from it *any meaning* that prevents the recognition of continuous, public and lasting union between persons of the same sex as 'family unit'. Recognition is to be done in the same manner and with the same consequences of stable heteroaffective civil union "(emphasis in italics by LM).

II. THE STRUCTURE OF FEDERAL CONSTITUTIONAL COURT OF GERMANY'S DECISION ON THE CONSTITUTIONALITY OF LPARTG(BVERFGE 105, 313)[48]

REASONS
A.
(FEATURE: DESCRIPTION OF THE FACTS AND PROCEDURE)
INTRODUCTION: DEFINITION OF THE PROPOSED ABSTRACT CONSTITUTIONAL CONTROL'S OBJECT: LPARTG (OR LPARTDISBG).[49]

I.

Purpose of the law: End discrimination faced by gay couples and opening the possibility of giving their partnerships legal protection and framework.

1. Presentation of sociological data and statistics (eg in year 2000, 47,000 gay couples were living in BRD) about the desire of having their unions recognized etc., with bibliographical sources from the sociological literature.
2. Description of proposals that were made in order to meet this sociopolitical demand since 1990 as a proposal of the Green Party - BTDrucks. 11/197[50] - and corresponding pressure from the European Parliament. Historical analysis (precedents) and genetics (protocols of parliamentary discussions in the legislative process of the law attacked).
3. Description and analysis of all provisions of the law enacted.

II.

Reproduction (in indirect speech) of the content of the arguments related to the abstract constitutional control proposed by the mentioned states.

1. The law would be unconstitutional even from a formal point of view.
   a) Thanks to the division of the original proposal in two, with the goal of making the law a law that does not require the approval of the Bundesrat, the new law would be fraught with insurmountable procedural defect.
   b) In addition the law supposedly contained extravagant rules pertaining to the derogation of the law that introduces the German Civil Code (BGB or EGBGB) and it should also go through the approval of the Bundesrat.
   c) Finally, other formal issues would make the law as a whole a kind of law that requires the consent of the Bundesrat (Zustimmungsbedürftiges Gesetz)
2. The law would also be unconstitutional from a material point of view:
   a)Incompatibility of the law with the constitutional protection of marriage and family as stated in the article 6, I of the German constitution because the law, when it created a parallel legal institution for homosexual unions, would not be respecting the state's duty of

detachment (Abstandsgebot) from the institutions of marriage and family derived from the institutional guarantee traditionally envisioned in the article 6, I of the German constitution.

b) The Article 6, I of the German constitution would also be violated because homosexual unions, because of the law's silence, do not stop marriage and thereby assuming a parallel union to marriage, although the mandatory obligations of the new law were incompatible with marriage.

c) The law would also be intervening in the family power of the partner without children with relevant patrimonial consequences to the fundamental right of inheritance stated in the article 14, I, GG. The Article 14 I GG would remain violated in the case of testamentary freedom curtailing the surviving partner. Also the article 3, I, GG (fundamental right to equality) would be violated because other civil unions (heterosexual ones) would lack such legal protection.

III.

The following were given the possibility to manifest their opinions in the case ("participants" and amici curiae): the Federal Chamber (Bundestag), the Federal Council (Bundesrat), the Federal Government (Bundesregierung), the (16) state governments (Landesregierungen), the Scientific Association for the Family Law, the Confederation of Lesbians and Gays in Germany, the German Confederation of Family and the Ecumenical Working Group (Collective) Church and Homosexuals.

1. The federal government considers the law compatible with the constitution.
   a) Formal exam: Exame of the division of the law to avoid the need to obtain the consent of the Bundesrat.
   b) Material exam: The law was compatible with the constitution (articles 2, I; 6, I; 3, I and 14, I from the German Constitution)
2.
   a) According to the view of the Federal Chamber, the propositions concerning the abstract constitutional control would lack foundation.
      aa) The arguments over the formal constitutionality are almost identical to the Federal Government's arguments.
      bb) Material exam of constitutionality.
   b) Participation of members of the Federal Chamber at the public audience: Renesse (SPD), Geis (CDU / CSU), Beck (Green Party) and Braun (FDP), but Geis (CDU / CSU) filed a dissenting opinion in relation to the opinion of the Federal Chamber.
3. Position of the Government of the Hamburg City-State: The propositions would lack foundation endorsing the reasoning of the Federal Government with small nuances.
4. Position of the Government of the State-Member Schleswig-Holstein: The propositions would lack foundation, mainly because

of a reproduction of marriage for similar situations could not be derived from the article 6, I of the German Constitution.

5. Position of the Confederation of Lesbians and Gays in Germany: The law would have been enacted, formally and materially speaking, in line with the German Constitution. Homosexual unions would have a constitutionally guaranteed right to legal support because of the Article 2, I and 3, I from the German Constitution. GG. The previous legal situation would be unconstitutional. The new legal institution, in its turn, would not have violated the article 6, I of the German Constitution. On the other hand, the understanding according to which the homosexual union would be dissolved if one partner did get married would be unacceptable.
6. The Ecumenical Working Group (Collective) Church and Homosexuals adhered to the legal reasoning of the Confederation of Lesbians and Gays in Germany, adding some sociological data as the fact that in some evangelical churches were already ministering the blessing of homosexual couples as an official action of the church.

B.
(EXAMS OF CONSTITUTIONALITY)
"THE REQUESTS [OF ABSTRACT CONSTITUTIONAL CONTROL] ARE UNFOUNDED. THE LAW FOR SOLVING DISCRIMINATION AGAINST HOMOSEXUAL UNIONS (LPARTDISBG) IS COMPATIBLE WITH THE GERMAN BASIC LAW."

I.

(Formal exam of constitutionality having in mind the necessity of approval from the Federal Council as stated in the article 84, I of the German Constitution)

"The law was made in accordance with the constitution. It did not need the consent of the Federal Council. "

1. "The law does not have provisions that, in accordance with the article 84, I of the German Constitution, would require such consent.".
   a) Interpretation of the requirement of consent stated in and in accordance with the article 84, I of the German Constitution
   b) Subsumption: "Daran gemessen [...]".
      aa) Exam of the article 1 § 1 I LPartDisBG
      bb) Exam of the article 3 § 25 LPartDisBG
      cc) Exam of the article 3 § 6 LPartDisBG
      dd Exam of the article 3 § 11 LPartDisBG
      ee) Exam of the article 3 § 16 LPartDisBG
2. "A mandatory consent of LPartDisBG cannot be inferred from the fact that the article 1 § 3 III and IV states powers of the person responsible for the official civil registration that have been known prior to the completion and publication of the law. That [present] version of the bill was corrected irreproachably concerning the constitutional point of view."

a) The German Constitution does not establish specific rules regarding corrections of legislative proposals, nevertheless there are other provisions in the internal regulations of the legislative houses and in the consolidated state praxis that would give fundaments to the perpetrated procedure. Presentation and interpretation of applicable provisions and consolidated state praxis.
b) Subsumption: "about the base for such parameters, the correction made in the article 1 §3 III and IV LPartDisBG did not go beyond the constitutional limits."
   aa) Demonstration of the material error in the article 1 § 3 III and IV LPartDisBG form the legislative protocols (among others: BTDrucks. 14/4545)
   bb) "The composition of the text of the article 1 § 3 III and IV LPartDisBG corrected and published corresponds to the intention of the legislator brought to term in the law." Reasons follow.
   cc) "Moreover," Confirmation through opinions on the correction procedure.

3. The division of the proposal, which was brought by the government benches in a material proposal and in a procedural one, does not clash against the constitution. "Mainly the division perpetrateddoes not motivate the requirement of consent [of the Bundesrat] for the LPartDisBG".
   a) "The Federal Chamber is not constitutionally prevented of, in the exercise of its legislative freedom, regulating different proposals". Reasons follow.
      aa) Exam of the article 74 I, N° 2 GG – concurrent legislative power.
      bb) Subsumption
   b) "If the operative power of the Federal Chamber must be concretely limited by constitutional provisions in the face of the division of one legal matters in more than one law as well as determining when such limits would be exceeded are questions that can stay here without examination (cf. BVerfGE 24, 184 [199 s].; 77 84 [103]). The federal legislator's decision [...] was not arbitrary." "
      aa) "The reason attributed to the Federal Chamber to have divided the legal matters in order to exclude the possibility of the Bundesrat to prevent the promulgation of material legal rules through the refusal to consent does not make this procedure an arbitrary one." Follows the reasoning based on the jurisprudence of the own BVerfG (cf. BVerfGE 8, 274 [294], 55, 274 [319]) according to which a law as a whole needs the approval from the Bundesrat if it contains only one device provision that needs such consent. Therefore, the path taken by the Federal Chamber would be legitimate to avoid a change of constitutional powers that Article 84 I GG's function is precisely preventing.
      bb) The juridical material rules of LPartDisBG are clear and accurate enough despite what say the responsible for the present abstract constitutionality control action.

II.

(Exam of material constitutionality)
1. Violation of the article 6 I GG.
a) Possible violation of the freedom to marry ("*Eheschließungsfreiheit*"):
aa) Anyone with legal capacity to marry can still marry after the introduction of gay stable civil union. Same sex couples remain, according to the new law, forbidden to get marry. The law does not influence, direct or indirectly, the freedom to marry of heterosexual couples. As the new law does not contemplate heterosexual stable civil unions, the heterosexual couples would not be forbidden to get married.
bb) The access to marriage is not limited by the LPartDisBG. The person who is part in a registered partnership is not forbidden to marry a person of a different sex. The consequences of the (homosexual) registered partnerships remain open.
b) Possible violation of the juridical institution of marriage: it does not exist because the object of the law is not the marriage.
aa) The *Grundgesetz* does not have the definition of marriage. The power to configure infra constitutionally (form and content) leave for the ordinary legislator, which has wide discretionary capacity, but still must respect certain "institutional and substantial principles". It is part of the content of marriage, independently of social mutation, i) the association between a man and a woman to a durable union of lives (without a determined date for its end), ii) it must be based on the free will of the partners, iii) under the state's actuation, iv) in which man and woman, in an egalitarian partnership, are faithful to each other and v) both can freely decide about the form of the life they have together.
bb) The institution of the registered partnership between same sex couples does not have the same state's protection given to marriage. This kind of partnership is not marriage in the sense of the article 6 I GG, but it gives gay couples [similar] rights. The legislator took in consideration 2 I, 3 I and III GG because it help people to develop their own personalities and combats discriminations.
cc) The marriage as an juridical institution did not go through any change. From the institutional guarantee of marriage does not derive some prohibition towards gay couples being able to enter a registered partnership that has juridical effects that are similar to the ones that are derived from the marriage.
c) Possible violation of the state's duty to protect the axiological decision made in the constitutional provision (axiological theory of the fundamental rights)
aa) No allocation of the institution of marriage. The special protection of marriage, prescribed in the Article 6 I GG,

prohibits its placement in a worse position than other life forms.

(1) No harm to occur when the Marriage Act provides a new institute made in the image and likeness of the rules of marriage. The novel institute is aimed at people who cannot marry.

(2) The rules on social assistance provided in the law do not imply downside to marriage.

bb) No withdrawal of Government support to marriage.

cc) The Article 6 GG I did not prevent the legislator to favor marriage in the face of other forms of family togetherness. However, from the commandment protective Wedding, the Article 6 GG I, it does not derive the commandment of a disadvantage to other forms of family togetherness. "This was ignored by Judge Haas in his dissenting opinion, when she understood the commandment of fostering the Article 6 GG as I commanded to [oppose] disadvantage to other forms of union other than marriage."

(1) Interpretation (including genetic) of "special" protection of marriage and family by the Article 6 I GG. It is a constitutional protection that does not exclude legislative infra constitutional protection from other forms of union. There is no duty of detachment by the legislator (kein Abstandsgebot).

(2) The Section 6 I GG protects marriage as the legislator, in compliance with the structural substantial principles, has set. In the face of social changes, the protection that is due to the institution of marriage cannot be separated from normative recipients for whom marriage was created as a way of life protected.

(3) The duty to protect the marriage has to be based on the purpose of protection ofthe Article 6 I GG. The legislator would have hurt this duty, for example, if he or she had created a parallel institute with identical function, equal rights, but fewer obligations and such that the institutes could be interchanged. This hypothesis is not present with the creation of the Institute of gay marriage. There is no competition between the institutes. Unlike stated in the two dissenting opinions (see below in the structure of the votes from the judges Papier and Haas, n. from author), homosexual union is not a "fake marriage with label" but an "aliud" in the face of marriage.

2. Violation of the Article 3 and the Article III 1 3 I GG GG: "The LPartDisBG does not violate the special prohibition of discrimination in the Article 3 III 1 GG nor the general principle of equality of the Article 3 GG I".

a) Because the law only opens up the possibility of a registered union for gay couples, it does not imply a disadvantage created to heterosexual couples based on gender. The law does not establish rights and obligations differentiated because of gender, but the combination of genders in the union of two people. The same

goes for the non violation of the discrimination prohibition on grounds of gender of homosexuals in the absence of the new law. Men and women are always treated equally because heterosexual couples cannot engage in a registered union such as gay couples cannot marry.

b) The fact that other life unions [stable and of heterosexual couples] or any other form of solidarity union haven't been contemplated with this form of registered union. The Art. 3 I GG forbids the differentiated treatment of normative recipients when there is no relevant different that justifies the unequal treatment. Those differences, however, exist in the case of homosexual couples with respect to other connections.

aa) Although there is also the need of recognition of the heterosexual unions, the road to marriage to heterosexuals are not sealed, unlike what happened historically to gay couples.

bb) Also in relation to other unions based on family ties and affection (union of brothers, for example) there are differences that justify different treatment, starting with the exclusivity of gay marriage (mutatis mutandis "monogamy"). These other types of union based on family ties and blood are also now protected in various fields of law, such as inheritance and taxes.

cc) The legislator is not prohibited to create new possibilities for recognition to heterosexual unions or to those unions guided by family and blood ties, providing he or she avoids the possibility of exchange with the wedding fashion, but a constitutional mandate to that effect [positive, of creation of the law] does not exist.

3. Provisions of the law on the protection and rights of succession of "life partners", as well as pension are not constitutionally questionable.

a)

aa) According to the Article 1 ß 9 LPartDisBG the companion of a parent may be given, by their acquiescence, the power to decide jointly on the child's everyday affairs. It was also created a family emergency power in regard to the child's welfare. With the establishment of this "small family power" for the homosexual partner (kleines Sorgerecht) the legislator did not intervene in the family right of a parent that does not have the family power. Examination of the protection area of the Article 6 II 1 GG. It is up to the legislator, under the field of family law, to create the rules of the family power. If a parent has been excluded from such familiar power by virtue of such devices and their application, the "small family power", the power that derives from one of the homosexual partners, does not intervene in the family right of that who has been excluded anyway.

bb) Subsumption: No violation of the Article 3 I GG. Under the new rule, parents that don't live with the person who has the family power in a juridical stable union do not suffer undue

disadvantages. Other juridicalopportunities would remain open for them.

b) aa) The Article 1 ß 10 VI LPartDisBG dos not infringe the testamentary freedom protected by the Article 14 I GG. It follows the interpretation of testamentary freedom as an element pertinent to the protection area of the Article 14 and as reference to the jurisdiction of infraconstitutional conformation of the ordinarylegislator (also, the right of inheritance has anormative protection nature, not a behavioral one).

bb) The Article 14 GG I would not be violated by the fact that the portion of the inheritance that is due to those entitled is decreased because of the participation of the partner of the person who died. It also would happen like this if the deceased had married.

c) Food Obligations based on the Article 5 ß ß 1, 0:16 LPartDisBG did not violate the Article 3 I GG. Follow fundaments.

C.
(CONCLUSION)

"This decision was taken by majority 5-3, with regard to compliance with the Article 6 LPartDisBG I GG; majority 7-1, with regard to compliance with the Article 3 GG I, other then that, there was unanimity."

Papier	Jaeger	Haas
Hömig	Steiner	Hohmann-Dennhardt
Hoffmann-Riem	Bryde	

Dissenting opinion of Judge Papier
(...)
Discordant opinion of Judge Haas
1. (...)
2. (...)
a) (...)
b) (...)
c) (...)
(1) (...)
(2) (...)

>> ENDNOTES

[1] Cf. for the initial part: Martins, 2013.

[2] A deeper review on the subject can be found at Dimoulis and Lunardi, 2011: 290-296.

[3] As brilliantly pointed out by Dimoulis and Lunardi, 2013: "It is common to describe the unions in question as 'gay' or 'homoaffectives'. However, neither the Brazilian Constitution nor Brazilian ordinary law mention orientation or sexual activity as a relevant criterion for describing Family units. Only biological sex is mentioned. Therefore, it is legally correct to refer to the union of persons of the same sex." This terminological confusion, with legal-dogmatic repercussions as will be seen, between sexual orientation and marriage of same-sex persons permeates the ruling here commented and leads to the foregone conclusion that the configuration of a legal institution by the legislator was an act of discrimination against a supposedly minority group with different sexual orientation. Linguistically, it is interesting to notice the use of the expression "homoaffection" instead of "homosexual" in order to live up to the code of political correctness, in view of the axiological negative content of the term "homosexual" which could, however, be used here in an axiological neutral context. In terms of social life, it is certain that it is not necessarily affection or more precisely familiar affection, but the expression of sexuality as an element of the free development of the personality of each. And this has nothing to do with the relative legislative discretion in setting up institutions of family law as will be demonstrated here. To avoid the very long formula suggested by Dimoulis and Lunardi (ibid.), it was chosen here the use of the expression "homosexual union".

[4] Cf. STF-ADI 4.277/DF, from 05/05/2011, published in 14/10/2011 no DJe 198, headnote 2607-3, p. 611-880 (there will be mentioned the numbers of pages of the official publication), which can be found in the following web link:<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628635>Accessed in: 30/03/2013.

[5] Cf. STF-ADPF 132/RJ, from 05/05/2011, published in 14/10/2011 in the DJe 198, headnote 2607-1, p. 1-274, which canbe found in the following web link:<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628633>Acesseded in: 30/03/2013.

[6] As pointed out by the rapporteur (cf. STF-ADI 4.277/DF, p. 623), this case originated a prevention because its object and the object of the previously mentioned case coincide (as stated by the Article 77-B of the RISTF). The objects here in question are the interpretation of the Article 1.723 of the Brazilian Civil Code.

[7] The plaintiff's complaint in ADPF 132/RJ to interpret according to the Constitution some pre-constitutional juridical norms, namely the Article 19.II and V and the Article 33 of Decree-Law 220/1975, was impaired by loss of purpose, because they were derogated by Law 5034/2007. Cf. STF-ADI 4.277/DF, p. 625.

[8] In the judgment of admissibility, the rapporteur, if he did examine, ceased to enshrine in his report the result of a necessary examination of the existence of relevant judicial controversy over the application of the fundamental precept that was acclaimed to have being violated as it is prescribed by the Article 3.V of Law 9.882/99. Maybe such examination was not enshrined in his report due to the preliminary trial set of both APDF 132 and ADI and 4,277. Without wanting to enter the constitutional procedural minutiae concerning the delimitation of the judgments of admissibility of the two instruments of normative control abstract (about cf. Dimoulis and Lunardi, 2011: 120-140 and 158-178), presenting the dispute in a systematic way from the original demands at least would be a good preparation for the examination of the merits. The vague information provided by some Courts of Justice (cf. STF-ADPF 132/RJ, p. 13 s.; STF-ADI/DF and DF-4277, p. 620 s.) are not enough.

[9] In the original cases, with their demands between individuals and administrative organs, the requests concerned, probably (as stated in the previous note, these were not presented in the report of the appellate decision, as a common practice in the decisions of the German Constitutional Court - see ref. the annex below - which compromises the precision of this analysis), mostly to provide pension benefits and others that could be accepted despite the aimed equalization, because all indeterminate legal concepts or likely to change according to conceptual mutation, as in the case of the family concept, involve the judicial duty to interpret them in the light of the constitutional system of fundamental rights (cf. Martins, 2012: 100-102).

[10] It is impossible to analyze here each one of the Decree-Law 220/1975's articles that were subject to attack in the ADPF 132 (namely Articles 19.II, 19.V and 33. I-X). Nonetheless, it is necessary to state that all of them (except Article 19.V, which speaks of [refers to]"spouse") should be interpreted in the light of the normative constitutional system that despite similarities should not be confused with the interpretation according to the constitution (cf. Schlaich and Korioth, 2010: 274; Dreier, 2004: 285 s., and Martins, 2013) in order to obtain the desired effect of extending social security benefits to homosexual stable civil unions. The analysis between, for example, the information provided by TJ-BA, according to which "[...] the judiciary, exercising administrative functions (application of the Statute of Public Servants), cannot grant rights that are not provided by law [...]" and the herein claimed generalization of the effects of res judicata brings up a quirk of the Brazilian legal and constitutional culture. In everyday administrative and judicial practice nobody sees the problem in infralegal norms being interpreted in a way that is contrary to the law and the constitution or in the law being interpreted in a way that it should not be according to a dogmatically and methodologically accurate interpretation guided by the constitution. This leads to an administrative discretion to which the judiciary should surrender. On the other hand (and against the rationality that demands respect for normative sources' hierarchy) and on behalf of a very vague " solidary constitutionalism ", the relativization of legal and constitutional objects and parameters is sought in order to make the exercise of the democratically backed legislative function even more irrelevant than it already has become. There is a kind of schizophrenia based on the attachment to the form and to a complex and counter-productive judicial process ????[falta uma palavra?], which is more detrimental to the effective constitutional concretization because it relegates to the background a correct application of the legal and constitutional system that requires strict observance of normative hierarchies.

[11] As a consequence, some authors advocate introduction of a collegiate foundation. See, for example, with references to Brazilian and foreign doctrine: Dimoulis and Lunardi, 2011: 108 and its finding of inconsistency problems derived from the lack of reasoning in the case under discussion, in: Dimoulis and Lunardi, 2013.

[12] Cf. great systematization of the arguments used by the judges in this case presented by Dimoulis and Lunardi, 2013.

[13] In the operative part of the decision (appellate decision in strict sense), the merit was set up as follows: "[...] By unanimous vote, [the Ministers] agree to uphold the actions, with erga omnes and binding effects, with the same rules and consequences of hetero-affective stable civil unions [...]. "(cf. STF-ADI-4277 DF, p. 615).

[14] Cf. STF-ADI 4.277-DF, p. 632-635.

[15] In this regard, cf. Martins, 2012: 30-33, 47-55 and Dimoulis and Martins, 2012: 49-51 and 110 s. The principles of legality and formal equality before the law have no consequences for the bond between the legislator and the constitutional norms, notably fundamental rights.

[16] The poorly received theory of horizontal effect of rights and, lately, also of the horizontal effect of positive state duties contributes to this legal-dogmatic misunderstanding, and

the result is a process of constitutionalization of the entire legal system and the consequent weakening of the normative force of constitution, which is primarily the State's constitution and not society's, in favor of its symbolic character. About the theoretical foundations of the argument, cf. Martins, 2012: 9 and 28-43. On major legal and dogmatic repercussions, cf. Dimoulis and Martins, 2012: 90-108 and Martins, 2012: 89-119. With a different theoretical assumptions than the ones shown here, but perpetrating an analysis of the phenomenon of constitutionalization of law, see generally: Smith, 2005. About Brazilian understanding of the theory of horizontal effect cf.: Sarmento, 2004: 279-289 and for a small and clear synthesis of the debate, cf. Novelino, 2012: 403-405 s.

[17] Cf. same finding in Dimoulis e Lunardi, 2013.

[18] The situation of unconstitutionality would be politically unlikely, given the qualified majority required for constitutional amendments compared to the simple majority needed to all infra constitutional legislation, unless in a scenario of slow legislative action, change of legislature, or political inconsistencies inside parties.

[19] This same review was made several years ago and substantiated by the present author in several publications. See, for example, more recently, Martins, 2011: 100 s., Martins, 2012: 240 s. and 304 and Martins, 2013.

[20] The overuse of this formula in the jurisprudence seems to reflect a conception of judicial activity that is not bound to the current constitutional order, because every time a normative texts does not suit the Brazilian Supreme Federal Court, it uses the before mentioned formula in a purely rhetorical way, since there is no debate among the various possible interpretations of the juridical norm object of the constitutional control and no justification for the chosen interpretation that is said to be more consistent with the constitutional parameter. This situation is exacerbated by the use of the constitutional mutation thesis, ie, becoming mitigated not only the effects of res judicata, but also the judicial norms that are used as object and parameter of such a constitutional test. The most striking example of this was the interpretation given by the Brazilian Supreme Federal Court to a constitutional provision that states grant of jurisdiction (!), namely the Article 52, X, of the Brazilian Constitution. This constitutional article, given its nature, contains no open concept that is likely to mutate in its historical understanding. The case was the Constitutional Complaint 4335 and its key excerpts followed by a precise discussion can be found in Dimoulis and Lunardi, 2011: 281-296.

[21] The Federal Constitutional Court of Germany's decision concerning the constitutionality of a statutory law that created registered homosexual unions, an institution parallel to marriage (cf. BVerfGE 105, 313 et seq. as well the brief presentation and ruling's structure in the annex below) started from the combination of sexes (not) corresponding to the constitutional concept of marriage and not from the marriage candidate's gender, much less from their sexual orientation and finally signed up such understanding that, prima vista, can cause strangeness in the lay public. With some exceptions, the German legal and constitutional dogmatic does not see a problem of correspondence between the free configuration of a legal institution by the legislators and unequal treatment to be constitutionally justified. The parameters of fundamental rights to equality ("everyone" in the Article 3 of the German Constitution) were brought to the agenda because the new institute of registered homosexual unions could not be extended to heterosexuals who could assert, as always, to the traditional marriage institution (cf. BVerfGE 105, 313 [351-353] and, in the Annex, point B II. 2.) See among many: Heuer, 2004: 482; Gröschner, 2004: 774-778; Jarass and Pieroth, 2011: 239-242; Manssen, 2012: 122 and 127; Papier and Krönke, 2012: 145; Schmidt, 2010: 231 s.; Schroeder, 2011: 128, Epping, 2012: 229; Ipsen, 2012: 98; Fisahn and Kutscha, 2011: 89; Degenhart, 2012: 130; Pieper, 2012: 159 s. and Pieroth and Schlink, 2012: 168 s. With a certain critical distance and under the influence of European community

law, yet without dismissing the dogmatic: Michael and Morlok, 2010: 146-147.

[22] The legal-dogmatic next step would be to investigate the extent to which the legislator is bound to the fundamental right as an institutional guarantee, because "that the legislator needs to set up a fundamental right cannot mean that he may [freely] dispose about it" (Pieroth and Schlink, 2012: 56). Cf BVerfGE 105, 313 (344-346), and below, attached B.II.1.b, besides the extensive discussion in the specialized legal literature, as in Gröschner, 2004: 768-772; a succinct but dogmatically very well made analysis that contains many sources in Jarass and Pieroth, 2011: 238-241; cf. as well the references in the previous note. As also alluded to in the previous note, partly defending a little dissenting opinion by reference to European Community law for the specific case of the general equality and claiming "functional proximity" between family and private life: Michael and Morlok, 2010: 146-148. But even such a pair of authors more sympathetic to that less strict, under a dogmatic point of view, European jurisprudence do not abandon the understanding of marriage as a fundamental right with an institutional character with its consequences as herein presented.

[23] Cf. BVerfGE 105, 313 (351 s.) And, below, in the Annex: B.II.2.a. Cf. Martins, 2012: 44-62 about the specific dogmatic concerning the fundamental rights of equality and freedom stated in the Article 5 °, caput, of the Brazilian constitution.

[24] All other conditions established by the civil legislator, however questionable, outdated, conservative etc., are applied equally to all those who want to get married without distinguishing persons, which reveals the peculiarity of institutional fundamental rights in relation to behavioral ones. If sexual orientation was indeed a discrimen, this could be extended ad absurdum, making impossible any legislative configuration of the institution. The prohibition of bigamy and polygamy or of marrying animals and things, the age limits to get married - it all would have to be measured based on the assumption of equal parameter.

[25] Pieroth and Schlink, 2012: 167.

[26] Cf. With broad list of references: Gröschner, 2004: 772-779.

[27] Although not shown in its proper systematic locus, which would be the list of fundamental rights stated in Articles 5-17 of the Brazilian Federal Constitution, the entire article 226 of the Brazilian Federal Constitution, that appears under the chapter dedicated to the family and the title correspondent to the "social order", contains, due to its text, positions arising from fundamental norms, just like other fundamental rights. In German constitutionalism, such fundamental rights that are sparsely shown in the constitutional text are called equal rights to fundamental rights" (Rechte grundrechtsgleiche). See, eg, Pieroth and Schlink, 2012: 18.

[28] Cf. Pieroth and Schlink, 2012: 55 s.: "For them [rights whose protection areas are normatively stated], the individual is still not able to exercise their fundamental rights only by its nature [individual] nor by their sociable nature, but only through the legal system. Examples: living (art. 2, II 1 GG) and settling residence here or there (Art. 11 I GG) are the individual's nature; exchanging opinions (art. 5, I, 1 GG) and making reunions (art. 8, I GG) are part of the individual's sociable nature. Rather, only the law makes any joint life of woman and man marriage (art. 6, I GG) and of any possession a property (Article 14 I GG)." Cf., in the vernacular, the reception of this concept in Dimoulis and Martins, 2012: 145 s.

[29] This principle states that it is the state that must justify its actions when intervening on rights and not the individuals who must justify their actions when exercising them. See Martins, 2012: 29, with reference to the principle mentor, Carl Schmitt.

[30] Cf., by all: Jarass e Pieroth, 2011: 249.

[31] See Martins, 2012: 57-59, and on the legal-dogmatic relevance of the concepts of regulatory area versus. area of protection for the rights of freedom: Dimoulis and Martins, 2012: 127-131.

[32] It is, considering that the Federal Republic of Brazil is a democratic and constitutional state

of law, such an obvious taboo that the state should not interfere, excluding the duty of protection in the face of the problem of domestic violence. The many pages of the votes in the Brazilian Federal Supreme Court's decision were only dedicated to verify the obvious and did only serve the purpose of diverting the focus, or rather, in this case, of revealing a misunderstanding on the part of the Ministers about the object of their decision.

[33] Disclaimer aptly presented by Dimoulis and Lunardi, 2013: "The ministers used the systematic interpretation for introducing constitutional foundations in the reasoning that were different from the Article 226, § 3, of the Brazilian Federal Constitution seeking to justify the decision of using the technique called interpretation according to the Constitution. Note that this method should have led to the declaration of unconstitutionality of the constitution itself, as the logical conclusion of the prevalence of certain principles over exhaustive constitutional norms. But the Brazilian Federal Supreme Court did not do it [...], preferring the inconsistency." This use could have been made in accordance to the implicit and functional societal element existent in the concept of family, as already pointed in here. This would have notorious impact to the legislator in fields such as adoption, for example. Cf. the quite palpable result of this premise in the recent decision of the German TCF, published in 19/02/2013: BVerfG, 1 BvL 1/11 - Sukzessivadoption innerhalb der Lebenspartnerschaft ("successively adoption inside registered partnerships [between people of the same sex] ") and a short presentation in the text below and in the note 41 as well.

[34] According to the reasoning in one of the Minister's vote: "This line of ideas leads to the question of the private individuals' autonomy, conceived in a Kantian perspective as the center of human dignity. Rivers of ink have been written on the subject in Brazil and abroad, making negligible greatest digressions on the subject. It is enough, for now, remembering that its [human dignity] consecration in the article 1, section III of the Brazilian Federal Constitution, translates the prediction that the individual is entitled to be treated by the state and by other individuals as subject and not object of law, respecting her/his autonomy, by her/his very condition [conferir o uso da palavra very antes de um substantivo] of being human"(emphasis in original, cf. STF-ADI-4277 DF, p. 674-675, Min Luiz Fux). Despite the mentioned "line of ideas" has not been well explained, who would dare disagree with this argument around the most important principle that should govern the Federal Republic of Brazil? And what an easy writing and flawless language Machado de Assis would say! It is a pity that it was not written as a piece of literary art and does not belong to any other human science; it is a judicial decision made in the context of normative control of constitutionality with its important consequences. In the same vote (p. 661-663) several successive references without logical and dogmatic concatenation appear. Between them is the dogmatic of states' duties of protection with explicit reference to the original German concept of "(Staatlichen) Schutzpflichten" and to national and international doctrines that welcomed the formerly cited dogmatic. But this concept, as many other imported ones, is decontextualized and is not applicable to the case (see about Dimoulis and Martins, 2012: 114-122 and Sarlet et al, 2012: 297). Moreover, it would lead to a dogmatic consequence characterized by the legislative obligation to act to protect a jusfundamental natural position and not a normative one (life and health especially) in the face of threats from private individuals (at this point, correct is the conceptualization of the fundamental right's spectrum of protection in Mendes et al, 2008: 267). Even assuming, as aimed by Brazilian dominant opinion, an objective dimension of fundamental rights that leads to a direct link between fundamental rights and private individuals (thesis to which the vote of the Minister apparently joins but actually there should have been made a separation between the state's duty to protect and the private individuals bond to fundamental rights but both concepts were treated as the same in the Minister's vote) remains the question about the

precise relation between the bond of private individuals to an alleged right to an equal legal status. And what would be its relation with the reversing of the rule concerning the solution of the specificity antinomy? Such blunders occurred frequently in this and other votes that upheld the judgment. This is what happens when judges do not aim to persuade and decide based on legal parameters. Such speculations are totally off the problem concerning the systematic interpretation of articles 3 and 226, § 3 of the Brazilian Constitution.

[35] On this figure, see for everyone: Dreier, 2004: 81.

[36] The norm stated in the article 2, I, of the German Constitution, more often in combination with the article 1, I (free development of personality combined with the order of observance and protection of human dignity) is sometimes used to interpret and define infra constitutional legislation. But the Federal Constitutional Court of Germany recognized the bigger impact on such interpretation of the article 3, I, II and III of the German Constitution (these articles refer to general equality, special equalities and prohibition of discrimination) and, lastly, also the very article 6of the German Constitution (protection of marriage, family, children's education etc..).

[37] Cf. references and discussions on such decisions in Martins, 2011: 455 et seq..

[38] See BVerfGE 124, 199: "1. Unequal treatment of marriage [regarding] registered [same-sex] partnerships in the field of pension successors for employees of the public service [...] is incompatible with the Art. 3, I, GG. 2. If the privilege of marriage imply a disadvantage of other forms of [marital] life, although they are comparable in view of the matters regulated social life and goals of marriage persecuted by legislative activity [under discussion] such differentiation was not justified with the mere mention of the commandment to protect marriage in the sense of the Art. 6, I GG. "

[39] The Transsexuellengesetz (TSG), synthetic epithet for the "law on the amendment of the first name and the statement of the relevance of gender in special cases", entered into force on September 17, 1980. Based on the scientific stage of the late 1970s, the law provided two solutions to change civil registry for people who do not identify themselves in their respective biological sex of birth: change the first name or, beyond that, also change the definition of genre. With the enactment in 2001 of the most talked here LPartG, the law to registered partnerships of persons with the same sex, many questions were raised, including the possibility of transsexuals to marry or register partnership between persons of the same sex, since there are cases of transgenders having homosexual orientation, that is, after the change of record of the genre, for which surgical intervention and the "permanent sterility" were required, the person developed homosexual behavior (which would be a straight one if the genre had not been previously changed). Among others, the need for sex-change operation was deemed unconstitutional in the face of the article 2, I and the article 1, I of the German Constitution by decision made in January 2011 to be then commented, in such a way that the situation today is about "the felled sex" (expression coined by Heribert Prantl, former judge of law and one of the today's largest German journalists, cf. . <http://www.sueddeutsche.de/politik/verfassungsgericht-kippt-transsexuellengesetz-das-gefuehlte-geschlecht-1.1052344> Accessed in: ??) by the holder of fundamental rights, and the State, based on criteria defined by the legislator, must only check the consistency of such a decision.

[40] Cf. in chronological order: BVerfGE 115, 1- Transsexuelle III (27/05/2008); BVerfGE 116, 243- Transsexuelle IV (27/05/2008); BVerfGE 121, 175- Transsexuelle V (27/05/2008); and BVerfGE 128, 109 – Lebenspartnerschaft von Transsexuellen (11.01.2011). In the first decision, the object was the section §7, I n. 3 TSG, from a concrete constitutional control proposed by Itzehoe State Court. The object of the ruling was considered incompatible with the articles 2, I and 1, I of the German constitution. In the second decision, the object was the section § 1, n. 1 TSG, from two

actions aiming the concrete constitutional control and were proposed by the Superior State Tribunal of Oberbayern and Frankfurt. The object of the ruling was considered incompatible with the articles 3, I; 2, I and 1, I of the German constitution. In the third decision, the object was the section 8, I n. 2 from a from an action aiming the concrete constitutional control by a single judge from Schöneberg (Berlin). The object was considered incompatible with the articles 2, I; 1, I, G and 6, I from the German constitution. In the fourth decision, the object was to the § 8, I, 4 n.3 from a constitutional complaint judged incompatible with articles 2 and 1, I from the German Constitution.

[41] Cf. BVerfG, 1 BvL 1/11, Sukzessivadoption innerhalb der Lebenspartnerschaft, from 19/02/2013, at: <http://www.bverfg.de/entscheidungen /ls20130219_1bvl000111.html>Accessed in 07/03/2013.

[42] Judicial representation of the Hanseatic Superior Court (Hamburg) from December 22, 2010, met the procedural requirements against the decision of the dispute and the conviction of the court concerning the unconstitutionality of the section 9, VII, LPartG in the face of the article 3, I of the German Constitution (on such procedural conditions, v. Martins, 2011: 22-26).

[43] Filed by a woman ("Dr. K.-W.") immediately against three decisions of the ordinary instances and mediately against the section 9, VII, LPartG (cf. on this duplicity of objects: Martins, 2011: 35 s.)

[44] Another consequence of the difference between "natural" freedoms - that is, legally constituted, but of behavioral content - and institutional fundamental rights, since only the former is enforceable against the legislative and others state functions without ordinary legislative intermediation.

[45] To paraphrase the well choosen words of Dimoulis and Lunardi, 2013.

[46] Since the demonstration of (bookish) erudition seems to be so dear to Brazilian judges, a research in the context of the history of ideas would have revealed interesting results: reading the reviews about the history of the concept of marriage of the art. 6, I of the German constitution made by Gröschner (2004: 757-760 and 775) reveals its "historical-institutional core". According to him, "the institutional protection of the possibility of reproduction [and] possibility of marriage is totally independent of circumstances, capacities and orientations. Therefore, it cannot be linked to homosexuality discredit. As well known, this disbelief was strange to Greek antiquity. Nevertheless, the oikos was there subjected to special protection from the polis precisely because of its reproductive role. This historical-institutional tradition which proved to be religious and ideologically neutral is what gives legitimacy to the constitutional article 6, I of the German Constitution"(op. cit. P. 775). That's because despite the Aristotelian vision of oikos as oikonomia, this has not proven itself as the criterion for the protection of family and marriage. With the exception of Sparta, the protection of the community life of the oikos only enjoyed the protection of the polis "because it was responsible for its perpetuation and good condition through fertilization and education of offspring" (op. cit., P. 757 s.). It was, therefore, more a population policy than an economic policy.

[47] Among other reasons and that is why using the right to privacy of the art. 5°, X of the Brazilian Constitution as a parameter is incomprehensible: it is not at all the protection of sexuality, as an exercise of autonomy and self-preservation (right to "intimate sphere") in the face of state interference. Regarding: Martins, 2012: 49 s. and Pieroth and Schlink, 2012: 91-93.

[48] Concerning the structure in general of the Federal Constitutional Court of Germany cf.Martins, 2011: 79-94.

[49] Respectively abbreviations for Lebenspartnerschaftsgesetz (literally: law of vital society) and Lebenspartnerschaftsdiskriminierungsbeendigungsgesetz (literally: law for solving vital society discrimination). These are two nicknames given by the legislature and legislative-political literature to this law. The political perception that the law aims to combat discrimination

does not have, as will be seen in the structure, support in the dogmatic of the fundamental right to general equality (article 3 I) or to gender equality (article 3 II) much less to equality in the face of specific discrimination (Art. 3, III). See below the point B.II.2 (parameter of fundamental rights to equality of the art. 3 GG, divided into: general equity, in the first paragraph; gender and promoting women's in order to achieve equality, in the second paragraph; and the prohibition of discrimination in the third paragraph), after thorough examination in the face of the Article 6, I GG (order of state protection to marriage and family, as a negative right, a legal institution and axiological decision of the constituent).

[50] Abbreviation for Bundestagsdrucksachen, the official collection of legislative protocols and materials produced in the legislative sessions of the Bundestag, the Federal Camera, 11th legislature (since 1949), p. 197. The BTDrucks are found in any law library and are commonly used in juridical-scientific researches and are relevant sources.

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THE CASE ADPF 132: IS DEFENDING THE CONSTITUTIONAL TEXT A POSITIVIST (OR ORIGINALIST) ATTITUDE?

// O CASO DA ADPF 132: DEFENDER O TEXTO DA CONSTITUIÇÃO É UMA ATITUDE POSITIVISTA (OU "ORIGINALISTA")?

Lenio Luiz Streck

>> ABSTRACT // RESUMO

In the last years, the Brazilian Constitution has been taken by a theoretical line that admits and defends the need for judicial activisms to solve political and social problems presented by everyday life. The last attempt was a constitutional lawsuit – known in Brazil as "Arguição de Descumprimento de Preceito Fundamental" ADPF n. 182 (Claim of Fundamental Principle Violation) – which purposes the judicial regulation marriage of same-sex persons. In this article it is problematized by demonstrating how such intent would express a serious democratic risk because it has become the judicial review in an everlasting constitutional power, although it is founded on good intentions. // Nos últimos anos, o Supremo Tribunal Federal tem adotado posturas interpretativas que extrapolam os limites constitucionais postos para a sua atividade. Os fundamentos adotados pela Corte para justificar tais posturas ainda se mantêm atrelados à superação do "positivismo", à superação da razão (do legislador, considerado inerte) pela vontade (do julgador), onde o texto constitucional passa a depender dos juízos subjetivos dos Ministros e tem sua normatividade enfraquecida. O presente artigo pretende, então, demonstrar o que significa, realmente, o positivismo e porque tal viravolta realizada pela Corte não o supera, além de apresentar os efeitos colaterais do ativismo judicial do Supremo.

>> KEYWORDS // PALAVRAS-CHAVE

ativismo judicial; hermenêutica; Supremo Tribunal Federal; positivismo; uniões homoafetivas. // **judicial activism; hermeneutics; Brazilian Federal Supreme Court (STF); legal positivism; same-sex marriage.**

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1. INTRODUCTION

Before moving into the core discussion which titles this paper, we should briefly take a look back at the constitutional actions that have settled the current position of the Brazilian Federal Supreme Court (STF) on the legal status of same-sex couples.

The STF jointly analyzed[1] the Direct Action on Unconstitutionality (ADI) 4277[2] and the Claim of Fundamental Principle Violation (ADPF) 132[3], respectively filed by the General Attorney of the Republic and Rio de Janeiro state governor Sérgio Cabral. The purpose of both actions was the recognition of same-sex couples as family entities.

Reporting Justice Ayres Britto voted in the sense of construing the issue according to the Federal Constitution under article 1.723[4] of the Brazilian Civil Code, excluding any possible understanding disallowing the recognition of same-sex couples as a family. Below is a brief description of the main grounds for the STF decision studied herein.

The Reporting Justice argued that article 3, item IV of the Brazilian Constitution (CF), bars any discrimination based on gender, race, and color; therefore, no one should be shamed or discriminated as a result of their sexual orientation. He ruled that "*people's gender, except for an express or implied constitutional provision stating otherwise, does not lend itself for inequality before the law*" (p. 612). Thus, he concluded that any depreciation of live-in same-sex couples goes against the aforementioned article of the Constitution and against one of its main purposes of the, which is to foster everyone's welfare.

Furthermore, he maintained that the Constitution's regulatory silence as to the ways of using sexual organs should not lead to a restrictive understanding. Citing Hans Kelsen and his general negative norm, Minister Ayres Britto stated that that which *is not legally barred or required, is legally allowed* (*idem*)[5]. Therefore, he believes that sexual freedom should be seen as a fundamental right, considering the autonomy of will, privacy, the right to pursue happiness, the right to have a family, and others. All that immersed in the paradigm of compassionate constitutionalism[6] and in accordance with the social-political-cultural pluralism protected by the Brazilian Constitution.

Regarding the notion of family[7], the Reporting Justice argued that, far from being an orthodox, closed-in content that is univocal or marked off by the law, it is a social-cultural category and a spiritual principle. Hence, given its express constitutional protection, the family should be safeguarded in its various formations and possibilities found in everyday life. From that standpoint, the law must treat all families in an equal manner, be they opposite or same-sex couples, thereby advancing into the realm of customs and helping eliminate prejudice.

With respect to the words man/woman[8] found in the constitutional norms pertaining to the topic, the Justice stated that the main role of said words is to assert the horizontality of these relationships. In other words, to equate the man and the woman in the family, thereby moving away from the hierarchy of the patriarchy imbued in Brazilian culture. He also

argued there is no terminological difference between "family" and "family entity", and that those terms are perfect synonyms.

Overall, all of the Justices agreed with the Reporting Justice's opinion. Justices Ricardo Lewandowski, Gilmar Mendes and Cesar Peluso disagreed on the grounds of the judgment, as they believed same-sex couples did not fit into the constitutionally established types of families. Nevertheless, the two actions were granted and the Justices have settled that article 1.723 of the Civil Code is to be "construed according to the Constitution," allowing ongoing, long-lasting, public same-sex relationships to be considered common-law marriage, while families.

It is important to clarify that the following approach disputes the way the STF found to deem same-sex couples equal to opposite-sex couples under the law, given that: a) it goes against an express constitutional provision; b) weakens the Brazilian democracy and the separation of powers; and c) reinforces a judicial pragmati(cis)m in which the Constitution, as a *tabula rasa*, merely constitutes the meanings its interpreters impose on it in a discretionary manner. I would like to point out that this analysis is based on the Hermeneutic Critique of Law and Dworkin's position that "what the interpreter thinks about a given subject does not matter." I mean, personally, I am in favor that same-sex couples have all the rights. At times, the Constitution does not say everything we want it to... Moreover, when it does not say something, twisting it is not the proper thing to do.

2. CRITICISM OF THE DECISION BY THE BRAZILIAN FEDERAL SUPREME COURT – THE "ACTIVIST" MINDSET

In Brazil, the term judicial activism has been used in a *blank slate* manner.[9] It should be noted that in the United States the discussion about the government of judges and judicial activism has spanned over two hundred years of history. On the other hand, we cannot forget that judicial activism in the United States was carried out upside down at first (so that we cannot consider the activism to be something always positive). The typical case of upside down activism was the US Supreme Court's stance relative to the New Deal as the Court, hanging tight to the principles of some *laissez faire*-type economic liberalism, barred the interventionist measures laid out by the Roosevelt government for being unconstitutional.[10] Interventionist attitudes in favor of basic human rights took place in a context that depended much more on the individual action by an established majority than on the results of an activist mindset *per se*. For instance the Warren Court case was the product of the personal notions held by a certain number of justices and not the result of some *constitutional feeling* about the issue.

In turn, this topic puts on dramatic airs in Brazil. It should suffice to mention that, in that regard, *judicial activism* shows up as a *principle* in the draft of the Brazilian Code of Class Action Lawsuits (art. 2, letter i). Although such bill is yet to be discussed by the Legislative Branch, the

mere mention to *judicial activism* as a "guiding principle" (*sic*) of brazilian class action suits depicts the state of deep theoretical impasse prevalent among jurists.

It is in such context that a good example of simple/everyday-type judicial activism permeating the mindset of bbrazilian jurists can be exactly taken from the judgment of the Claim of Fundamental Principle Violation (ADPF) 132, already outlined at the beginning of this text. Let's see: the claim was filed in 2009 by the Federal Public Attorney's Office aimed at recognizing the common-law marriage between same-sex people and ensuring them the same rights given to opposite-sex couples.

At first, the action meant for the Legislative Branch's alleged omission in regulating the rights of same-sex couples to be recognized and remedied, although the very Constitution, in its art. 226, §3, points towards another direction. Denied at first, the claim was filed again, this time seeking *verfassungskonformeAuslegung* (an interpretation according to the Constitution) of art. 1.723 of the Brazilian Civil Code[11], in the sense of providing full protection to same-sex couples.

The perplexity that ensues is owed to the following question: how could there have been the aforementioned omission if the very Constitution establishes it is the Government's duty *to protect the union between a man and a woman*? Does the Constitution's normative power imply obedience to semantic limits or not?

Where would the omission be, *considering it is a constitutional order* that establishes the Government's action should be towards protecting the union between a man and a woman? It should be noted we cannot speak of hierarchy among constitutional norms. Otherwise, we would be accepting Otto Bachof's thesis about the possible existence of unconstitutional constitutional norms. What is still more astounding is that said ADPF also intended to annul the several decisions that had literally followed the aforementioned constitutional order. It is, therefore, some hyper-activism.

The following issue is immediately blatantly clear: rendering a measure of this sort effective means turning the Court into an agency with permanent powers to alter the Constitution by affirming an obsolete species of *Verfassungswandlung* which in fact would operate as a veritable process of *Verfassungsänderung*, reserved to the amending Constituent Power through the constitutional amendment process.

The risk emerging from such type of action is that an intervention of this caliber by the Judicial Branch into society generates *serious side effects*. I mean, there are problems which simply cannot be solved by way of a misguided idea of judicial activism. The Judicial Branch cannot replace the lawmaker (here, let us not forget the difference between activism and judicialization: the former, weakens the autonomy of law; the latter, at the same time, inexorable and contingent).[12] It is unnecessary to mention the countless court decisions forcing governments to fund experimental medical treatments (even outside Brazil), the supply of erectile dysfunction drugs, and baldness treatments...!

3. GAPS IN THE CONSTITUTION?

First off, it should be unnecessary to say it is not up to the Judicial Branch to "fill in gaps" (*sic*) left by constituent lawmakers (neither originary nor amending ones). By allowing decisions of that sort, we would be encouraging the Judicial Branch to "create" a "parallel" Constitution by establishing, based on its members' subjecting subjectivity, that which was "unduly" – at the interpreter's discretion – left out of the Constitution.

There are hermeneutical limits to the Courts turning into lawmakers. It should be noted that one of the arguments used – at least rhetorically to justify said decisions – is that the Courts must ensure the common-law marriage (therefore, equating it to marriage) of same-sex couples because lawmakers did not intend to do that in the short term as they lacked the "political conditions" to Legislate on the matter. However – if I may say so – it is exactly this argument that is contrary to the very thesis: *in a representative democracy, it is up to the Legislative Power to make laws* (or constitutional amendments).

The facts that Courts – via constitutional justice – make "corrections" to the legislation (hermeneutical-constitutional filtering and *strictosensu* control of constitutionality) does not mean they can, in cases where the very Constitution points towards another direction, issue "lawmaking" decisions (I recall here Recl 4335-4/AC[13] in which the STF, in a decision yet to become final, under the pretext of making a "constitutional change" – *sic*, "eliminated" item X of art. 52 from the constitutional text).

The Constitution recognizes the common-law marriage between a man and a woman. That does not mean that, for failing to forbid such common-law marriage from being contracted between people of the same sex, the very Constitution can be "filled in", under a Kelsen-type argument that "that which is not forbidden is allowed" (as if Kelsen could be read in such a simplistic manner). Were that to be so and countless non-prohibitions could be turned into permissions. Let's consider: the 1988 Constitution also does not bar direct actions for the unconstitutionality of city laws under the Federal Constitution (art. 102, I, "a", only provides for the possibility of arguments addressing federal and state laws). That does not make it possible to speak of an ADI against a city law at the STF. City folk could claim the original Constitution violated the principle of isonomy and that the lack of a mechanism of that sort violates basic rights etc. However, none of that can be "filled in" by an act of will by the Courts (it should be noted that the ADPF ended up solving the problem by admitting the examination of city laws under the Constitution whenever there is no other way to solve the dispute; nevertheless, it must be repeated: that change to the state of the art was made via a legislative provision). Also as an example: the civil legislation only addresses changes to one's first name. However, that does not mean, based on the axiom "that which is not forbidden is allowed", that Courts can rule for the change to one's family name, in the event someone feels humiliated by their last name and claims, *v.g.*, the principle of the dignity of the human person. In short: there is no "B side" of the Constitution to be "discovered" in an

axiological manner. The correct answer for the (same-sex) common-law marriage case depended on a legal-constitutional change and not on an activist attitude by the STF. For instance, we should look at the Spanish case, in which the problem was solved via the Legislative Branch.[14]

4. GOOD ACTIVISMS?

ADPF 132, granted by the STF, has serious side effects. For two reasons, to say the least:

a) explicitly, because there is an attempt to establish a veritable Jurisprudence of Values (*Wertungsjurisprudenz*) as the intent is to "make legal room" to create something that depends on regulation by lawmakers;

b) implicitly, because the argument of the Federal Attorney General's Office leads to the reinstatement of the outdated idea that there could be unconstitutional constitutional norms, given that the very §3º in article 226 of the Brazilian Constitution would be unconstitutional (*sic*!) as it states the Government's protection is meant for the union between a man and a woman, thereby going against sensitive principles in the Constitution, as is the case of legal certainty and the human person's dignity.

The concern-raising element in this type of legal protection request is that it brings along – in an underlying manner – an idea that has been gaining ground in and acceptance by the brazilian legal dogmatics: the need to resort to "*good judicial activisms*" to solve issues that an ever-changing society raises and with which the political decision-making media (especially the Legislative) cannot keep up. Now, the historic experiences we have been legated and which allow us to develop a notion of *judicial activism* do not point towards the "good" or "evil" of the activities carried out under this sign.

Certainly, the experiences coming from the United States and Germany provide the substantial *corpus* we have on the topic. In the US, as Christopher Wolfe reminds us in his *The rise of modern Judicial Review*, judicial activism managed to name from the conservative stances that perpetuated racial segregation and prevented the economic changes Roosevelt's New Deal was attempting to perform in the first half of the 20th century, all the way to the Warren Court's stances deemed progressive or liberal in the 1960s. In Germany, as previously stated, the Federal Constitutional Court's activity has also been rated by some authors as judicial activism, giving rise to the school of the so-called *Jurisprudence of Values* (it should be noted that it is exactly the Jurisprudence of Values that will be harshly criticized by Habermas, who will deem it a stance by the courts which settles the public sphere and prevents decisions from being democratically made).

In all those cases, the most correct thing to say is that there is no way to establish a given judicial activism's "goodness" or "evil". The most correct thing to say is that issues such as this one we are analyzing should not be left to be solved by the Courts' "will to power" (*WillezurMacht*). Delegating such issues to the Courts means running a serious risk: that of weakening the democratic production of law, the cornerstone of democracy. Or

are we about to admit that the – democratically produced – law may come to be corrected by teleological-factual-and/or-moral arguments?

What type of democracy do we want? It is not a matter of being pro or con protecting homosexuals' personal and property rights. The risk emerging from such type of action – and now, from the STF's decision - is that an intervention of this caliber by the Judicial Branch into society generates serious side effects. I mean, there are problems which simply cannot be solved by way of a misguided idea of judicial activism. The Courts cannot replace lawmakers.

Let me explain. In a democratic regime, as well stated by Ronald Dworkin in his *Sovereign Virtue*[15], we need to make a distinction between personal preferences and issues of principle. The courts may intervene, as they should, whenever an issue of principle is at stake. However, it is not up to this branch to issue decisions embodying personal preferences held by its members or a portion of society. For a very simple reason: democracy is a thing too important to be at the mercy of the Judicial Branch's representatives' personal taste. Were that the case, the homosexuals' very interests would be in jeopardy, given the regulation of relationships between same-sex people would depend on the "opinion" and "will" of the one ruling on the case. In other words, what if the STF had decided otherwise? Would those engaged in the cause agree with that? What would be left for them to do in that case? Only political pressure, via a social movement, which is exactly what should be (have been) done as a mechanism to solve this legal problem!

If the issue is analyzed by a Justice favorable to the minorities' movements and regulating such relationships, his/her decision tends to grant it; on the other hand, a conservative Justice opposing such "change to customs" may deny the request.

That is exactly what should not happen in a case such as this. The decision to be made in such cases must be reached in the political sphere instead of the courts, precisely to prevent its solution from being at the mercy of the Constitutional Court's Justices' personal opinions.

In other words, the decision must be arrived at in the context of a dialoguing society where the courts have their role, which does not comprise legislating. In short, an issue like this, exactly for the importance it carried, cannot be solved by a court's ruling. It is necessary to have a more comprehensive discussion that involves all sections of society, whose proper locus is marked off within the democratic decision-making media.

In any case, there is a dangerous trend inside the legal community of turning to the courts to remedy occasional omissions by lawmakers, struggling for a veritable exercise of a belated Jurisprudence of Values by the Brazilian Federal Supreme Court (or by the other courts in the Republic). It suffices to note the subordinated assignment of ADI 4277 (initially ADPF 178) to ADPF 132, which had already been filed by the Governor of the State of Rio de Janeiro. Both their reasons are grounded on an alleged violation of constitutional principles (injury and right) and the frequent denial of rights to homosexuals. All that because the union of same-sex people is an "indisputable factual reality", the product of the

"liberalization of customs", already recognized in other countries, and failing to treat same-sex couples "with the same respect and consideration" afforded opposite-sex couples means "looking down on the identity and dignity" of homosexuals. It means the assumption of a sociologism clad in legal attire, more than arguments dealing with ethical values and their legal regulation. The claim also mentions the violation of the following constitutional rights: 1) the dignity of the human person, 2) equality, 3) prohibition of odious discriminations, 4) freedom, and 5) protection of legal certainty.

We cannot but be intrigued by the fact the principle of legal certainty was mentioned as an argument authorizing the action filed by the Federal Attorney General's Office. It seems there was no concern about the validity of the claim, which in the future may lead to interpretative instability with respect to the constitutional text's normative power due to the fissure caused in the Constitution's text through a protagonism of the Constitutional Court. Or is that reason for concern only when the "activism is bad"? Are "good activisms" allowed?

In other words, legal certainty is wronged not by failing to legally regulate the cohabitation of same-sex people but instead at the time the Court changes, under the pretense of some "omission by constituent lawmakers" (*sic*) or an "evaluative discovery" (*sic*), or yet of the (improper) remedy of "the very Constitution's unconstitutionality" (*sic*), the text of the Constitution as though they were a constituent Power, thereby creating a sort of *extremely seriousinstitutional uneasiness*.

It is important to further highlight that the very use of the ADPF as a mechanism capable of remedying the "legislator's omission" is misguided. That is because, in cases of omission, the proper handling of constitutional jurisdiction mechanisms points towards filing for a Writ of Injunction (article 5º LXXI of the Federal Constitution). Now, a Writ of Injunction is an action delivering concrete effects and which would have maintained the institutional balance between the Republic's powers, while the ADPF, given the system of the decision's effects, makes the Courts act as though they were lawmakers by actually creating a general, abstract rule. Not to mention that, in this case, the action by the courts would not impact merely the action of ordinary lawmakers but would cause a tear in the very constitutional order by formally amending the text in §3º of article 226. In any way, even the *writ* of injunction would have no constitutional room for the simple fact that the constitutional text points to the opposite of the claim. In other words, we cannot overstep the boundaries of the text: let us take the (constitutional) text seriously.

Additionally, it should be noted that the recognition of common-law marriage between same-sex couples was already being discussed legally, and decision by trial and appellate courts had been rendered. In those cases, too, there was a clear trespass by the courts in terms of breaking away from the Constitution's text. That is a symptom of what we are here calling "reinstatement of the Jurisprudence of Values". Now, although the Constitution's text provides too "closed-in" a normative fabric, some law operators believe we need to "open up" this sense of constitutional

rulemaking by randomly and casually using the constitutional principles. Such principles are invoked based on a sort of "meaning anemia", in which the great revolution brought about by the neo-constitutionalism — the principles represent the practical world's insertion into law — ends up obscured by something we can call pan-principles[16].

5. DISCRETION VERSUS INTERPRETIVISM (ORIGINALISM)?

In my book *Verdade e Consenso* e *HermenêuticaJurídicae(m) crise*[17], based on the Hermeneutic Critique of Law, I make several criticisms of the judges' discretionary power. I fundamentally attack legal positivism and understand it based on its crucial aspect: discretion. I will not dwell on this point in this limited space. I would just like to underscore that positivism is not only the exegetic one; there are several other "post-exegetic" positivisms which rely on axiologisms and voluntarisms. In other words, I believe the "mouth-of-the-law judge" is a legal positivist as much as the "law meaning-owner judge". Putting one in the place of the other represents no progress in legal theory. Incidentally, that seems to be the major problem of the several neo-constitutionalist stances.

It seems some critics of my work have failed to understand the way I fight discretion. Such is the case of Eduardo Appio who, in a recent book, criticizes specific points in my work and labels it – in a specific topic in his book – "*Lenio Streck's hermeneutic interpretivism*"[18]. Appio uses that argument to criticize my position relative to the STF's decision in the case of ADPF 132, the subject-matter of this ponderings. A problem immediately arises. It seems clear to me there is a misguided articulation of the notion of *interpretivism*.

As generally known, *interpretivists* are the theoretical stances advocating an *originalist* interpretation of the Constitution. Given such theories emerge in the United States, it is an originalism related to the US Constitution. To further clarify, there has been a historic dispute between North American theorists – at least since the classic article by Thomas Grey, who was the first to thus establish and classify the methodological difference regarding the interpretation of the Constitution[19] – about how the interpretation of the Constitution should be methodically handled. According to Grey, there are two opposing positions: *interpretivism* and *non-interpretivism*. *Interpretivism* is related to the originalist stance, in which the limits of lawmakers' freedom of interpretation must be bound to the limits of the written text; that is, the constitutional writing suffices for the political process limits to be established and implemented. On the other hand, *non-interpretivist* stances defend a sort of constitutional policy and are closer to the ideas advanced by legal realism. Now, it is certain that, by defending the possibility and the need for correct answers in law (or, according to the formula I propose: constitutionally suitable answers), it is not possible to consider me an *interpretivist* (originalist). For a simple reason: when I affirm such thesis, I assume the *interpretivism/non-interpretivism* dichotomy has been obsolete for a long time,

and that the problems deriving from it have been solved. That is because when, in *Law's Empire*, Dworkin tackles the semantic sting and the pragmatism problem, the classical theses about the Interpretation of the US Constitution are inevitably overcome.

In other words, the correct answer problem is not reduced to the court ruling's identification with the text of the law or the Constitution. Were we to think like that, we would still be tied to the dilemmas of semantic stances. When we speak of correct answers, there is a host of events that cross through the law, which go beyond the mere problem of the "literality of the text".

Hence the confusion made by Appio: when I assert that the semantic limits of the text must be complied with, as in the case of the problem involving same-sex marriage, he takes from my approach an inexplicable slant of judicial restraint in benefit of strict exegesis, according to the literality of the norm[20]. Still in the realm of the series of mistakes and confusions made by the author in the course of his text, let's look at the statement saying that philosophical hermeneutics "does not point a way to be followed, as it simply recommends that the interpreter should let the interpretation flow naturally"[21], as though I were suggesting some sort of hermeneutic *laissezfaire*.

I must insist: the hermeneutics I work on is anti-relativist and anti-discretionary, which is to say that *the meaning is not at the interpreter's disposal* (which is different from saying there is some "strictly literal exegesis"). Finally, it should be noted that, since the first edition of my *Súmulas no Direito Brasileiro*[22], prior to the release of *Hermenêutica Jurídica e(m) Crise*, I have already been defending an explicit doctrine in a sense that is vastly unlike the one stated in this odd typological synopsis, which makes me consider there is an indisputable misinterpretation about the corresponding contents in my texts, which not even the hermeneutic "let-it-flow" would allow in such notorious mistakes.

That is why we need to avoid the following confusion: when I assert the semantic limits of the text must be (minimally) complied with, as in the case of the problem involving same-sex marriage, one cannot take from my approach an inexplicable slant of judicial restraint in benefit of some strict exegesis, according to the literality of the norm. Far from it! I must insist: saying the meaning is not at the interpreter's disposal is different from saying there is some "strictly literal exegesis".

In one word: we have a Constitution that is the Alfa and Omega of democratic judicial order. A steering, commitment-based Constitution. Living in a democracy has its costs. In this case, a basic cost: the constitutional pre-commitments can only be cleared by those appointed by the very Constitution (the amending constituent power).

Assuming everything that is not provided for in the Constitution can be "performed" by the Judicial Branch, we would not even have had to write the Constitution: the courts would do it better (or the Public Attorney's Office!). Incidentally: after the aforementioned ADPF thesis success, there is a host of claims that should immediately be filed with the courts (and which are widely supported by the population...!). Do I need to list them?

Always defending the preservation of the autonomy degree reached by law and in democracy, I believe it would actually be better to rely on the Constitution and the way it itself has laid out for it to be amended and laws to be created. After all, 200 years of constitutionalism should have taught us the price of the countermajoritarian rule. At the helm of his boat, Odysseus was aware of the danger posed by the sirens' song...! Oh, social facts...; the good old factual positivism. Oh, the majorities... However, how can we tell what they want other than by way of the Legislature? Either that or let us leave everything to lawsuits! But then we had better not complain about "excess judicialization" or "activisms"...!

6. HERMENEUTICS, JUDICIAL PROTAGONISM AND LEGAL POSITIVISM: THE PROBLEM DERIVING FROM REPLACING THE MOUTH-OF-THE-LAW JUDGE WITH THE PRINCIPLE-BASED JUDGE (OR THE PROBLEMS DERIVING FROM LEAPING FROM REASON TO THE WILL)

Talking about "hermeneutics" is complex business. In the (jurists' theoretical)[23] common sense, this word is plagued by some veritable "meaning anemia." People say "anything about anything" about it (to reclaim here jargon I once minted to face the relativisms typical of would-be critical and post-positivist theories).

Saying that hermeneutics is the "art of interpreting" or that "hermeneutics" is the science of interpretation" solves nothing. Likewise, saying the Constitution requires mechanisms (*sic*) or specific methods for its interpretation is absolutely reckless, besides failing to withstand a 30-second philosophical discussion.

In fact, interpretation studies have gained momentum in the past years with the advent of post-WWII Constitutions. A wide variety of notions have emerged from that. On the one hand, it is widely said "we are in the age of principles", "principles are the positivation of values", the "general principles of law have now been turned into constitutional principles", principles are the way for morals to correct the law, principles are *writs* of optimization, "the balancing method" (*sic*) is the best suited to face the complexity of constitutional texts, and subsumption has been "replaced with balancing" (although it, i.e. subsumption, remains crucial for "easy cases" etc). That is "the word on the streets". Therefore, countless are the mistakes colonizing the theory of law at this point in history.[24]

This issue is so serious that the weighing rule proposed by Alexy has been gradually turned into a "principle" (*sic*). To make matters worse, the so-called "balancing" is directly applied by the "interpreters", who place one "principle (or value)" on each plate of the scale (*sic*) for the result to finally emerge: the value (*sic*) that will prevail. Many also speak of some "weighing of interests" (as though they were reinstating Philipp Heck's *Interessenjurisprudenz*). One principle supersedes the other... As a result of what? The answer is simple: as a result of the "balancing" interpreter's discretion (to say the least). What was the ADPF 132 judgment other than the exercise of some wide discretionary (or arbitrary) power?

Another problem emerges from the misunderstanding about the "interpretation methods." In fact, the writer-jurist clings to Savigny and brings the traditional grammar, axiological, teleological, logical-systematic, and historic-evolution methods. That is done without any critical judgment of the role historically played by those methods and without any comments about what actually took place in Germany in the 19th century, as the country struggled between historicism and pandectism. As though it were under a veil of ignorance, the theoretical common sense disregards that aspect. Were jurists aware of that, they would probably not cite Savigny. Or at least they would be honest and put the master's work in context.

Other authors have "found out" (quite belatedly) that the judge is no longer the mouth of the law (they are those who make the "positivism-natural law" dichotomy, or something similar, as will be shown below). Quite often I hear in lectures - and read in some books – that for this "discoverer" authors there would be two types of judges: the mouth-of-the-law judge and the principle-based judge. The "world" would fit in here, so to speak, given that in place of this exegetic (primitive positivist) judge, the "post-positivism" vulgate has put the "judge who owns the meanings", a solipsist judge (*Selbstsüchtiger*). Why does/did that happen? Because the field of law (in Bourdieu's sense) has yet to duly solve the problem called "what is this, the legal positivism?"

To most people, speaking of positivism means recalling the old exegetics, in which text and rule are (were) the same thing, just like term in effect and validity. Hence, my warning: when we speak of positivisms and post-positivisms, from the start it is necessary to make clear the "place of speaking", that is, about "what" we are talking.

In fact, it has been a long time since my criticisms have been aimed chiefly to the post-Kelsen normative positivism, that is, the positivism that admits discretion[25] (or judicial decisionisms and protagonisms – in short, we must keep it clearly in mind that the positivism of that sort is called "normative" because the "judges produce norms" and, as they have the power to produce norms, whatever they decide, goes – therein lies the core of Chapter 8 of the Pure Theory of Law[26]). Actually, discretion is a characteristic of any and all positivism.

In other words, it is not necessary (anymore) to say the "judge is the mouth of the law" etc.; in short, we can all be spared, at this point in history, from such "discoveries of black powder." That is because such "discovery" should not lead to an empire of solipsist decisions, examples of which are the stances which follow the Jurisprudence of Values (which has been "imported" from Germany in a misguided fashion), as well as the various axiologisms, legal realism (which is no more than some "factual positivism"), the weighing of values (through which, at least in *terrae brasilis*, the judge literally chooses one of the principles he himself elects *prima facie*) etc.

Even here in the final considerations, this issue needs to be better explained: positivism is a scientific stance that cements itself in a decisive manner in the 19th century. The "positive" to which the tern positivism

refers is understood here as being the facts (we should remember that the logical neopositivism was also called "logical empiricism"). Evidently, facts, here, correspond to a given interpretation of reality that encompasses only that which we can count, measure or weigh, or, at the limit, something we can define by means of an experiment.

In this conceptual jumble, some manuals even present Kelsen's thesis regarding the separation between law and morals in the science of law as the detachment of morals from law, which makes "applying the letter of the law" a positivist attitude. Therefore, according to a misguided interpretation, Kelsen would have been a positivist who used to advocate a pure interpretation of law. Hence, it is said he believed the law should be applied in a literal manner (*sic*). In fact, that type of mix-up is seen quite often. We also frequently see self-described critic (and post-positivist or non-positivist) jurists pushing Kelsen's maxim that the "interpretation of the law is an act of will." In such case, such jurists unwittingly assume Kelsen's "other side", that is, the side on which Kelsen says that interpretation is an act of will, although he says that because he believes judges do not make science but legal politics.

Based on that, the confusion is endless, even reaching the debates at the Brazilian Federal Supreme Court. A sort of "state of nature in the understanding of law" is created, in which each one defends their own thesis. The result: to "escape" the exegetic formalism (because in jurists' mind positivism equals exegetism), a considerable amount of said jurists ends up going for (philosophical) relativism, that is, by mistaking truth for an apodictic notion, they say "the truth is always relative". It is the pragmati(ci)sm taking over the last trenches of law. The ADPF 132 decision seems to fit perfectly into that context. It should suffice to see some of the opinions issued by the Justices during the proceedings:

> **J. Gilmar Mendes:** *"The Court's elimination or establishment of certain normative meanings of the text almost always have the ability to change, albeit minimally, the original normative meaning set by the lawmaker. That is why oftentimes the interpretation given by the Court may turn into a decision that alters the original meanings of the text"*[27]

> **J. Luiz Fux**: *So much so that at this time, which is also one of judicial daring – but life is daring, otherwise it is nothing -, is the time for a crossing. The crossing that perhaps the legislator has not wanted to make but which the Supreme Court, by means of Justice Carlos Ayres' splendid vote, has signaled it is willing to.*

Finally, the interpretation carries a decisive meaning for the normative consolidation and preservation of the Constitution. The constitutional interpretation is subject to the principle of the optimal actualization of the norm (*Gebot optimaler Verwirklichung der Norm*). Evidently, that principle cannot be applied based on the means provided by logical subsumption and conceptual construction. If law and above all the Constitution

have their efficacy conditioned by the concrete facts of life, it does not seem possible that the interpretation should make them a blank slate[28].

Therefore, it is urgent to renew that same emancipator mindset and, at this point in history, extend the institutional guarantee of the family also to same-sex couples.[29]

> **J. Ricardo Lewandowski**: *It is certain that the Courts no longer are, as the 18th century liberal thinkers would have them be, a mere non-critical, mechanical* bouche de la loi*, and certain creativity by the judges is admitted in the law interpretation process, especially when they come across gaps in the legislation. However, we must not forget that the judges' exegetic work ceases upon reaching the objective limits of the statutory law. In other words, although judges may and should resort to a wide variety of hermeneutic techniques to extract from the law the meaning that is closest to the legislator's original intent, combining it with the Zeitgeist in effect at the time of its subsumption to the facts, the judicial interpretation cannot flow over the boundaries objectively outlined in normative parameters, given that, as our forerunners used to teach,* in claris cessat interpretatio[30]

> **J. Joaquim Barbosa:** *For believing that that was not the constituent legislator's intent, I understand it is up to this Court to search the rich axiological palette informing the entire constitutional framework created in 1988 and check whether the legal disregard some intend to lay on these relationships is compatible with the Constitution. It is then that this Court will be undertaking one of its noblest missions: the one of preventing the smothering, the despise, the plain and hard discrimination of a minority group by the majorities that be.*[31]

Let us examine how symptomatic that is. In Brazil, there are several authors who maintain so-called "progressive" positions and say judges are the channel through which social values invade law. It is intriguing that many such positions – and Brazil is bountiful in that sort of production – speak of post-positivism and even cite Dworkin as the author who has "elevated principles to the status of norm, thereby freeing judges from the constraints of strict legality."

Now, it is generally known that Dworkin devised his thesis exactly to fight the afflictions of Herbert Hart's positivism (who, by the way, can also be considered a normative positivist). The core point in Dworkin's argument is related to the discretionary power Hart bestows upon judges to solve that which he used to call difficult cases. It should be noted that the author, unanimously held as one of the so-called post-positivism leaders, is a stalwart discretion opponent (and, as a necessary corollary, and anti-relativist), despite certain sections in the legal community saying Dworkin is a natural law theorist and his "Judge Hercules" is a subjectivist.[32] As we are going to see, nothing could be more mistaken and unfair.

Therefore, it seems obvious to say that, if someone grounds their theory on Dworkin, they will carry the burden of being discretion opponents,

unless they lower their position to some naive methodological syncretism that remains blind to the existing differences. Incidentally, such syncretism is not hard to find among brazilian jurists, *v.g.* those who advocate weighing in stages and cite, to support their thesis, as astounding as it may seem, no less than Gadamer's hermeneutic circle. I think that is unacceptable. It would be something like placing modern subject in the midst of Aristotle's work. Or yet, "bundling up" Alexy's and Dworkin's positions; or attempting to bridge the gaps in Habermas' theory using Alexy's balancing.

What is, after all the core issue of the discussion? I will try to explain that more thoroughly. In the field of law, at the age of the great Constitutions, no one wants to be a positivist (any longer) (except, of course, for Ferrajoli, Peces-Barba and PrietoSanchis, to name the most important). Everyone sees themselves as post-positivists or non-positivists. In the classroom, conferences and seminars, I often hear criticisms against legal positivism. When someone defends the application of a given legal text, they are soon branded a positivist. Defending the application of some law's "literality", for instance, has become a mortal sin. However, would defending the "law's literality" be a positivist attitude?

Now, positivism is a *scientific* stance that cements itself in a decisive manner in the 19th century. The "positive" to which the tern positivism refers is understood here as being the facts (we should remember that the logical neopositivism was also called "logical empiricism"). Evidently, facts, here, correspond to a given interpretation of reality that encompasses only that which we can count, measure or weigh, or, at the limit, something we can define by means of an experiment.

In the realm of law, such positivist measurability will be found first in the product of the Legislature, that is, in the legislation, more specifically in a certain type of legislation: the Codes. Positivism was an ideological stance built to sustain that which had been made positive by the new historic subject: the revolutionary legislator. Then, positivism means: a theory to ensure the product that, in a discretionary manner, the legislator has set as a way to maintain the power.

That first phase was "legalism." It should be noted that such legalism presents different overtones as we look at that phenomenon from the standpoint of a given legal tradition (for instance, we can refer to: the english positivism, of a utilitarian nature; to french positivism, where a legislation exegesis prevails; and to the german positivism, within which we can see the rise of the so-called conceptual formalism that is at the root of the so-called jurisprudence of concepts).

With respect to the french and german experiences, that can be ascribed to the heavy influence Roman Law had on the formation of their respective private law. Not because of what is usually believed – that the romans "created the written laws" – but instead because of how Roman Law was studied and taught. That which is called exegesis has its origins there: there was a specific text on which the most sophisticated studies about law focused. That text was – in the pre-codification period – the *Corpus Juris Civilis*.

The codification moves along the following path: before the codes, there was a sort of ancillary role attributed to Roman Law. That which could not be solved by Common Law would be solved according to criteria deriving from the authority of studies on Roman Law – by the commentators or glossarists. The codification movement somehow incorporates all the Romanist discussions and ends up "creating" a new element: the Civil Codes (France, 1804, and Germany, 1900).

From then on, the ancillary role of Roman Law disappears completely. All legal arguments are supposed to attribute their merits to the codes, which are given the stature of veritable "sacred texts". That is because they are the positive element with which the Science of Law is supposed to deal. Of course that, even back then, there emerged problems related to the interpretation of such "sacred text".

Somehow we would come to realize that that which is written in the Codes does not cover the reality. But then, how do we control the exercise of interpreting the law so that such work is not "destroyed"? And, at the same time, how do we exclude from the interpretation of law the metaphysical elements that were not well-liked by the positivist way of interpreting reality? At first, the answer will be given based on an analysis of the very codification: the School of Exegesis, in France, and the Jurisprudence of Concepts, in Germany.

I call that first panorama primitive positivism or exegetic (or legalist) positivism. The main feature of that "first moment" of legal positivism, with respect to the problem of interpreting law, will be to perform an analysis which, under the terms proposed by Rudolf Carnap[33], we could call syntactic. In that case, the mere strict determination of the logical connection of the signs that make up the "sacred book" (Code) would be sufficient to solve the problem of interpreting law. Therefore, concepts such as those of analogy and general principles of law must be also seen from that standpoint of building a strict conceptual framework that would represent the – extremely exceptional – hypotheses of case inadequacy to the legislative hypotheses.

Then, there emerge proposals to improve that logical "rigor" of scientific work as proposed by the positivism. That second moment is what we can call *normative positivism*. Here there is a significant change regarding the manner of work and the starting points of the "positive", the "fact". First off, the first decades in the 20th century witnessed the overwhelming growth of the Government's regulatory power – which will intensify in the 1930s and 1940s of the 20th century – and the demise of the syntactical-semantic models of interpreting the codes, which models seemed to be completely unhinged and worn out. Then, the problem of the undetermined meaning of Law emerges front and center.

It is in such environment that, in the first decades of the 20th century, Hans Kelsen enters the scene (and whose major work, the second edition of the Pure Theory of Law, is published in 1960). Surely Kelsen does not mean to destroy the legal positivist tradition that had been built by the *Begriffjurisprudenz* (Jurisprudence of Concepts). On the contrary, we can say that his main goal was to strengthen the analytical method proposed

by the conceptualists so as to respond to the increasing breakdown of the legal rigor that was being disseminated by the growing Jurisprudence of Interests and the School of Free Law – which significantly nourished the use of psychological, political, and ideological arguments in the interpretation of law. That is done by Kelsen based on a radical finding: to him, the problem of interpreting law is much more semantic than syntactic. Therefore, we have here an emphasis on semantics[34].

Nevertheless, at a specific point Kelsen "gives in" to his adversaries: the interpretation of law is riddled with subjectivisms deriving from a solipsist practical reasoning (it should be noted that later on Habermas would devise his theory of communicative action as a way to replace that practical reason). To the Austrian author, such "deviation" is impossible to be corrected. In the famed chapter VIII of his *The Pure Theory of Law*, Kelsen even states that legal norms – understanding norm in the sense of the PTL, which is not equivalent, *stricto sensu*, to the legislation – are applied in the scope of their "semantic frame". It is a procedural view of the application of law.

To Kelsen, the only way to correct that inevitable indetermination of the meaning of law would be to resort to a logical therapy – of the *a priori* kind – that made sure Law moved about on strict logical grounds. That field would be the place of the Legal Theory, or in Kelsenian terms, the Legal Science. And that is directly related to the results of research conducted by the Vienna Circle (the birthplace of logical neopositivism). Without it, it is impossible to understand the complexity of Kelsen's work.

That point is essential for us to be able to understand the positivism which developed in the 20th century and how I conduct my criticisms in this field of the theory of law. More clearly: I am talking about that normative positivism and not about an exegesis that had been giving off signs of exhaustion in the beginning of the last century.

In one word: Kelsen was already done with the exegetical positivism but he abandoned the main problem of Law - the material interpretation at the "application" level. And therein lies the "curse" of his thesis. He was not completely understood, as to this day some mistakenly believe that, to him, judges should carry out a "pure" interpretation of the law...! Definitely: one cannot begin a study of the theory of law believing that exegetic positivism finds in Kelsen an advocate or leader.

Let me be clearer. Since the early 20th century, the philosophy of language and the logical neopositivism of the Vienna had already pointed out to the problem posed by the multiple meanings of words. That leads us to another question:

a) is the so-called "literality of the law" something that is available to the interpreter?

b) given that words are polysemous, given there is no possibility of completely covering the meaning of statements contained in a text, then when is it that we can say we are before a "literal interpretation"?

Therefore, literality is much more an issue of the interpreter's understanding and insertion in the world than a "natural" characteristic, so to speak, of legal texts. In other words, we cannot admit that, still at this

point in history, we should be taken by arguments which remove the contents from a – democratically legitimized – law based on the alleged "outdated" literality of the legal text.

7. CONCLUSION.

When I affirm my position in defense of the "constitutional legality" (or of a right democratically produced by the Legislature, in short, of an "integrity of the legislation", ultimately), I see the idea of exegesis (or exegetism) as outdated, as previously shown. In fact, I mean that in Contemporary Constitutionalism the Legislature's work should be understood no longer in terms of the prevalence of some bourgeois legality but instead as a constitutional legality, to quote ElíasDíaz[35]. In other words, I am referring to the fact that we have leapt from a *lowly legalism* that reduced the core element of Law either to a strict concept of legislation (as in the case of 19th century codes, the basis for primitive positivism) or to an abstract, universalizing concept of norm (which is embedded in the idea of law found in normative positivism), *to a concept of legality that only constitutes itself under the cloak of constitutionality*. After all, we would not be able to, at this point in history, admit an unconstitutional legality. Strictly speaking, legality should be understood as the set of operations by the State that is determined not only by the law but also by the Constitution – once it would be nonsense to affirm a legality that did not express the commendation of a constitutionality – and by the effectiveness of court decisions under the framework of democratic legitimacy. [36]

Hence, I insist: literality and ambiguity are interchangeable concepts which are not clarified in a simply abstract dimension of analyzing the signs that make up a statement. Such issues always take us to a level of depth that carries with it the context from which the statement originated.

That is why when I sometimes affirm the "literality of the law" I am siding with neither an originalist nor an exegetic stance. Well, literality, with or without quotation marks, is much more an issue of the interpreter's understanding and insertion in the world than a "natural" characteristic, so to speak, of legal texts. Besides, there are no texts without contexts. The text does not exist in its "textitude." It merely "is" in its norm. Such norm has limits, though. Many. Why? For the simple reason we cannot attribute any norm to a text or, as something I came up with some time ago which has become a catch phrase, "*we cannot just say anything about anything.*" It is Gadamer who says: if you want to say something about a text, let the text tell you something first[37].

That is the hermeneutical problem we must tackle! Which problem misleading arguments like that only conceal and, more seriously, at the risk of tainting the democratic pact. Regardless of how fair and popular the cause may be. The issue is to know the limits of activist stances. And whether there is in fact the "good activism." And, more than that, the problem is to establish who is going to say what it is – "this good activism?"

>> ENDNOTES

[1] Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628635. Access: February, 12th, 2013.

[2] ADI 4277 was initially filed with the Court as ADPF 178. The action sought a statement recognizing the union of same-sex people as a family entity. It was also requested that the same rights and duties of common-law marriage partners be extended to same-sex partners (BRAZIL. Federal SupremeCourt.AçãoDireta de Inconstitucionalidade No. 4277. Petitioner: General Attorney of the Republic. Requested: the President of the Republic and the National Congress. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement's Date of Publication: 14/10/2011).

[3] In ADPF no. 132, the state government of Rio de Janeiro (RJ) claimed the failure to recognize same-sex couples violates basic principles such as equality, freedom (from which the autonomy of will derives) and the principle of the human person's dignity, all of them contained in the Federal Constitution. Under that argument, the government asked the STF to apply the legal regime of common-law marriage provided for in article 1723 of the Civil Code to the same-sex relationships of Rio de Janeiro civil servants (BRAZIL. Federal SupremeCourt. Arguição de Descumprimento de Preceito Fundamental No. 132. Petitioner: Governor of the State of Rio de Janeiro. Requested: Courts of Justice and the Legislative Assembly of the State of Rio de Janeiro. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement's Date of Publication: 14/10/2011).

[4] The common-law marriage between a man and a woman is recognized as a family entity, comprising their public, ongoing, and lasting cohabitation established in order to raise a family.

[5] *Verbis*, from the vote: The Constitution does not bar same-sex people from forming a family. The opinion is settled in that no one is forbidden anything except given someone else's or the entire society's right or legitimate interest protected, which is not the case under judgment (p. 614). Actually, regarding the concrete use of sex in the three aforementioned functions of erotic stimulation, sexual intercourse and biological reproduction, the Brazilian Constitution is intentionally silent. Which is in itself a way of operating by drawing from Kelsen's general negative norm, according to which 'everything that is not legally barred or required, is legally allowed' (p. 634) (...). Plainly speaking: the Federal Constitution does not expressly provide about the three classical forms to concretely use the human sexual apparatus. It does not explicitly refer to people's subjectivity to choose to purely and simply not use their genitals (sexual abstinence or vow of chastity), to use them by oneself (masturbation), or finally, to use them along with a partner. Therefore, the Constitution hands over the empiric performance of such sexual functions to each person's free will, as the normative silence in this case operates as absolute respect for something that, in animals at large and human beings in particular, is defined as instinctive or deriving from the very nature of things. Every natural person's "preference" or "orientation" is embedded in such instinctive way of being (BRAZIL. Federal SupremeCourt. Arguição de Descumprimento de Preceito Fundamental No. 132. Applicant: Governor of the State of Rio de Janeiro. Requested: Courts of Justice and the Legislative Assembly of the State of Rio de Janeiro. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement's Date of Publication: 14/10/2011: p.634-635).

[6] *Verbis*, from the vote: This type of constitutionalism, i.e. compassionate, is oriented towards people's community integration (not exactly towards "social inclusion"), to be made viable by urgently adopting affirmative public policies for the basic civil-moral equality (more than simply economic-social) of historically underprivileged and even vilified social strata. Social

strata or segments such as, for instance, the blacks, the Indians, women, people with a physical and/or mental disability, and more recently, those who stopped being referred to as "homosexuals" to be identified by the name of "homoaffectionate." That, along with public laws and policies fiercely fighting prejudice, ultimately means fully accepting and subsequently experiencing social-political-cultural pluralism (BRAZIL. Federal SupremeCourt. Arguição de Descumprimento de Preceito Fundamental No. 132. Applicant: Governor of the State of Rio de Janeiro. Requested: Courts of Justice and the Legislative Assembly of the State of Rio de Janeiro. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement's Date of Publication: 14/10/2011: p. 632).

[7] *Verbis*, from the vote: The caption in art. 226 grants the family, the basis of society, special protection from the State. Constitutional emphasis on raising a family. Family in its colloquial or proverbial meaning as a domestic group, regardless of it having been formally or informally set up, or whether it comprises opposite-sex or same-sex couples. When using the word "family", the 1988 Constitution does not limit its formation to opposite-sex couples or to city hall formalities, civil ceremony, or religious rite. Family as a private institution which, voluntarily constituted between adult persons, maintains a necessary trichotomous relationship with the State and civil society (BRAZIL. Federal SupremeCourt. Arguição de Descumprimento de Preceito Fundamental No. 132. Applicant: Governor of the State of Rio de Janeiro. Requested: Courts of Justice and the Legislative Assembly of the State of Rio de Janeiro. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement's Date of Publication: 14/10/2011:p. 612-613).

[8] *Verbis*, from the vote: The Constitution's reference to the basic man/woman duality in paragraph 3 of its art. 226 is due to the focused effort to not miss the slightest opportunity to benefit horizontal legal relationships or hierarchy-free ones in the scope of domestic partnerships. Normative reinforcement for more efficiently fighting the Brazilian customs' patriarchal obstinacy (BRAZIL. Federal SupremeCourt. Arguição de Descumprimento de Preceito Fundamental No. 132. Applicant: Governor of the State of Rio de Janeiro. Requested: Courts of Justice and the Legislative Assembly of the State of Rio de Janeiro. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement's Date of Publication: 14/10/2011: p. 614).

[9] I suggest Tassinari, 2013 as a mandatory reading to learn more about judicial activism, study its origins, the misguided import of the activist model, the limits of jurisdiction, and the necessary distinction between judicialization and activism; also Streck, 2013, especially chapters 5 and 6.

[10] Acc. Wolfe, 1994.

[11] CC, art.1.723: "The common-law marriage between a man and a woman is recognized as a family entity, comprising their public, ongoing, and lasting cohabitation established in order to raise a family."

[12] It should be noted there is a considerable number of Brazilian authors concerned about the problems deriving from that misguided reception of the judicial activism idea in Brazil. In that respect, it is worth mentioning Valle/Vieira, 2009.

[13] BRAZIL. Federal SupremeCourt. Reclamação nº 4335 (AC). Petitioner: Federal Public Defender's Office. Requested: Criminal Execution Judge of Rio Branco's District. Rapporteur: Ministro Gilmar Mendes. Still pending judgement.

[14] Also in that respect and to learn more about the topic, Acc. Streck/Tomaz de Oliveira/Barretto, 2010

[15] Dworkin, 2005.

[16] Acc. Streck, 2011a.

[17] Streck, 2011b.

[18] Acc.Appio, 2009.

[19] Acc. Grey, 1975.

[20] Appio, 2009.

[21] Appio, 2009:299.

[22] Streck, 1995.

[23] The expression *theoretical common sense* comes from Luis Alberto Warat, eminent argentinean professor who unveiled the masks of the "obvious" by showing/denouncing, in the scope of the theory of law, that the "obvious elements, certainties and truths" transmitted by legal dogmatics are no more than rhetoric-ideological constructs. That is not to say that every dogmatic-legal discourse is ideological; but a considerable number is, to the extent in which it is a symbolic venue for de "discursive retaliation", "*ad hoc* justifications" and "neo-sophisms", given that when it is convenient for them, jurists ignores any possibilities for words tp have DNA. One of the subject-matters of his criticism was the production of digests aimed at making things universal. Fundamentally, even today – or more and more still – jurists' production related to that which we can call legal dogmatics keeps following court decisions, in which entire fields of knowledge are eliminated to dispatch people to a highly standardized symbolic sphere instituted and capitalized in favor of the prevailing mode of semiotization. In other words, the doctrine keeps indoctrinating very little. It was against this sort of "hermeneutic runaround" that Warat devised this concept, which is the way through which legal dogmatics equips such issues.

[24] For a proper reading of the principles, see the book by Tomaz de Oliveira, 2008. In this book, the author discusses the issue of principles from the standpoints of hermeneutic philosophy and philosophical hermeneutics, affirming their normative nature and deontological character. About my criticism against pan-principles, see my debate with Luigi Ferrajoli in Ferrajoli, 2012).

[25] I understand discretion according to what we can infer from *lato sensu* positivism, therefore referring to the idea of the power to *choose* the interpreter has when judging a case. I consider discretion the main characteristic of post-exegetic positivism (especially the proposals by Kelsen and Hart). It is obvious that discretion was also present in the legalist (primitive) positivism, to the extent that the legislator had full discretion to prepare the law. In that regard, I make use of the *strong discretion* notion worked on by Dworkin in his *Taking Rights Seriously*, to criticize Herbert Hart's positivism. In *terrae brasilis*, there is boundless expanses where the judges' discretionary power is applied, chiefly from the standpoint of securing greater powers for judges in order to overcome the model of formal-exegetic law; or as a bet on judicial protagonism, in which the judge judges based not on non-legal criteria but on an act of will (I recall Kelsen maintains the judge's act is an act of will), and discretion is therefore understood as a power inherent to the judicial task, in view of the vagueness and ambiguity of normative texts. It is important to say that, based on a theory of decision – grounded on the demand for correct answers in law – I wholly refute the judges' discretionary power.

[26] Kelsen, 2011.

[27] BRAZIL. Federal SupremeCourt. Arguição de Descumprimento de Preceito Fundamental No. 132. Applicant: Governor of the State of Rio de Janeiro. Required: Courts of Justice and the Legislative Assembly of the State of Rio de Janeiro. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement's Date of Publication: 14/10/2011: p. 755

[28] BRAZIL. Federal SupremeCourt. Arguição de Descumprimento de Preceito Fundamental No. 132. Applicant: Governor of the State of Rio de Janeiro. Required: Courts of Justice and the Legislative Assembly of the State of Rio de Janeiro. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement'sDate of Publication: 14/10/2011: p. 680

[29] BRAZIL. Federal SupremeCourt. Arguição de Descumprimento de Preceito Fundamental No.

132. Applicant: Governor of the State of Rio de Janeiro. Required: Courts of Justice and the Legislative Assembly of the State of Rio de Janeiro. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement'sDate of Publication: 14/10/2011: p. 681

[30] BRAZIL. Federal SupremeCourt. Arguição de Descumprimento de Preceito Fundamental No. 132. Applicant: Governor of the State of Rio de Janeiro. Required: Courts of Justice and the Legislative Assembly of the State of Rio de Janeiro. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement's Date of Publication: 14/10/2011: p.712

[31] BRAZIL. Federal SupremeCourt. Arguição de Descumprimento de Preceito Fundamental No. 132. Applicant: Governor of the State of Rio de Janeiro. Required: Courts of Justice and the Legislative Assembly of the State of Rio de Janeiro. Rapporteur: Minister Carlos Ayres Britto. Date of Judgment: 05/05/2011. Judgement'sDate of Publication: 14/10/2011: p. 724

[32] Upon reviewing the literature dealing with authors like Dworkin in Brazil, I believe the best books have been authored by Motta, 2012 and Meyer, 2008. Meyer – who was advised by Marcelo Cattoni, another legal philosopher specializing in Dworkin and Habermas –, like Motta, puts "things" in their rightful places. Additionally, they both demystify the misguided readings about Dworkin and deliver sharp criticism against Alexy.See Cattoni de Oliveira, 2007.

[33] Carnap, 1971.

[34] For us to fully understand this issue, I must insist on a point: there is a split in Kelsen between law and the science of law, which will crucially determine his concept of interpretation.

[35] Díaz, 1995.

[36] Acc. Díaz, Elías (1995). "Estado de Derecho y Derechos Humanos". *Novos Estudos Jurídicos*, Itajaí, Year1, no. 1, Jun, p. 16.

[37] Gadamer, 1998.

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BOOK REVIEWS
// RESENHAS

BARROSO, LUÍS ROBERTO (2013). [*THE DIGNITY OF THE HUMAN BEING IN CONTEMPORARY CONSTITUTIONAL LAW: THE CONSTRUCTION OF A LEGAL CONCEPT UNDER THE LIGHT OF THE WORLD'S CASE LAW*]. BELO HORIZONTE: FÓRUM.

// BARROSO, LUÍS ROBERTO (2013). *A DIGNIDADE DA PESSOA HUMANA NO DIREITO CONSTITUCIONAL CONTEMPORÂNEO: A CONSTRUÇÃO DE UM CONCEITO JURÍDICO À LUZ DA JURISPRUDÊNCIA MUNDIAL.* BELO HORIZONTE: FÓRUM.

Gilberto Guerra Pedrosa

>> ABOUT THE AUTHOR // SOBRE O AUTOR

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This is an abstract of Luís Roberto Barroso's book, which is based on the article "Here, there and everywhere: human dignity in contemporary law and in the transnational discourse". The article was developed in 2011 during the period Barroso was a visiting scholar at Harvard University.

In a legal context more and more globalized, *"human dignity would be one of the main ideas of this setting"* (p. 12). However, the concept regarding human dignity is not well delimited in the current legal discourse, as the concept is usually hostage by the fallacies that take advantage of its amorphous characteristic. Such problem reflects on the book's main proposition: to structure a legal concept of human dignity assuming that the concept is a potentially valuable tool for the decision of morally complex controversies in constitutional field. In order to achieve his goal, the author goes through three main objectives: to demonstrate the importance of human dignity in Brazil's jurisprudence, international jurisprudence and in *"the transnational discourse"*[1]; to explore the legal nature of human dignity (value/fundamental right/principle) aiming to condense the concept into its core meaning and to demonstrate the utility of the core meaning of the concept.

At the beginning of the book, the author establishes a narrative under various points of view about the origin and evolution of the concept of human dignity. Barroso underlines two different representations of the concept. The first one regards to ancient Rome until the 18th century, period in which *"the first sense attributed to dignity, while a categorization of the individuals, was related to a superior status, a higher position or social classification"*. The second one is related to a contemporary representation, which is *"based on the assumption that each human being owns an intrinsic value and enjoys an especial position in the world"* (p. 14). This is a reference to the Judaeo-Christian tradition, the Enlightment and the postwar period. It is precisely during the post-World War II period that the concept of human dignity is incorporated in the legal and political discourse.

There are some factors that have contributed to the diffusion of the concept of human dignity in the legal discourse, which are: the textual record of human dignity in treaties, international documents and national constitutions; and the *"rise of a post-legal positivism culture that has reconnected law with moral and political philosophy, lessening the radical clash between these three elements imposed by the pre-World War II positivism."* (p. 19). Barroso describes the presence of the legal concept of human dignity on various constitutional texts, jurisprudence of constitutional courts and on documents and international treaties. The presence of the concept on these fields has enabled institutional and rhetorical phenomena to contribute to the diffusion and standardization of the legal meaning of human dignity. In this sense, the author identifies the *"legal transposition"*[2] and the so-called *"transnational discourse"*. Newly democracies, such as Greece, Portugal, Spain, Brazil, Chile and Argentina, have taken as their model institutional designs from more deeply rooted democracies (United States of America and Germany). According to Barroso, such influence is also observed on the constant dialog between constitutional court and higher courts noted on mutual mentions, conferences about

academic exchange and the organization of public transnational forums, such as the Venice Commission (p. 34).

First, the author discusses about the legal nature of the concept of human dignity, and after, he defines the core meaning of the concept. Some problems become evident since the concept is exposed to multiple influences that come from religion, philosophy, politics and law. According to the author, the rise of the concept of human dignity in law is linked to a change on the legal thinking: it grew apart from the formalist thinking and came closer to a post-legal positivism perspective. Considering this context, Barroso describes the idea that human dignity is characterized as a fundamental value implicit in constitutional democracies as a consensus. The concept of human dignity would be part of the legal system under the shape of *"legal principle with constitutional status"* (p. 64), whose functions would go from source of rights and duties to interpretative guide to criterion for nullity (p. 66). Those functions are closely related to the way the author of the book systematically describes the constitutional principles as two concentric circles. Inside the inner circle, close to the center, the *"essential content of the principle"* (p. 65) would be working as a source of rights and duties. Therefore, the principle of human dignity, while working as a source, acts as a mechanism of inclusion of rights that are not recorded on text in any legal system. Inside the outer circle, the principle of human dignity works as a interpretative tool, thus it would act as a link of communication between the essential core of the fundamental rights - such as equality, freedom, right to vote - and the core meaning of human dignity. This would result in the correct interpretation and would help on the decision process about the meaning of the fundamental rights in real cases. Therefore, when confronted with the ambiguities, loopholes or collisions between fundamental rights, the principle of human dignity *"may be a proper compass to the search for the best solution". In situations that are conflicting with the principle of human dignity any law that violates the dignity, whether it is in the abstract case or in real life, the law will be null"* (p. 66).

The author, at last, offers the core meaning of human dignity, a concept that aims to make it more objective and crystallize it in the application of law. *"Broadly speaking, this is my minimalist conception: the human dignity identifies 1. the intrinsic value of all human beings, as well as 2. the autonomy of each individual; 3. which is limited by some legitimate constrictions imposed in the name of social values or state interests (community value)."* (p. 72). According to the author, the intrinsic value would the ontological element of human dignity (p.76) and it is expressed as the fundamental rights to live, equality, physical and psychiatric integrities. The autonomy, on the other hand, would be the ethical element, the individual's freedom to route its biographic path through a group of fundamental rights: basic freedoms (private autonomy, the freedom of the modern ones?), right to political activism (public autonomy, the freedom of the ancient ones?) , fundamental social right to minimal conditions of life (the existential minimum). The community value would be the social element of human dignity. During the debate over human dignity, the community value

(which is especially investigated by the author) is present in controversial cases, due to its restrictive character to personal autonomy. According to Barroso, the community value element is present in the justification for controversial legal decisions, some of them mentioned by the author: the case of the dwarf tossing, decided by France's *Conseil d'Etat* and endorsed by the United Nations Human Rights Council; the peep show case judged by the Federal Constitutional Court of Germany; the restrictions to prostitution in South Africa and in Canada - going on a different path from the one chosen by the Constitutional Court of Colombia, which considers prostitution a tolerable social phenomenon. The author establishes methods of observation aiming to build a proper justification for the concept of community value in order to avoid the risks of legal decisions invading personal autonomy by moralistic or paternalistic stances. Therefore, three points must be taken in consideration: *"a) the existence or non-existence of a fundamental right being attacked; b) the potential damage that can be inflicted on others and the person who is into consideration; and c) the level of social consensus regarding the subject under analysis"* (p. 95-96).

After having delimited the three basic elements, Barroso starts to explore them as three essential analytic levels between the subjects that are related to complex cases and human dignity. The author analyses abortion, same-sex marriage and assisted suicide. In each case, the conflicting elements between rights and duties present in each element of human dignity are considered and, at the end, the author takes a conclusive stance. According to Barroso's considerations, this is the way to ensure *"more transparency and accountability to the argument and decisions made by judges, courts and interpreters in general."* (p. 112).

On a postscript that goes beyond the article that inspired the author to write the book, Barroso analyses the use of human dignity in Brazilian jurisprudence. He makes a list of jurisprudential data from Supreme Federal Court and the other superior courts in Brazil. According to the author, due to the wide range and the great thematic detail present in the 1988 Federal Constitution — along with the long list of fundamental rights mentioned on the constitutional text — *"many situations in which other jurisdictions would imply the need to use the more abstract principle of human dignity, between us [Brazilians] they are already present in rules more specific and of more legal density."* The Brazilian jurisprudence based on human dignity usually is shown as a mere *" reinforcement to the argument"* of another fundament or a *"theoretic ornament"* (p. 115). The concept of human dignity is used mainly in situations of ambiguity, loopholes and when constitutional rules and fundamental right collide with each other (p. 115). It is rarely met as a central element during the development of an argument. Thus, its minimal elements are rarely specified or shown in the Brazilian jurisprudential arguments. Actually, they are fragmented as an approach of the fundamental value or the constitutional principle of human dignity and dispersed in various particular themes present in different jurisdictional instances in Brazil.

>> ENDNOTES

[1] On the note nº 8, the author explains the term: *"The use of the expression 'transnational discourse' intends to mean the mention and the argumentative use of foreign and international jurisprudences by the legal system of a country."* (p.11).

[2] Term defined by Frederick Schauer used by the author. Its definition would be *"the adoption by a country of the law and legal institutions developed by another country."* (p.33).

CASTRO, MARCUS FARO DE (2012). [*LEGAL ABSTRACTIONS AND SOCIAL CHANGE: INTERACTIONS BETWEEN THE LAW, PHILOSOPHY, POLITICS AND THE ECONOMY*]. SÃO PAULO: EDITORA SARAIVA. // CASTRO, MARCUS FARO DE (2012). *FORMAS JURÍDICAS E MUDANÇA SOCIAL: INTERAÇÕES ENTRE O DIREITO, A FILOSOFIA, A POLÍTICA E A ECONOMIA*. SÃO PAULO: EDITORA SARAIVA.

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The most recent book written by Marcus Faro de Castro – who is full professor at Universidade de Brasília Law School, located in Brasília, Brazil; master in law and Ph.D in law (both degrees obtained at Harvard University) – is structured with the aim to provide the means to perceive contemporary law in a critical point of view. In order to reach the objective, Marcus Faro de Castro uses history, comparative analyses between distinct legal traditions and a multidisciplinary approach to intertwine philosophy, politics and economy. According to the author: "Law is a method used by authorities from the State to put into order uncountable social relationships. It is too important to be lead by posturing and empty intellectual formalities" (p.22). The book is about this "system", which is not always deliberated or considered conscientiously. By going through different sets and historical contexts, the book depicts the Brazilian reality as an omnipresent wall against criticism, made by cross references and a recurring analytical element: the alternative routes that indicate that any particular option would lead to a different destiny. Marcos de Faro characterizes Brazilian law from the conservatism present in its legal field. He uses the term "theatre of shadows" defined by Brazilian historian, José Murilo de Carvalho. Carvalho's expression derivates from the awakening of the Brazilian Republican era when it was possible to occur some reconfiguration in the mismatches between ideas, institutions and Brazilian social reality. For Carvalho, the Republic rose immersed in an "bestialized" aura. It is an interesting allegory structured by Castro that can be related to Platon's cavern myth and what is described by the author as an immoderate moralism in Brazilian law.

Such awakening for the criticism a critic point of view is conducted by some the deconstruction of some themes concepts. Along the way it is essential to keep track of some conceptual elements. Similar to what he has done in his previous book, Marcos de Faro designs some sort of epistemological genealogy that starts at the two traditions he considers to be the base for the formation of philosophical thought in Occident: Platonism and Aristotelianism. The influence of both traditions over the construction of ideas and realities are explored on the book in a way that they go through different systems and they are articulated with the concepts of shape and matter. Both Platonism and Aristotelianism have their structures developed from the predilection for ideas and speculations about ideas. The transference of such emphasis on shape – performed by legal constructions – is criticized. It is not a matter of despising shape but a rejection to the insistency of using it even when it is not adequate or even "insufficient as intellectual support able to lead to the solution of practical conflicts" (p. 15). It is the discovery of the limits of metaphysics. It is explicit the intent to deconstruct the notion that law must necessarily search for support in philosophy or in abstractions and self-centered doctrines (p. 219). It is suggested an alternate route, which is defended from criticism as being more pragmatic: the matter. The deconstruction comes accompanied by the distance from the idea of law as a science, in the sense that science means the "construction of some higher and safe certainties, or some deep and praiseworthy truths" (p.17) and an

approach much closer to the concept of law as a social phenomenon. It is the substitution of a conceptual law, which is conservative and untouchable, by a pragmatic law, described as changeable by deliberation, opened to interdisciplinary empiric research and to reality. It is about the need to connect law with the social agenda and its transformation.

Another fundamental concept to the argumentative universe of the book – which articulates the frequent interposition of politic and "the game with shapes" (p. 41) – is the problem concerning power. This problem arrises with the challenge to coordinate the use of violence in order to organize life in society when it results in a process of legitimation and institutionalized allocation of force and the determination of the boundaries between licit and illicit. The problem of power does not concern only the use of brute force. The subtle violence of unquestioned reason, the universal absolute and dogmas the dogmatic absolute can equally serve to fundament the arbitrary exercise of authority. According to the author, "the elaboration of law has always have political consequences" (p.87) - and, often, commercial ends. The present moment, in which is perceived the proliferation of spread protests - and, somehow, interconnected in theirs complaint and geopolitics - and the violent repression to those movements, brings to surface both impacts derived from the problem of power and the reverberation of the democratic challenge - another important concept that refers to the inclusion of new actors in the construction and enjoyment of rights.

Rethinking law and democracy in such term conducts to the essential tension expressed in the identification of the jurist's double role. Much like the acrobat, the operator of law finds itself over this thin line (continuously trembling, vibrating reality and in constant transformation), in which it must balance the preservation of order – assuring historical conquests, legal safety and stability – as well as the transformation of the order, whenever there are unjust and excluding realities. Law may be, under this concept, a powerful instrument either of oppression or liberation. The examples brought by the author show that the answers to the problem of power have not been much aseptic. Being contaminated, they just reallocate power. The Roman jurisprudence has served as and alternative to religious narratives, but has also served to reconfigure the problem of power under political interests of aristocracy and the emperor. "It was not just religion, as a traditional culture, that established social divide and oppressive hierarchies kept by the exercise of power. It was also the law" (p. 41). The same has been observed in some of the varieties of medieval jurisprudence and also in the conceptions regarding jusnaturalism (natural law).

The book is structured in five chapters. The first one sets a panorama for the following chapters by exposing its theoretic concept. Basic challenges are listed in this part of the book: excessive formalism, anachronism between theory and practice, balance between maintaining and reforming the order and deconstruction of law as a science. It seems like the introduction would suggest that those challenges are the lenses to guide the reading. The last chapter, called epilogue, is somehow an

invitation: by listing deconstructions and suggesting reforms, always focusing on Brazilian reality, the last chapter is less of an ending than an attempt to begin a construction outside the book's pages. The book does not end in itself. That seems to be the intention of Faro's work. In this regard the book is ultimately what it wants to be. It is an hybrid: part theory, part invitation to more practical approach; part exhibition of legal shapes and part wishful desire for social change. Among those extreme points that manage to involve the panorama of the initial theoretical development and the ending of an invitation to practical approach what the book really explores is the construction of legal fabric. It includes its structure, organization, its raison d'être under various contexts and legal traditions.

The second chapter is divided into four sections. The first describes the arising of philosophy as an intellectual reaction to changes in Greek polis. Philosophy would constitute a different way to the formation of conscience, that would be based on reason. The Greeks, though, would have been attached to the field of ideas so they haven't actually applied it to practical use. The Romans would have been the firsts to do so. The second part of this chapter puts evidence on the contrasts between Greek philosophy and the pragmatism of Roman jurisprudence, which is characterized by its casuist feature and its lack of any formal organization system or logic structure. In the third section, the author describes the development of common law in England, under the light of the battle between barbaric habits and the hierocratic aspirations of Church. Common law is described as an alternative model apart from Roman law and Canon law. It is also described as being more tolerant to changes and more open to new and emerging interests, as those originated from long distance commerce. The last part of the chapter introduces another possibilities of medieval jurisprudence which are identified to different politic projects and associated to groups with practical ideas and objectives. Defended by coalitions of new princes and the bourgeoisie, Civil law is featured as the most successful political project among Canon law (which is the base for Church's hierocratic project), Commercial law from the Dutch republics, the imperial-monarchic project from Holy Roman Emperor and the Feudal law from princes and their subjects.

The third chapter explores the development of humanism in Italian cities during Middle Age. The context concerns commercial expansion and the challenge is to adapt the law system to the changes of the upcoming era. The author defends the importance of humanism which opened space for the development of different types of jurisprudence by highlighting "the historic relativism present in any construction made by jurists" (p. 98). Adopting a construction symmetric to the method used in the previous chapter, after the description of humanism the author starts the characterization of Natural law which provides the basis for the project designed by the bourgeois coalitions. Property is described as Natural law and it is at the same time the central element of Natural law. However, Natural law loses its force as another model rises, one more dynamic and complex. At the end of the chapter, the author analyses the

crisis of natural philosophy under the pressure of the first elaborations of the economic thinking. Castro also observes the competition between rationalism science and empiric science and the complete abandon of the metaphysical basis of science which led to the uprising of positivistic approaches in the fields of law.

The forth chapter highlights what is described as the purifying aspect of Kantian criticism, the "half opened door" (p. 222) for a glimpse of new orthodoxies. At this point the book sets a complete introduction to some of the main legal traditions and contemporary debates regarding the law. Therefore, it is recommended reading even for the ones who are yet beginning in the legal field, since it seems that the aim of this careful narrative is less of an encyclopedic knowledge and more an awakening for criticism. To reach such objective, the author points out what may be hidden behind intellectual constructions. The chapter focus on demonstrating how some debates are structured as different answers to the democratic challenge set by the political vacuum after the Modern Age, in 1789.

The new road represented by French Revolution leads to doubts about the arriving point which shadows put the spotlight over extemporary insistences and inertial resistances to the much needed changes. "It has always been a difficult task to change the order of society into a dynamic matter to make society fairer and even more rooted to the feeling of freedom to all human beings. It has always been easier to adopt the rule from the past and keep in the preset its injustices" (p. 122). The book from Marcus Faro de Castro sets itself as an interlude as it aims to perceive critically contemporary Brazilian law. In the pause perceived between shape and matter, the easy and the necessary, the past/present and the future, the possibility of a fairer ruling and the establishment of a kind of natural order, between all these, two questions remain: what is possible to do in front of this half-opened door in law and what (or who) is supposed to be its guardian (shape? matter? jurists? the ones who protest? justice? the ones who have been tamed? freedom? included in the current classification?). What lays in the subtext is the perception that a lot of the decisions that have been made could have been different - and reality could have been something distinct.

BENVINDO, JULIANO ZAIDEN (2010). *ON THE LIMITS OF CONSTITUTIONAL ADJUDICATION: DECONSTRUCTING BALANCING AND JUDICIAL ACTIVISM*. HEIDELBERG: SPRINGER.

// BENVINDO, JULIANO ZAIDEN (2010). [*OS LIMITES DA JURISDIÇÃO CONSTITUCIONAL: DESCONSTRUINDO O BALANCEAMENTO E O ATIVISMO JUDICIAL*]. HEIDELBERG: SPRINGER.

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It's common that book reviews are opened with a kind of compliment that highlights the importance of a certain work to the field of study where it belongs. This is not exactly what one can say about *On the limits of constitutional adjudication: deconstructing balancing and judicial activism*, by Juliano Zaiden Benvindo. Not without a complication; not without the notion of field having already been complicated for at least two reasons. Firstly, although the book, which is a result of the doctoral thesis defended both at Universidade de Brasília and at Humboldt University, Berlin, announces itself as a study of constitutional law, it becomes most promptly clear to the reader that those limits are dissolved before the naturalness and consistency of Benvindo's journey through some of the most complex philosophical debates of the second half of the 20th century. Notably on what is organized around the names of Jacques Derrida and Jürgen Habermas. Secondly, the idea of *field* is harmed because the entire proposal of the work is nothing more than a strong critique to the hegemonic movement that informs contemporary constitutional law – both Brazilian and German versions. Therefore, Benvindo's work does not derive its *importance* from a so-called *importance to* the filed, but instead from how it challenges the strength of that common sense, taking part on its deconstruction.

If the object of the investigation is already displayed on the subtitle, that is, a certain objection to balancing (values, principles, maybe *values-principles*) and to judicial activism, it becomes thinkable through a certain course, a path where *one sees* the concept of *limited rationality coming*. Trail and treading in which the becoming of balancing and of judicial activism unfolds as one thing only; one same movement combining intention to rationality and centralization of major political decisions on constitutional courts. One circulates, somehow, around what Jean de la Fontaine would say on the fable *The wolf and the lamb*: "the reason of the strongest is always the best". Benvindo will demonstrate it, "subsequently", on the threefold division of the book.

In the first chapter it is discussed the presence of the principle of proportionality as a dominant method of adjudication and, on its inside, balancing, logical finishing line of this historical proceeding. Three cases are underlined to this matter: the *Crucifix case*, the *Cannabis case* and the *Ellwanger case*. Having this last one been ruled by the Brazilian Supreme Court (STF) and the two others by the German Federal Constitutional Tribunal (*BVG*), the outlines of hegemony that crosses both juridical cultures investigated by Benvindo are established: balancing as definitive entrance of values in the form-of-law. Dissolving the boundaries of this form, the balancing designs the transposition of the political reasoning of reaching common good to the typical space of constitutional courts activities.

This is exactly what Benvindo intends to oppose. The two chapters that follow analyze historically the emergence of the principles of proportionality and balancing to the condition of constitutional meta-principles. This movement introduces a clear guidance: the change in *BVG* and *STF* auto-comprehension towards a model of judicial activism. The

constitutional tribunals would then franchise the conversion of fundamental rights as subjective rights to their conception in terms of objective principles of a total legal order. Under such terms, the subjective right no longer functions as trump against the will of political majorities, being put in relation to the order of values that the principles would shape. The totality of the legal order is now the totality of the objective principles and every political question may be handled as a question of optimizing fundamental rights. If principles are indeed maxims, the constitutional courts may now describe themselves as the lawful path to the enforcement of values.

Benvindo supports the interesting thesis that, both in Brazil and in Germany, the change towards judicial activism was related to the need to respond to antidemocratic legacies. Saying "never more" to *Nazism* and to the military dictatorship involved, beforehand, distrusting legislative institutions and the executive power, considered responsible for the devastating authoritarian practices or, at least, incapable of standing against them. One foresaw the indispensability of a strong power that would endure the task of defending the values of constitutional democracy and enforcing fundamental rights. Autoimmunity: that which is built to protect democracy risks destroying it. Balancing becomes hegemonic in this context because it is capable of opening two different paths of legitimation: on one hand, it allowed treating rights as if they were values, widening the scope and nature of judicial activity in accomplishing its new task – even if this meant disregarding the traditional limits of the notion of division of powers; on the other hand, it allowed justifying judicial activism by granting it an aura of rationality. Through innumerous examples and a wide historical reconstruction of the role of *BVG* and *STF* in emerging German and Brazilian democracies, Benvindo demonstrates how balancing accompanies the rising centrality of constitutional courts erasing the borders between law and justice at the exact same time it emphasizes the rationality of its methodology.

The second part of the book is dedicated to the debate about the rationality of balancing. After all, what is weird about its emergence to the condition of guardian of the place of jurisdictional rationality? The forth chapter elects Robert Alexy's theoretical model as *locus* to the discussion and seeks to highlight the features of its main axioms. On the well-known *special case thesis*, developed on *Theory of Legal Argumentation*, it is already seen the problematic dissolution of the limits of law on a discourse in which the objectives of a given community may prevail over constitutional guarantees. On his *Theory of Fundamental Rights*, Alexy translates this logic into a method that would supposedly control the risks of irrationality on normative collisions. The principle of proportionality and, on its inside, balancing constitute a rational methodology to times of judicial activism.

Chapters 5 and 6 will attack these premises. Benvindo adopts a strategy somehow heterodox and, for this reason, really courageous: to oppose balancing by using a concept of *limited rationality* created through the productive tension between Jacques Derrida's *différance* and Jürgen

Habermas' proceduralism. As if replicating the former's reply to the invitation to a discussion proposed by the latter in 1999 – "it's time, we hope it's not too late" –, Benvindo makes the two philosophers dialogue before his need to confront and face balancing. With Derrida, he drafts a thought of justice that makes justice to the other. Law is, therefore, assimilated into the *double bind*, into the aporia between constitutionalism and democracy. Understanding that the law is properly de-constructible and that justice is the de-construction means realizing the indispensability of both and the fact that a decision worthy of the name is always the one that resides on undecidability– to be infinitely distinguished from indecision – on differentiation and on differing the presence of its content, on its irreducibility to any set of rules. This dynamic of infinite negotiations is poorly adjusted to a methodological ruling that intends to be rational precisely in controlling the *différance*. There is something extremely *logocentric* in balancing.

With Habermas, Benvindo searches a kind of *therapy* to the problem of law's indetermination and, therefore, of adjudication in the context of post-conventional societies. One may, then, develop a critique to balancing through the emphasis on proceedings oriented to mutual understanding. The Habermasian idea of intersubjectivity and its consequences to the motivation of a judicial activity that does not resort to previous methodologies sustain his critique. Benvindo is not limited to pointing out, from this critique, how balancing includes valorative elements in adjudication or how its criterion of discretionarity reduces rights of the minority, but he also disapproves the supposed heuristic capacity of its method of controlling knowledge.

The concept of *limited rationality*, finally discussed in depth on the third and last part of the work, tries to account for a possible dialogue between *différance* and intersubjectivity and, ergo, between a symmetric justice and another asymmetric. The thesis supported is that, as hard and improbable as this approximation may be, there is a game of complementarity and compatibility between them. If any translation is at the same time possible and impossible, then one has to turn the reflection to a resolution without resolution: the productive tension upon its horizon of (un)translatability. Benvindo bets on a kind of approximation between Derrida and Habermas' philosophizing about more concrete institutional matters, such as adjudication. The *limited rationality* does not only put itself on this place, but makes room for these issues to irrupt on a dynamic of searching for justice. The last chapter operates a return to the three judicial cases studied at the beginning of the work in order to reconsider them in light of this rationality that recognizes itself as limited. Three axioms on its approach are noticeable: a) focus on the singularity of the concrete case beyond the simplifying previous formula; b) reconstruction of institutional history to maintaining the consistency of the system of rights; c) a adjudication that asserts the otherness of the other.

This is how Benvindo proposes as an alternative to balancing a renewed connection between "the empirical world" and a limited reason. On the limit, a matter of limits. In this manner, rationality also invites to

think the porosity of its limitation, what crosses it, what undoes the pure boundaries. Whatever the answer may be, before the *limen*, it's necessary to read *On the limits of constitutional adjudication*.

Direito.UnB. Revista de Direito da Universidade de Brasília.
Programa de Pós-Graduação em Direito – Vol.1, N.1 (jan./jul 2014) –
Brasília, DF: Universidade de Brasília, Faculdade de Direito.
Semestral. 2014.
ISSN 2357-8009 (VERSÃO ON-LINE)
ISSN 2318-9908 (VERSÃO IMPRESSA)
Bilíngue (Português/Inglês)
1. Direito – periódicos. I. Universidade de Brasília,
Faculdade de Direito.
CDU 340